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About the International Association of Defense Counsel

The International Association of Defense Counsel is the oldest international association of lawyers representing corporations and insurers. Its activities benefit the approximately 2,500 invitation-only, peer-reviewed members and their clients through networking, educational and professional opportunities as well as benefiting the civil justice system and the legal profession. The IADC takes a leadership role in many areas of legal reform and professional development.

Founded in 1920, the IADC’s membership comprises the world’s leading corporate and insurance lawyers including partners in large and small law firms, senior counsel in corporate law departments and insurance executives. They engage in the practice and management of law involving the defense, prosecution and resolution of claims affecting the interest of corporations and insurers. The Association maintains a comprehensive list of publications and training programs, including the quarterly Defense Counsel Journal. It provides educational offerings including its Midyear and Annual Meetings, Regional Meetings, the Trial Academy, the Corporate Counsel College, International Corporate Counsel College, and the Professional Liability Roundtable. The IADC founded the Defense Research Institute (DRI) and co-founded Lawyers for Civil Justice.
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Dr. J. Rufus Fears, the David Ross Boyd Professor of Classics at the University of Oklahoma, has said that if a society were to be based upon honor, its disputes would be settled by duels. After all, the contestants in a duel are so committed to their position that they are willing to stake their lives on it. Dr. Fears goes further to say that lawyers, hired by others to settle their disputes for them, represent the antithesis of honor.

Over my years in this profession, I have encountered lawyers who would lead me to agree with Dr. Fears. There have been those who have absolutely no regard for the truth, but rather are using every trick they know to get a witness to give them a sound bite or quote that will help them win their case. Even though they know the true answer the witness has to offer, they will repeatedly ask the question, sometimes from slightly different angles, in an attempt to get the witness to give an answer that will help their cause, whether or not the answer is true. Such tactics led one lawyer, in open court, to refer to his adversary, in the following manner: “[i]f I ordered a boxcar full of sons-a-bitches, and the boxcar arrived and I broke the seal on the door and opened it, and only he was standing alone in the car, I would NOT file a claim for shortage.”

While I understand the lawyer’s duty to represent his client zealously, I view ignoring the truth in trying to win a case as going beyond that obligation and reaching a point that, indeed, represents the antithesis of honor.

Is our profession an honorable profession?

When I was considering my invitation to join the IADC, my nominator, Bill Wood, handed me a copy of the Defense Counsel Journal, turned to the “IADC Tenets of Professionalism,” and said, “The members of the IADC take these very seriously.” As I read through the Tenets, I realized that an organization of members who lived these principles would represent the best of our profession. I was humbled to be asked to join such an honorable group.

This year the Defense Counsel Journal is celebrating its 75th Anniversary. For the past sixteen years the “IADC Tenets of Professionalism” have appeared in each issue. Their presence in each of the last 64 issues is appropriate for a journal published by an organization of members “who aspire to the highest ideals of professionalism.” If it has been some time since you reviewed them, please take time to
do so now, even if it means you may not get back to this President’s Page. That
which is presented in the Tenets is far more significant than anything I could say
here.

Consider the themes that form the basis of the Tenets:

- Respect
- Courtesy
- Civility
- Cooperation
- Honoring Promises and Commitments
- Building a Reputation of Dignity, Honesty, and Integrity

Members of the IADC take these Tenets seriously. In so doing, they better serve their
clients and they bring honor to themselves, to our legal system and its processes, and
to our profession. It is such lawyers who make ours an honorable profession, of
which we all can be proud.

Those of us in the profession, and those of us served by this honorable profession,
thank all of you who “aspire to the highest ideals of professionalism” through your
adherence to the IADC Tenets of Professionalism.
The International Association of Defense Counsel is aware that applicable rules or codes of professional responsibility generally provide only minimum standards of acceptable conduct. Since we aspire to the highest ideals of professionalism, we hereby adopt these tenets and agree to abide by them in the performance of our professional services for clients.

1. We will conduct ourselves before the court in a manner which demonstrates respect for the law and preserves the decorum and integrity of the judicial process.

2. We recognize that professional courtesy is consistent with zealous advocacy. We will be civil and courteous to all with whom we come in contact and will endeavor to maintain a collegial relationship with our adversaries.

3. We will cooperate with opposing counsel when scheduling conflicts arise and calendar changes become necessary. We will also agree to opposing counsel's request for reasonable extensions of time when the legitimate interests of our clients will not be adversely affected.

4. We will keep our clients well-informed and involved in making the decisions that affect their interests, while, at the same time, avoiding emotional attachment to our clients and their activities which might impair our ability to render objective and independent advice.

5. We will counsel our clients, in appropriate cases, that initiating or engaging in settlement discussions is consistent with zealous and effective representation.

6. We will attempt to resolve matters as expeditiously and economically as possible.

7. We will honor all promises or commitments, whether oral or in writing, and strive to build a reputation for dignity, honesty and integrity.

8. We will not make groundless accusations of impropriety or attribute bad motives to other attorneys without good cause.

9. We will not engage in discovery practices or any other course of conduct designed to harass the opposing party or cause needless delay.

10. We will seek sanctions against another attorney only when fully justified by the circumstances and necessary to protect a client's lawful interests, and never for mere tactical advantage.

11. We will not permit business concerns to undermine or corrupt our professional obligations.

12. We will strive to expand our knowledge of the law and to achieve and maintain proficiency in our areas of practice.

13. We are aware of the need to preserve the image of the legal profession in the eyes of the public and will support programs and activities that educate the public about the law and the legal system.
Defending Business Assets and Reputation During World Economic Turmoil: The Role of the Successful Legal Team

International Association of Defense Counsel

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24-25 September 2009
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Calendar
of Meetings

IADC Meetings

September 24-25, 2009
International Corporate Counsel College
Hilton Arc de Triomphe
Paris, France

November 4-6, 2009
IADC and FDCC Joint Law Firm Management Conference
Embassy Suites O’Hare
Chicago, Illinois USA

November 18-20, 2009
International Alternative Dispute Resolution Academy
Sofitel Hotel
Chicago, Illinois USA

February 13-18, 2010
Midyear Meeting
Naples Grande Beach Resort
Naples, Florida USA

April 22-23, 2010
Corporate Counsel College
The Ritz-Carlton
Chicago, Illinois USA

July 10-15, 2010
Annual Meeting
Hotel Arts
Barcelona, Spain

The full schedule for IADC Regional Meetings is at www.iadclaw.org.
2010 Midyear Meeting

Naples Grande Hotel
Naples, Florida
February 13 - 18, 2010

More information is coming soon in your mailboxes and on www.iadclaw.org.
Phase III of the popular Privacy Project now available!
Phase I, II and III are each $30 or purchase the three-volume set for $80.
Visit www.iadelaw.org for more information.
Arbitration In Nursing Home Cases: Trends, Issues, And A Glance Into The Future

By Reed R. Bates and Stephen W. Still, Jr.

ALTHOUGH COURTS have a long history of addressing arbitration agreements in business and consumer transactions, the concept of arbitration in nursing home cases is a relatively recent development that has become a hotly contested area of law. Unique legal issues are raised by the use of arbitration agreements by long term care providers, and these issues have been increasingly litigated. This article summarizes common arguments raised in opposition to arbitration in nursing home cases and trends among courts throughout the United States with respect to enforcement of arbitration agreements in nursing home cases, considers the impact of FAA Section Four Complaints to Compel Arbitration, and provides a glance into the future of arbitration in nursing home cases, including potential federal legislative changes to curtail arbitration.

I. Common Arguments Asserted To Avoid Arbitration

A party moving to compel arbitration has the initial burden of establishing (1) the existence of a valid arbitration agreement, (2) involving interstate commerce. After this burden is satisfied by the moving party, the burden shifts to the party opposing arbitration to establish the absence of a valid or enforceable agreement to arbitrate.

Plaintiffs commonly oppose efforts to pursue arbitration in nursing home cases based upon the following grounds:

1 This article references “nursing homes” and “nursing home cases,” but is intended to encompass all cases in the long term care setting.
3 Id.
resident lacked authority (legal, express, implied, or apparent) to sign on behalf of the resident, and (4) the purported signature of the resident and/or representative was fraudulently executed.

1. Capacity Arguments

Defendants frequently respond to claims of capacity by asserting that the resident has never been declared legally incompetent and, therefore, had sufficient mental capacity to contract regardless of whether the resident suffered from any mental deficits. The law in many states supports this argument, providing that a party is presumed sane, fully competent and capable of understanding the nature and effect of his or her contracts. According to the law, the party seeking to invalidate a contract on grounds of mental incompetence bears the burden of proving the alleged incompetence.

2. Authority Arguments

Defendants respond to claims of lack of authority by asserting that the resident’s representative had (a) legal and/or express authority to sign the arbitration agreement on behalf of the resident based upon a power of attorney, other legal documents, or certain statutory authorities, or (b) apparent and/or implied authority to execute the agreement on behalf of the resident.

A resident may grant express or actual authority to act on his or her behalf pursuant to verbal express authority, power of attorney (“POA”), durable power of attorney (“DPOA”), or court appointment as guardian or conservator for the resident. Courts have frequently held arbitration agreements enforceable when executed by such individuals acting on behalf of the resident. However, some courts have held arbitration agreements unenforceable even when executed by the POA or DPOA based upon case specific fact scenarios.

State surrogacy statutes may also grant express or actual authority to certain family members to make health care decisions on behalf of a family member. Courts from certain jurisdictions have held that surrogacy statutes vest a family member with express or actual authority to enter into a binding arbitration agreement on behalf of a resident, but other courts have refused to hold arbitration agreements enforceable on the basis of surrogacy statutes.

Defendants also argue that the individual who executed the arbitration agreement had apparent or implied authority to act on behalf of the resident, evidenced by holding himself or herself out as someone with authority to make health care decisions for the resident. Several courts

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4 See, e.g., Simmons First Nat’l Bank v. Luzader, 438 S.W.2d 25, 27 (Ark. 1969) (holding “[t]here is a presumption of law that every man is sane, fully competent and capable of understanding the nature and effect of his contracts”).


8 See Hendrix, 2007 WL 4523876 at *4-*5; Cabany, 2007 WL 3445550 at *4.
around the country have addressed this issue and have held arbitration agreements enforceable on the basis of apparent/implied authority.\(^9\) Other courts have refused to enforce arbitration agreements on the basis of apparent/implied authority.\(^10\) Courts refusing to apply this doctrine have often done so on grounds that the scope of the alleged apparent authority did not extend to executing arbitration agreements and situations where the resident suffered from severe mental deficits upon admission to the nursing home.\(^11\)

### 3. Other Arguments to Compel Arbitration

Defendants also argue that the resident becomes a third party beneficiary to the agreement signed by the representative on behalf of the resident, and the plaintiff is bound by the arbitration agreement based upon principles of ratification, waiver, and estoppel (e.g., the plaintiff’s intentional and voluntary act of asserting a breach of contract claim on behalf of the resident, or the resident’s estate, may be construed as waiver of right to deny existence of a valid agreement).

Parties seeking to enforce an arbitration agreement on grounds the resident was a third party beneficiary of the agreement argue that the resident, pursuant to the arbitration agreement/other admission documents executed as part of the admissions process, enjoyed the benefit of becoming a resident of the facility and is, therefore, a third party beneficiary and bound by the arbitration agreement. Likewise, the resident’s personal representative, who stands in the resident’s shoes, cannot claim the benefits of the arbitration agreement by suing under it and simultaneously attempt to avoid arbitration of their claims. The third party beneficiary argument is most compelling when the arbitration provision is contained within the admission agreement as opposed to being a “stand alone” arbitration agreement. Courts around the country have enforced arbitration agreements on grounds the resident, a nonsignatory to the arbitration agreement, was an intended third party beneficiary of the agreement.\(^12\)

Estoppel, waiver, and ratification of the arbitration agreement by a resident, resident’s family, or resident’s “responsible party” may provide additional or alternative grounds to compel arbitration. In this regard, a party may be estopped from simultaneously claiming the benefits of a contract and repudiating the contract’s burdens and conditions. Similarly, a non signatory can be estopped from refusing to comply with an arbitration clause if that party received a direct benefit from the contract.\(^13\)

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\(^12\) See Johnson, 2008 WL 73682 at *3 (daughter of nursing home resident bound by arbitration agreement on grounds resident was third party beneficiary); Alterra Healthcare Corp. v. Linton, 953 So.2d 574, 578 (Fla. Dist. Ct. App. 2007) (affirming trial court’s granting of nursing home’s Motion to Compel Arbitration and finding resident was intended third party beneficiary of arbitration agreement); JP Morgan Chase & Co. v. Conegie, 492 F.3d 596, 600 (5th Cir. 2007).

\(^13\) See Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000); Daisy Mfg. Co., Inc. v. NCR Corp., 29 F.3d 389, 393 (8th Cir. 1994) (reversing denial of 9 U.S.C. § 4 Complaint to Compel Arbitration on grounds party opposing arbitration, by its conduct, “ratified and accepted” agreement containing arbitration provision and was, therefore, bound by agreement).
B. Unconscionability

Unconscionability is also a recurring argument asserted by plaintiffs in opposition to arbitration in nursing home cases. Many jurisdictions require a plaintiff to prove both “procedural” and “substantive” unconscionability to establish the defense of unconscionability. In analyzing procedural unconscionability, courts look to the “bargaining power” of the parties. Regarding substantive unconscionability, courts generally look to whether the terms of the agreement are “outrageously unfair.”

When confronted with a challenge to an arbitration agreement based on unconscionability, courts may consider (1) the absence of meaningful choice on one party’s part (e.g., all nursing homes in the same geographic area require arbitration agreements as a condition of admission to facility), (2) contractual terms that are unreasonably favorable to one party, (3) unequal bargaining power, and (4) whether the contract contains oppressive, one sided, or patently unfair terms.

In addressing these factors, the party seeking to enforce the arbitration agreement may assert that (1) alternative nursing homes were available to the resident that did not require arbitration as a condition of admission, (2) the nursing home has agreed to incur most/all administrative fees and costs associated with arbitration; (3) the nursing home staff closely reviewed and discussed the arbitration agreement with the resident and/or the representative prior to signing of the agreement; (4) the nursing home did not place any time constraints on the resident or the representative for reviewing the agreement prior to execution; (5) the arbitration agreement has a revocation period during which the resident or the representative could have revoked the agreement; (6) a recognized and unbiased arbitration forum is designated as the forum of choice in the agreement; (7) the arbitration agreement is not “hidden” and is conspicuous among admission documents; and (8) references to any other provisions of the agreement or facts and circumstances surrounding execution of the agreement that are indicative of the resident/representative’s meaningful choice, equal bargaining power, and overall “fair” terms of the agreement and circumstances under which the agreement was executed.

Another creative unconscionability argument frequently proffered in opposition to arbitration is that the agreement to arbitrate constitutes “additional consideration” in violation of Medicare and Medicaid regulations. This argument is premised upon certain regulations stating that, when admitting residents entitled to assistance through Medicare or Medicaid, a facility must “not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan…any gift, money donation, or other consideration as a precondition of admitting…the individual to the facility or as a requirement for the individual’s continued stay in the facility.” 42 U.S.C. § 1396r(c)(5)(A)(iii) (2006). The “additional consideration” argument has been rejected by several courts, concluding that arbitration provisions in nursing home agreements do not constitute “additional

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16 Id.
17 See, e.g., Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004) (enforcing arbitration agreements in two nursing home admission contracts on grounds, among other things, plaintiffs failed to present legally sufficient evidence that they were unable to acquire alternative nursing home care for residents and holding that “even if there are only two nursing homes in [that county], plaintiffs have not asserted that an elderly person…lacks meaningful options to live in a nursing home in another county or to have in-home care”).
consideration” in violation of Medicare or Medicaid regulations.\(^\text{18}\)

**C. Claims in Tort, Not Contract**

Plaintiffs opposing arbitration also contend that the arbitration agreement should not be enforced because their claims sound in “tort” as opposed to “contract.” Some courts have been receptive to this argument, while others have not.\(^\text{19}\) Defendants should contend the arbitration agreement covers all claims related to the resident irrespective of whether the claims sound in contract or tort and that parties to an arbitration agreement may not evade arbitration through “artful pleading.” Courts evaluating this issue commonly refer to the express language of the arbitration agreement to evaluate the scope of claims covered by the agreement.

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18 See Owens v. Nat’l Health Corp., 263 S.W.3d 876, 887 (Tenn. 2007); Broughsville, 2005 WL 3483777 at *7-*8 (examining whether “nursing home admission contracts containing arbitration provisions constitute unauthorized additional consideration from the resident” and holding that “inclusion of an arbitration provision in a nursing home admissions agreement does not constitute additional consideration”); Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983 at 989 (“requiring a nursing-home admittee to sign an arbitration agreement is not charging an additional fee or other consideration as a requirement to admittance”); Gainesville Health Care Ctr., Inc. v. Weston, 857 So.2d 278, 288 (Fla. Dist. Ct. App. 2003) (examining argument that “arbitration provision is unenforceable because it is illegal under federal law which prohibits a nursing home from accepting any additional consideration from a Medicare/Medicaid patient” and noting “[w]e have found no authority from any jurisdiction which holds that an arbitration provision constitutes ‘consideration’…nor do we believe that the federal regulation was intended to apply to such a situation”).


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20 See Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (“it is perfectly clear that the FAA encompasses a wider range of transactions than those actually ‘in commerce’ – that is, ‘within the flow of interstate commerce’”).


22 See Stephens, 911 So.2d at 51 (admission agreement affected “interstate commerce” where nursing home received supplies from out-of-state vendors and payments from out-of-state insurance companies); Owens v. Coosa County Healthcare, Inc., 890 So.2d 983 at 988 (affirming Order compelling arbitration of personal injury and wrongful death claims against nursing home where medical supplies and equipment were purchased from out of state).

23 See In re Nexion Health at Humble, Inc., 173 S.W.3d 67, 69 (Tex. 2005) (claims against nursing home due to be arbitrated where Medicare funds crossing state lines were “interstate commerce” thereby bringing contract within FAA); Owens v. Coosa County Healthcare, Inc., 890 So.2d at 988;
E. Non-Signatory Defendants

Parties opposing arbitration often argue that certain defendants, such as affiliated entities and individual defendants, are non-signatories to the arbitration agreement and, therefore, cannot enforce the agreement with respect to claims asserted against those defendants. Courts around the country have routinely rejected such arguments based upon evidence that the arbitration agreement was broad enough in scope to encompass all claims against the non-signatories, third party beneficiary theories, and estoppel and intertwining theories. For example, some courts have held that “[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement.” In such cases, were the court to allow a plaintiff to bring suit against one defendant, while arbitrating claims against the other, the arbitration proceedings would essentially be rendered meaningless and the public policy favoring arbitration frustrated.

F. Impact on the Resident’s Estate

Parties opposing arbitration in wrongful death actions may argue that the estate is not bound by the agreement signed by the now deceased resident or another individual acting on behalf of the resident prior to the resident’s death, because the estate cannot be bound by an arbitration agreement executed prior to the resident’s death.

Courts have been inconsistent in addressing this issue. Some courts have held that the estate is bound by the agreement, while others conclude that the estate is not bound by the agreement. How a court rules on this issue may be dictated to a significant degree by the manner in which wrongful death claims are construed under the laws of each specific state.

G. FAA Preemption

Many states have enacted statutes specifically prohibiting arbitration of health care/tort claims. Where such statutes exist, a party opposing arbitration may contend the case is not subject to arbitration because the FAA does not preempt the statute at issue. Courts around the country have reached different conclusions on this issue.
H. Waiver

Finally, a party seeking to compel arbitration can waive the right to compel arbitration if it “substantially invokes” the litigation process. Because the determination of waiver is generally based on the particular facts of each case, the practitioner must consider waiver before filing any pleadings or motions with the court or otherwise participating in any aspect of discovery.29

II. Trends Among Courts

Courts have addressed arbitration agreements in nursing home cases inconsistently. Some jurisdictions routinely enforce arbitration agreements, while others often refuse to enforce the agreements. In addition, federal courts have often held differently than state courts in a given state. The following is a general analysis of how various states have addressed the issue of enforcing arbitration agreements in nursing home cases.

Alabama

Alabama Supreme Court has held arbitration agreements enforceable in four primary cases related to this issue, focusing primarily on whether a party signing an arbitration agreement on behalf of a resident had authority to bind the resident to the arbitration agreement.30 However in a fifth case, Noland Health Serv., Inc. v. Wright, a plurality opinion held an arbitration agreement unenforceable based upon the specific facts involved in the case.31

Arizona

Arizona courts have enforced arbitration agreements in two cases against nursing homes, examining whether an arbitration agreement violates Arizona law and whether the individual who executed an arbitration agreement had authority to bind the resident.32

Arkansas

Few Arkansas courts have addressed this issue. In Waverly-Arkansas, Inc. v. Keener,33 the Arkansas Court of Appeals


31 Noland Health Serv., Inc. v. Wright, 971 So.2d 681 (Ala. 2007) (affirming Order denying Motion to Compel Arbitration of wrongful death cause of action brought by administrator of estate of former resident).


affirmed the denial of a Motion to Compel Arbitration of an action brought by the wrongful death beneficiaries of a former resident on grounds the resident’s daughter, who held a power of attorney, did not have authority to bind the resident to arbitration because, among other things, the resident had previously declined to sign a general power of attorney, the daughter put the pen in her mother’s hand and held it as she signed the power of attorney, the daughter did not know whether her mother understood what she was being asked to do or whether she had actually moved the pen, and the resident’s son had the power of attorney notarized by someone who was not present when the document was signed. However, in Northport Health Services of Arkansas, LLC v. Robinson,34 the United States District Court for the Western District of Arkansas recently entered an Order compelling the estate of a former nursing home resident to arbitrate its wrongful death claim, rejecting plaintiff’s arguments that the arbitration agreement was not enforceable because it was an attempt to contract away the resident’s constitutional right to a jury trial, was unconscionable, lacked mutuality, was oppressive, and on grounds that the plaintiff, who signed the agreement on behalf of the resident, lacked authority to execute the agreement.

California

California courts have split when adjudicating nursing home cases, but have trended recently towards unenforceability, focusing in cases like Waterman v.

Evergreen at Petaluma, LLC.35 on whether the individual who executed an arbitration agreement on behalf of a resident had the authority to do so.36 However, California courts have held arbitration agreements enforceable in certain nursing home cases, including Hogan v. County Villa Health Svcs.37

Colorado

There are few Colorado cases on this issue. In Moffett v. Life Care Ctrs. of

America, the Colorado Court of Appeals reversed a trial court’s Order denying a Motion to Compel Arbitration of an action brought by the children of a deceased resident and remanded the case for further consideration, holding that the resident’s children, holding powers of attorney pursuant to the Colorado Health Care Availability Act, were authorized to execute an arbitration agreement.

Florida

Florida courts have addressed nursing home cases more frequently than any other courts in the country, with Florida courts focusing on questions of signatory authority and unconscionability in deciding whether to enforce an agreement to arbitrate. Decisions rendered have been based on particular circumstances, and results have been mixed.

Florida courts have held arbitration agreements enforceable in nursing home cases, including New Port Richey Med. Investors, LLC v. Stern, Jaylene, Inc. v. Moots, Slusser v. Life Care Ctrs. of America, Inc., Shotts v. OP Winter Haven, Inc., Alterra Healthcare Corp. v. Estate of


40 Slusser v. Life Care Ctrs. of America, Inc., 977 So.2d 662 (Fla. Dist. Ct. App. 2008) (affirming Order compelling arbitration of negligence claims and finding arbitration agreement was not unconscionable as violative of Nursing Home Residents Act).
Florida courts have refused to enforce arbitration agreements in other cases.\(^{53}\)

\(^{51}\) Integrated Health Svcs. of Green Briar, Inc. v. Lopez-Sil vero, 827 So.2d 338 (Fla. Dist. Ct. App. 2002) (reversing and remanding with instructions to grant Motion to Compel Arbitration of action alleging improper care).


\(^{53}\) See, e.g., Woebse v. Health Care and Retirement Corp. of America, 977 So.2d 630 (Fla. Dist. Ct. App. 2008) (reversing and remanding trial court’s grant of Motion to Compel Arbitration of wrongful death claims and claims for violation of Nursing Home Resident’s Rights Act on grounds circumstances surrounding execution of agreement were procedurally unconscionable and arbitration provision was substantively unconscionable); In re Estate of McKibbin v. Alterra Health Care Corp., 977 So.2d 612 (Fla. Dist. Ct. App. 2008) (estate was not bound by arbitration provision in nursing home agreement because resident did not sign agreement and son signed pursuant to power of attorney that did not give son authority to enter into arbitration agreement on behalf of resident); Estate of Orlanis v. Oakwood Terrace Skilled Nursing and Rehab. Ctr., 971 So.2d 811 (Fla. Dist. Ct. App. 2007) (reversing and remanding trial court’s Order compelling arbitration of action on grounds nursing home waived right to arbitration by availing itself of discovery rules before seeking arbitration); Place at Vero Beach, Inc. v. Hanson, 953 So.2d 773 (Fla. Dist. Ct. App. 2007) (affirming denial of Motion to Compel Arbitration on grounds agreement violated Nursing Home Resident’s Rights Act); Fletcher v. Huntington Place Ltd. P’ship, 952 So.2d 1225 (Fla. Dist. Ct. App. 2007) (reversing and remanding trial court’s Order compelling arbitration of agreement was unenforceable as it required that arbitration be administered by American Health Lawyers Association and holding that daughter of resident signed agreement precluded enforcement of agreement against resident’s estate); SA-PG Ocala, LLC v. Stokes, 935 So.2d 1242 (Fla. Dist. Ct. App. 2006) (arbitration agreement requiring clear and convincing evidence of intentional or reckless conduct for arbitrator to award compensatory and punitive damages is against public policy and unenforceable).

\(^{54}\) See Ashburn Health Care Ctr., Inc. v. Poole, 648 S.E.2d 430 (Ga. Ct. App. 2007) (husband of resident did not act with actual or apparent authority to sign arbitration agreement); Washburn v. Beverly Enter. – Georgia, Inc., No. CV 106 051, 2006 WL 3404804 (S.D. Ga. Nov. 14, 2006) (not reported in F. Supp. 2d) (wrongful death action not due to be arbitrated because arbitration agreement was not signed by representative pursuing wrongful death claim and holding wrongful death claim was “separate, new and distinct cause of action”).


\(^{56}\) See Carter v. SSC Odin Operating Co., LLC, No. 5-07-0392, 2008 WL 943746 (Ill. App. Ct. Apr. 4, 2008) (affirming denial of nursing home’s Motion to Compel Arbitration on grounds Nursing Home Care Act, which invalidates a resident’s waiver of right to sue or right to jury trial, was not preempted by FAA).

on a variety of issues in deciding whether to enforce an arbitration agreement, including whether the individual who signed the agreement had authority to bind the resident and whether the agreement is unconscionable, ultimately concluding that the trial court properly compelled the estate to arbitrate its survival and wrongful death claims. The Court also concluded that the agreement was not unconscionable, did not violate the FAA, and that the estate was bound to the agreement because all claims arose out of or related to the agreement.

Kansas

In *McNally v. Beverly Enter., Inc.*, the Court of Appeals of Kansas refused to enforce an arbitration agreement in a wrongful death and survival lawsuit against a nursing home on grounds the resident’s wife did not have authority to execute the arbitration agreement on behalf of her husband, noting that the durable power of attorney at issue only gave the wife power to make health care decisions rather than “general” decisions. The Court also concluded that the wife lacked apparent or ostensible authority because there was no evidence that the husband induced or permitted the nursing home to believe his wife was his agent.

Kentucky

Kentucky courts have refused to enforce arbitration agreements in nursing home cases.

Louisiana

In *Landers v. Integrated Health Services of Shreveport*, the Court refused to enforce an arbitration agreement, affirming denial of Motion to Compel Arbitration on grounds the resident lacked capacity to contract. *Landers* suggests that Louisiana courts may examine a variety of issues in determining whether to enforce an arbitration agreement, including whether the resident had capacity to contract and whether the agreement complies with Louisiana law.

Massachusetts

Massachusetts courts appear to focus on whether an arbitration agreement is unconscionable. In *Miller v. Cotter*, the Massachusetts Supreme Court reversed the trial court’s Order denying Motion to Compel Arbitration of claims brought by estate of former resident and holding that agreement was not unconscionable.

Mississippi

Mississippi courts routinely examine a multitude of issues in deciding whether to enforce arbitration agreements, placing particular emphasis on whether the individual who executed the agreement had authority to bind the resident and whether the agreement is unconscionable. Courts have held arbitration agreements enforceable in several nursing home cases.

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59 See Beverly Health & Rehab. Servs. v. Smith, 209 S.W.3d 916 (Ky. Ct. App. 2006) (affirming denial of nursing home’s Motion to Compel Arbitration on grounds nursing home failed to show “extraordinary cause” necessary for Court to vacate or modify trial court’s interlocutory order).
60 Landers v. Integrated Health Services of Shreveport, 903 So.2d 609 (La. Ct. App. 2005).
62 See, e.g., Covenant Health Rehab. of Picayune, L.P. v. Brown, 949 So.2d 732 (Miss. 2007) (enforcing arbitration agreement signed on behalf of resident where individual who signed agreement satisfied requirements of Mississippi’s healthcare surrogacy statute); Vicksburg Partners, L.P. v.
Mississippi courts also have refused to enforce arbitration agreements in other cases.63

Missouri courts have refused to enforce arbitration agreements in nursing home cases on several occasions, focusing on whether the individual who signed an arbitration agreement on behalf of a nursing home resident had the authority to bind the resident to arbitration.64

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63 See, e.g., Trinity Mission Health & Rehab. of Holly Springs LLC v. Lawrence, No. 07-6050, 2009 WL 331626 (Miss. Feb. 12, 2009) (refusing to enforce arbitration agreement on grounds nursing home failed to prove resident signed agreement at issue or intended to enter into arbitration agreement); Robbins v. Beverly Enter., Inc., Civil Action No. 3:07CV047-B-A, 2008 WL 907465 (N.D. Miss. Mar. 31, 2008) (valid arbitration agreement did not exist where nursing home failed to produce power of attorney, failed to set forth proof that resident gave wife authority to act as his agent, and no statutory authority existed to allow wife to bind husband to arbitration); Magnolia Healthcare, Inc. v. Barnes, 994 So.2d 159 (Miss. 2008) (holding arbitration clause in admission agreement unenforceable on grounds it was signed before resident filed lawsuit and arbitration rules incorporated by arbitration clause at issue only permit arbitration agreements if executed after claim arises); Compere’s Nursing Home, Inc. v. Estate of Farish, 982 So.2d 382 (Miss. 2008) (affirming denial of Motion to Compel Arbitration on grounds resident’s nephew lacked apparent authority to bind resident to arbitration agreement and did not meet statutory requirements of Mississippi’s Health Care Surrogacy statute); Miss. Care Ctr. of Greenville, LLC v. Hinyub, 975 So.2d 211 (Miss. 2008) (affirming denial of Motion to Compel Arbitration on grounds, among other things, resident’s daughter did not have authority, pursuant to power of attorney, or as resident’s health care surrogate, to execute arbitration agreement); Grenada Living Ctr. v. Coleman, 961 So.2d 33 (Miss. 2007) (affirming denial of Motion to Compel Arbitration on grounds resident’s half-sister was not resident’s surrogate and did not bind resident through express authority); Bedford Care Ctr.-Monroe Hall v. Lewis, 923 So.2d 998 (Miss. 2006) (affirming denial of Motion to Compel Arbitration on grounds resident made “knowledgeable and express decision not to sign the arbitration provision”).

64 See, e.g., Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (affirming trial court’s Order denial of Motion to Compel Arbitration on grounds wrongful death claims are new causes of action and not derivative of underlying tort claims); Ward v. Nat’l Healthcare Corp., et al., 275 S.W.3d 236 (Mo. 2009) (affirming trial court’s denial of Motion to Compel Arbitration on grounds daughter of resident, who had not been given power of attorney, did not have authority to bind resident or family to arbitration agreement); Sennett v. Nat’l Healthcare Corp., 272 S.W.3d 237 (Mo. Ct. App. 2008) (affirming trial court’s Order denying Motion to Compel Arbitration on grounds plaintiff’s wrongful death claims were outside scope of arbitration agreement and resident’s wrongful death beneficiaries did not sign arbitration agreement in their individual capacity such that they were not bound by agreement); Tallmadge v. Beverly Enter.-Missouri, 202 S.W.3d 47 (Mo. Ct. App. 2006) (remanding case and refusing to enforce arbitration agreement signed by resident’s attorney-in-fact on grounds resident did not execute durable power of attorney until after her attorney-in-fact executed arbitration agreement); Finney v. Nat’l Healthcare Corp., 193 S.W.3d 393 (Mo. Ct. App. 2006) (affirming denial of Motion to Compel arbitration of wrongful death claim on grounds daughter of deceased resident was not party to arbitration agreement and, therefore, not bound by agreement).
Nebraska

Although there is little Nebraska law on this issue, a federal court in Nebraska recently held an arbitration agreement enforceable in a wrongful death action against a nursing home.65

North Carolina

North Carolina courts have held arbitration agreements enforceable in nursing home cases on at least one occasion, Raper v. Oliver House, LLC.66

Ohio

Ohio courts have both upheld and denied motions to compel arbitration, focusing primarily on whether an arbitration agreement is unconscionable. Courts in Ohio have held arbitration agreements enforceable in some actions, including Hayes v. Oakridge Home.67 In cases like

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Manley v. Personacare of Ohio, Ohio courts have refused to enforce arbitration agreements where unconscionability is demonstrated.68

Oklahoma

Oklahoma courts focus on several issues in electing whether to enforce an agreement to arbitrate, with recent consideration given to FAA preemption of state law prohibiting arbitration.69

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66 Raper v. Oliver House, LLC, 637 S.E.2d 551 (N.C. Ct. App. 2006) (reversing and remanding for Order granting Motion to Compel Arbitration of action brought by executrix of deceased resident’s estate for negligence, wrongful death, and punitive damages).
Arbitration in Nursing Home Cases

Pennsylvania

*Smalley v. JHA-Markleysburg, Inc.* suggests that Pennsylvania courts focus on the signatory issue in electing whether to enforce an arbitration agreement. *Smalley* affirmed a trial court’s Order compelling arbitration of a plaintiff’s claims for negligence and wrongful death. The plaintiff, who signed the arbitration agreement on behalf of his father pursuant to a power of attorney, argued that his father lacked mental capacity to know what he was doing prior to signing the power of attorney, so the son lacked authority to execute the arbitration agreement. The Court rejected this argument and required the parties to arbitrate.*

South Carolina

South Carolina courts have refused to enforce arbitration agreements in nursing home cases on two occasions, *Grant v. Magnolia Manor-Greenwood, Inc.* and *Timms v. Greene.*

Tennessee

This issue has been frequently litigated in Tennessee during the recent years, with courts focusing primarily on the authority to bind the resident by the individual who executed an arbitration agreement. Tennessee courts have enforced arbitration agreements in some cases, most recently *Mitchell v. Kindred Healthcare Operating, Inc.* Tennessee courts have refused to enforce arbitration agreements in other nursing home cases, most recently *Barbee v. Kindred Healthcare Operating, Inc.*

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72 Grant v. Magnolia Manor-Greenwood, Inc., __ S.E.2d. __, 2009 WL 1678204 (S.C. June 15, 2009) (affirming trial court’s Order denying nursing home’s Motion to Compel Arbitration on grounds the designated arbitrator became unavailable and such unavailability voided the arbitration agreement).
73 Timms v. Greene, 427 S.E.2d 642 (S.C. 1993) (refusing to enforce arbitration agreement and holding FAA not applicable on grounds nexus to interstate commerce was not satisfied).
Texas

Texas courts have been inconsistent in the enforcement of arbitration agreements in nursing home cases, focusing on the signatory issue when examining whether an arbitration agreement is due to be enforced. Texas courts have enforced arbitration agreements in the certain cases. Texas courts refused to enforce arbitration agreements in the following cases:

Patterson v. Nexion Health, Inc., Texas Cityview Care Ctr., L.P. v. Fryer, et al., (Tenn. Ct. App. Dec. 6, 2007) (reversing trial court’s ruling that attorney-in-fact lacked authority to bind resident and remanding for hearing on issue of whether resident was mentally capable to execute power of attorney and whether agreement was unconscionable); Cabany v. Mayfield Rehab. and Special Care Ctr., No. M2006-00594-COA-R3-CV, 2007 WL 3445550 (Tenn. Ct. App. Nov. 15, 2007) (vacating denial of Motion to Compel Arbitration and remanding case for further proceedings on issue of conditions authorizing resident’s spouse to act under power of attorney for healthcare when she executed admission agreement).

See Owens v. Nexion Health at Gilmer, Inc., No. 2:06 CV 519, 2007 WL 841114 (E.D. Tex. March 19, 2007) (finding valid arbitration agreement existed and requiring arbitration of all claims asserted in negligence action brought after death of resident); In re Nexion Health at Humble, 173 S.W.3d 67 (Tex. 2005) (holding enforceable arbitration agreement in action for damages under Texas Wrongful Death Act and Texas Survival Statute and noting that Medicare funds crossing state lines are “sufficient to establish interstate commerce” under FAA); In re Ledet, No. 04-04-00411-CV, 2004 WL 2945699 (Tex. Ct. App. Dec. 22, 2004) (incapacitated adult who required long term care was bound by terms of arbitration agreement signed by her son who was not her legally appointed guardian).

Patterson v. Nexion Health, Inc., Civil Action No. 2-06-CV-443, 2007 WL 2021326 (E.D. Tex. July 9, 2007) (refusing to enforce arbitration agreement on grounds agreement violated Texas Civil Practice and Remedies Code and holding that even if agreement did not violate Code, wrongful death claims would not be arbitrable because plaintiffs did not sign agreement).
Virginia

Virginia courts have refused to enforce arbitration agreements in actions against nursing homes on at least two occasions, Giordano ex rel. Estate of Brennan v. Atria Assisted Living, Virginia Beach, L.L.C. and Bishop v. Med. Facilities of America XLVII(47) Ltd. P’ship, focusing on whether the individual who executed the arbitration agreement on behalf of a resident had authority to bind the resident.

III. 9 U.S.C. § 4 Complaints to Compel Arbitration

Given the creative means by which plaintiffs seek to oppose arbitration and the inconsistency of courts addressing arbitration in the nursing home context, it would be remiss not to briefly address a statutory vehicle the FAA affords parties seeking to enforce arbitration agreements, albeit one that has not been frequently employed in nursing home cases. In this respect, 9 U.S.C. § 4 provides, in pertinent part, that “[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction . . .” In short, 9 U.S.C. § 4 affords the aggrieved party an independent cause of action to enforce their arbitration agreement. A Complaint to Compel Arbitration pursuant to 9 U.S.C. § 4 is a federally granted right to file an individual action to compel arbitration.

Ordinarily, the Plaintiff, i.e., the nursing home, has the burden of establishing a proper basis for federal court jurisdiction. The basis for federal court jurisdiction will generally be “diversity” as opposed to “federal question” jurisdiction. Filing the Complaint pursuant to the FAA does not provide an independent basis for federal court jurisdiction. However, as the plaintiff, the party seeking to enforce the arbitration agreement can satisfy the diversity requirement by only naming “diverse” parties in the § 4 Complaint. A § 4 Complaint can be used under different circumstances in nursing home cases. For example, the § 4 Complaint can be used to enforce an arbitration agreement where an action is remanded from federal court after the party opposing arbitration is allowed to defeat federal court jurisdiction by adding a non-diverse defendant. Likewise, it can be used when suit has already been filed by the nursing home resident in state court against diversity destroying defendants, i.e., the Administrator or Director of Nursing, by omitting the diversity destroying parties in the state court action as parties in the § 4 Complaint subsequently filed in federal jurisdiction.

79 Sikes v. Heritage Oaks West Retirement Village, 238 S.W.3d 807 (Tex. Ct. App. 2007) (refusing to enforce arbitration agreement signed by wife of resident where plaintiff presented evidence that wife was not husband’s guardian, had not been given power of attorney, and husband was not incapacitated and was capable of signing agreement on his own behalf).
80 In re Kepka, 178 S.W.3d 279 (Tex. Ct. App. 2005) (ordering trial court to deny Motion to Compel Arbitration on grounds deceased resident’s representative was not party to arbitration agreement in her individual capacity and wrongful death claims were not subject to arbitration).
court. Parties opposing arbitration may move to dismiss the § 4 Complaint for failure to join a purported necessary and indispensable party. Courts around the country have been inconsistent in determining whether a non-diverse party in the underlying state court action is a necessary and indispensable party in a 9 U.S.C. § 4 action.

Additionally, a § 4 Complaint may be beneficial in jurisdictions that do not provide an automatic right of appeal from an Order denying a Motion to Compel Arbitration. Furthermore, a § 4 Complaint may be helpful where a trial court, presumably in an effort to frustrate arbitration, refuses to address or rule on a pending Motion to Compel Arbitration. In this regard, § 4 imposes an affirmative obligation on courts to rule on a § 4 Complaint. This provision of the FAA, therefore, can be relied upon in support of a motion for expedited hearing on the § 4 Complaint.

Section 4 of the FAA demands “an expeditious and summary hearing, with only restricted inquiry into factual issues” necessary for determining the existence and enforceability of an arbitration provision. This is so because under the FAA, Congress intended to “move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.”

Notably, where a parallel action is pending in state court, a § 4 plaintiff may ask that the state court proceedings be stayed pending resolution through the arbitral process, an authority recognized by states throughout the country. In this regard, pursuant to the All Writs Act, the federal court has the jurisdiction and authority to enjoin the state court proceedings. Notably, in actions involving written arbitration agreements, the FAA requires that such actions be stayed pending resolution of the arbitral process:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Parties opposing enforcement of arbitration agreements pursuant to § 4 Complaints may cite a recent United States Supreme Court opinion, Vaden v. Discover Bank. In Vaden, the Supreme Court stated that a District Court may “look through” a § 4 Complaint to Compel Arbitration to confirm whether it has jurisdiction over the action. Relying on this language, parties opposing arbitration may argue that Vaden requires District Courts to “look through” to the underlying state court complaint to determine if diversity or any other basis for federal court jurisdiction exists. For example, a party opposing arbitration may contend that all parties to the underlying state court action must be “diverse” for the

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85 Id.
86 See, e.g., Green Tree Fin. Corp. v. Vintson, 753 So.2d 497, 502 (Ala. 1999) (stating “trial courts are required to stay or dismiss proceedings and to compel arbitration when the parties have entered into a valid contract containing an arbitration agreement…”); Kadov v. A.G. Edward & Son, Inc., 721 F.Supp. 201, 203 (W.D. Ark. 1989) (stating “[9 U.S.C.] section 3 requires a federal court in which suit has been brought ‘upon any issue referable to arbitration under an agreement in writing for such arbitration’ to stay the court action pending arbitration once it is satisfied that the issue is arbitrable under the agreement”).
89 129 S. Ct. 1262 (Mar. 9, 2009).
90 Id. at 1268.
federal court to have jurisdiction. Parties seeking to enforce arbitration agreements should counter this argument by asserting that *Vaden* is inapplicable to § 4 Complaints based on “diversity” because *Vaden* involved a case of “federal question” jurisdiction pursuant to a “counterclaim.” The manner in which courts apply *Vaden* could significantly affect the ability of parties to enforce arbitration agreements by filing § 4 Complaints.

IV. Future of Arbitration in Nursing Home Cases

Inconsistent rulings among state courts and the potential of federal legislation cloud the future of arbitration in nursing home cases. Defense lawyers seeking to enforce arbitration agreements in nursing home cases face numerous obstacles, including judicial reluctance towards arbitration agreements in the nursing home setting based primarily on the bases of lack of agency and unconscionability. Even in “friendly” jurisdictions, counsel can expect arguments by plaintiffs that the arbitration agreement at issue should not be enforced by the court.

During the last two Congresses, bills have been introduced that would substantially hinder arbitration in nursing home cases. In this regard, H.R. 1237, the “Fairness in Nursing Home Arbitration Act of 2009,” seeks to amend the FAA with respect to arbitration by prohibiting pre-dispute arbitration agreements in the nursing home context, providing that “a pre-dispute arbitration agreement between a long-term care facility and a resident of such facility (or person acting on behalf of such resident, including a person with financial responsibility for such resident) shall not be valid or specifically enforceable.” A similar bill was approved by the House Judiciary Subcommittee in 2008, and H.R. 1237 is currently pending in the House. A Senate version of the bill, S. 2838, was also approved by the Senate Judiciary Subcommittee in 2008. Based upon the possibility of legislation specifically prohibiting arbitration in nursing home cases, defense counsel should aggressively pursue arbitration where desired before this proposed legislation forecloses the possibility of enforcing arbitration agreements in nursing home cases.

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The Consumer Product Safety Improvement Act, Its Implementation And Its Liability Implications

By Frank Leone and Bruce J. Berger

Although enacted before Election Day, the Consumer Product Safety Improvement Act of 2008 (CPSIA or the Act), may be the first of a series of new legislative initiatives that will strengthen federal regulatory power, increase funding for federal agencies, impose new requirements on businesses, and assist plaintiffs in pursuit of product and toxics liability lawsuits. Because the scope of the CPSIA may be interpreted more broadly than was initially anticipated, defense lawyers should be aware of the many requirements of the Act. This article (1) provides a brief overview of the CPSIA and reviews some of the steps that the Consumer Product Safety Commission (CPSC) has taken already to implement the Act; (2) discusses the potentially broader impacts of provisions which were designed to address children’s products; and (3) discusses provisions which affect all consumer products.

I. CPSIA Overview

The CPSIA implements the most sweeping revision of United States consumer product safety laws since 1972, when Congress enacted the original Consumer Product Safety Act (CPSA). The Act expands the regulatory and enforcement powers of the Consumer Product Safety Commission (CPSC or Commission) and imposes new obligations on manufacturers, importers, and retailers of consumer products. Moreover, Congress has curbed CPSC’s discretion by enacting specific product standards and setting 42 deadlines for agency action over the next five years.

Congress drafted the CPSIA as a reaction to a number of high-profile product safety recalls, most notably recalls of Chinese-manufactured jewelry and painted toys that contained excessive, and in some cases dangerous, amounts of lead. The Act addresses toys and children’s products, and, over a short time period, (1) lowers

Footnotes:


3 The CPSC website lists approximately 50 recalls involving lead-containing products between July 2007 and June 2008. See http://www.cpsc.gov/cgi-bin/haz.aspx. In March 2006, it was reported that a four-year-old boy died of acute lead poisoning after swallowing a lead charm sold with sneakers, see Glenn Howatt, Boy’s Death Prompts Lead Bracelet Recall, MINN. STAR TRIBUNE, March 24, 2006, at C-1.
permissible lead levels in paint; (2) imposes maximum permissible limits for lead in product substrates and components; (3) bans certain uses of six phthalates (plasticizers); and (4) incorporates an ASTM (American Society for Testing and Materials) toy standard as a CPSC rule. Furthermore, the CPSIA adds new requirements governing children’s products, including for testing and certification of compliance with regulations, use of tracking labels, and warnings in connection with advertisements.

The CPSIA also imposes additional new requirements affecting all consumer products (not just children’s products), including:

- greater CPSC recall authority,
- mandatory recall notice standards,
- broadened reporting requirements,
- adoption of a class-wide product hazard list, and
- creation of a publicly accessible Consumer Product Safety Database identifying harmful products.

The Act also weakens protections designed to prevent public disclosure of confidential business information, allows enhanced State Attorney General enforcement of standards through injunctive relief, increased civil and criminal penalties for violations, requires a GAO (Government Accountability Office) study of formaldehyde, and limits the preemptive effects of consumer protection statutes.

The numerous specific requirements and short deadlines the CPSIA imposed have placed a great burden on the CPSC staff, as well as on the regulated community. Although the CPSIA anticipates increased funding and staffing for the CPSC, Congress has been slow in adopting specific appropriations. In response to the CPSIA mandates, CPSC has engaged in a flurry of activity, including issuance of Office of General Counsel opinions, publication of guidance, accelerated rulemaking, and adoption of interim final rules. CPSC established a new CPSIA website, and provides almost daily e-mail notices of updates.

In recent days, many members of Congress, unhappy with the public reaction to legislation that most of them supported, have introduced a variety of bills to amend the Act, primarily by postponing compliance dates or excepting specific products, such as ATVs, or specific industries, such as thrift stores, from lead limits. CPSC, in fact, has taken the fairly extraordinary step of proposing changes to the Act, primarily to limit retroactive application to products where exposure poses a health and safety risk to children, lower the age limit of certain products, and allow CPSC to address certain requirements on a logical basis, using risk assessment to establish need and priorities. President Obama has recently nominated, and the Senate has recently confirmed, Inez Tenenbaum as the new Chair of the Commission. Congress may consider statutory amendments this session.

From a product liability and toxic tort defense perspective, the general argument can be made that much of this legislative and regulatory action is not scientifically based (and therefore not admissible under

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4 The CPSIA authorizes increased CPSC funding starting at $118.2 million in FY 2010 to $136.783 million by FY 2013 and authorizes increases staffing levels, including more agents at ports to address consumer product imports. CPSIA Sec. 201 (enacted at 15 U.S.C. § 2081).

5 Indeed, CPSIA Sec. 204 allows CPSC to issue product safety rules without first using an Advance Notice of Proposed Rulemaking (which would request pre-proposed rule comments) and without having to publish a proposed product safety rule in the Federal Register for 60 days. 15 U.S.C. § 2058.


7 Available at: <https://www.cpsc.gov/about/cpsia/cpsialist.aspx>.


Daubert v. Merrell Dow Pharms.,\textsuperscript{10} is not determinative of chemical hazard or product defect, and may not even be relevant to products liability or toxics litigation.\textsuperscript{11} For example, although lead exposure can be harmful, setting strict limits on lead content of components that do not actually release any lead is not scientifically sound. Likewise, debate continues about the potential health hazards of phthalates. Nevertheless, many of the provisions discussed below will be encountered in litigation, and defense lawyers should be aware of them.

II. CPSIA Provisions Relating to Children’s Products and Their Potential Broader Impact

The CPSIA requirements for children’s products are of great interest to the manufacturers, importers, retailers, and distributors of such products.\textsuperscript{12} The provisions also are of more general interest because plaintiffs in civil litigation may contend that agency findings regarding chemicals and standards of care in the context of children’s products may be relevant to other products. Moreover, Congress may elect to extend legislative actions that begin with children’s products to other areas of chemical manufacture, use, and disposal.

A. Lead Ban, CPSIA Sec. 101\textsuperscript{13}

The CPSIA greatly expands the universe of products subject to lead limitations and reduces acceptable levels of lead.\textsuperscript{14} Specifically, the Act applies the current lead paint standard of 600 parts-per-million (ppm) to children’s products for sale as of February 10, 2009.\textsuperscript{15} This standard will be lowered to 300 ppm by August 14, 2009, and to as low as 100 ppm (if technologically feasible) by August 14, 2011.\textsuperscript{16} The lead content limit applies to any


\textsuperscript{12} CPSIA’s Sec. 101 lead standards apply to “children’s products;” the CPSA defines a children’s product as “a consumer product designed or intended primarily for a child 12 years of age or younger.” 15 U.S.C. § 2052(a)(2). The definition goes beyond toys and includes any products that are primarily marketed to children. Id.; see also 15 U.S.C. § 2052(a)(5) (generally defining “consumer products” as any products used in a residence, school, or for recreational or personal use (subject to enumerated exceptions)).


\textsuperscript{15} The CPSC rejected industry entreaties to apply the 600 ppm lead limits only to products manufactured after the effective date of February 10, 2009, not to products in inventory as of that date. The CPSC Office of General Counsel (OGC) determined that the Act, in stating that the lead standard was an FHSA standard, intended that the ban on sale of products containing over 600 ppm of lead apply to any products sold after February 10, 2009, regardless of date of manufacture. See OGC Letter (Sept. 12, 2008), available at <http://www.cpsc.gov/LIBRARY/FOIA/advisory/317.pdf>. The CPSC also rejected an industry petition seeking non-retroactive application. See CPSC Statement (Feb. 5, 2009) <www.cpsc.gov/library/foia/ballot/ballot09/nam.pdf>.

component of a product, e.g., a metal button would be evaluated separately from a jacket. The Act does not apply risk assessment methodology that the agency would typically apply in determining the appropriate standards for protection of public health. Congress circumvented this risk assessment process and determined on its own that any product that contains over 600 ppm lead is banned (with a few exceptions) – regardless of the potential for exposure or ingestion or consideration of dose or risk. The Act imposes this ban despite the absence of scientific evidence that correlates lead content of product substrates with actual lead exposure, ingestion, and risk.

The Act provides for exceptions for component parts that are not accessible and for electronic products (e.g., those containing batteries) where elimination of lead is not technically feasible. CPSC is currently evaluating the use of an “accessibility probe,” which is normally used to test products to see if children’s fingers will be exposed to sharp parts, to determine lead accessibility. Thus, consistent with the Act, the agency seeks to ensure that children cannot even touch components containing over 600 ppm of lead, even if there is no actual lead exposure from such touching and even though there are disputes as to whether lead is likely to be absorbed by the skin even if there were some contact.

CPSC also may, by regulation, exclude a specific product or material from the lead ban if, after notice and a hearing, it “determines on the basis of the best-available, objective, peer-reviewed, scientific evidence that lead in such product or material will neither (A) result in the absorption of any lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child. . .; nor (B) have any other adverse impact on public health or safety.” CPSC, again restricted by the legislative language, stated that “any lead” means “any lead” no matter how little. It will be challenging for a manufacturer to prove that an accessible lead component, not otherwise excluded, would not result in the absorption of “any lead.” In fact, manufacturers of youth ATVs recently submitted a scientific analysis, which, using conservative assumptions, concluded that lead ingested from exposure, e.g., to brass (lead-containing) tire valves, was far less than acceptable lead levels in food and water. CPSC, however, concluded that the study failed to show no absorption of “any lead” and denied the exception request. CPSC, however, granted an enforcement stay until August 2011.

On February 6, 2009, CPSC issued an enforcement policy which stated that certain products were not likely to contain lead levels exceeding regulatory standards, including products made of all natural materials, such as wood and cotton, children’s books printed after 1985 and (3) most dyed or undyed textiles (without plastic or metal fasteners). CPSC stated that it would not bring enforcement actions regarding these products, even if they

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17 CPSIA Sec. 101(a)(2)(A) (codified at 15 U.S.C. § 1278a) (imposing lead limit of “600 ppm total lead content by weight for any part of the product”).
18 See, e.g., 15 U.S.C. § 2058(f)(3) (CPSC required to find that consumer product safety rule is reasonably necessary to eliminate or reduce unreasonable risk of injury associated with product).
20 See 16 CFR § 1500.48 and § 1500.49 (accessibility probe testing).
25 Id.
exceed lead limits, unless the seller had knowledge that the products did not comply with the ban.26

Although the CPSIA lead limits are based on legislative fiat, not scientific analysis, plaintiffs in civil litigation can be expected to invoke them in litigation as to classes of products primarily used by children. Moreover, Congress’ aggressive regulation of lead content, without regard to risk, may presage new chemical-specific legislative initiatives. As with the phthalate ban (for which there is far less scientific support), the Congressional approach has been to ban first, research later. In contrast to agencies, Congress acts without any formalized notice and comment process.27

Moreover, Congressional enactments under the commerce clause to protect public health (and related findings) are subject to a very limited judicial review.28 Courts, likewise, may defer to Congressional findings in evaluating the constitutionality of legislation.29 In any specific case, however, it may be argued that these Congressional actions and findings are no more reliable or scientifically valid than administrative decisions. Therefore, Congressional findings may be subject to exclusion from product liability cases under Federal Rules of Evidence 402 (irrelevant), 403 (prejudicial, confusing or waste of time), 802 (hearsay), and 702 and Daubert v. Merrell Dow Pharms. (as not scientifically reliable).30

B. Phthalate Ban, CPSIA Sec. 10831

Phthalates comprise a group of more than 50 compounds used to make vinyl, polyvinyl chloride (PVC), and other plastics soft and flexible, as a solvent in paint, adhesives, cosmetics, and fragrances, and in personal care products, detergents and surfactants, printing inks, coatings, food products, and textiles. Chemicals may leach from these materials and be absorbed by the skin, ingested, or adhere to inhalable dusts. Phthalates are suspected of being “endocrine disruptors” which allegedly can

26 Id.

27 Although CPSC may ban products under the CPSA, 15 U.S.C. § 2057, and the FHSA, 15 U.S.C. §§ 1261-1262, such bans may be adopted only through rulemaking processes, which carry certain procedural guarantees. In fact, courts have struck down product bans enacted by the CPSC (and other agencies) on grounds including failure to support the regulatory action with substantial evidence. See, e.g., Gulf South Insulation v. CPSC, 701 F. 2d 1137 (5th Cir. 1983) (invalidating CPSC urea-formaldehyde ban due to absence of substantial evidence supporting the ban, including evidence of unreasonable risk of injury, and quantification of that risk); see also Corrosion Proof Fittings v. Environmental Protection Agency, 947 F.2d 1201 (5th Cir. 1991) (court overturned EPA ban of asbestos-containing products issued under Toxic Substances Control Act because EPA lacked substantial evidence that it considered all necessary evidence and promulgated the least burdensome regulation necessary to protect the environment).

28 See, e.g., Gonzales v. Carhart, 550 U.S. 124, 165 (2007) (“we review congressional fact-finding under a deferential standard,” although courts do not place dispositive weight on those findings “when constitutional rights are at stake”); Walters v. Nat’l Ass’n of Radiation Survivors, 473 U.S. 305, 319-320 (1985) (“This deference to Congressional judgment must be afforded even though the claim is that a statute . . . effects a denial of the procedural due process guaranteed by the Fifth Amendment.”).

29 See, e.g., United States v. Silverman, 132 F. Supp. 820, 830-31 (D. Conn. 1955) (congressional findings are entitled to great weight in considering the constitutionality of a statute, but do not establish essential elements of a case or relieve the government of the burden of proving those elements).


affect hormone levels and contribute to birth defects. The Act makes it unlawful for any person to manufacture for sale, distribute in commerce, or import into the U.S. any children’s toy or child care article that contains concentrations of more than 0.1% of three phthalates, DEHP (di-(2-ethylhexyl) phthalate), DBP (dibutyl phthalate), or BBP (benzyl butyl phthalate). The Act also prohibits use of three other phthalates, DINP (disononyl phthalate), DIDP (disodecyl phthalate), or DnOP (di-n-octyl phthalate) in any children’s toy that can be placed in a child’s mouth or child care article (presumably that also can be placed in the mouth, but the Act is unclear). The CPSIA authorizes CPSC to undertake rulemaking re these phthalates. CPSC staff currently takes the view – contrary to the CPSIA directives with respect to lead – that the percentage of phthalates is to be determined based on the mass of the entire product, not phthalate components.

The Act requires CPSC to appoint a Chronic Hazard Advisory Panel (CHAP) to “study the effects on children’s health of all phthalates and phthalate alternatives as used in children’s toys and child care articles.” The CHAP has 24 months to prepare a report and CPSC has another six months to issue a rule.

CPSC has previously considered phthalate issues. In 1985, it convened a CHAP that resulted in a voluntary ban of DEHP for teethers, rattles and pacifiers, a ban that the ASTM F963 toy standard (discussed below) now incorporates. Later, in response to a petition by environmental groups to ban PVC in children’s products, a CHAP Report (June 2001) concluded that DINP in toys, teethers, and rattles was not hazardous to children, and CPSC denied the petition in 2003.

C. Mandatory Adoption of ASTM Toy Safety Standard, CPSIA Sec. 106

Section 106 of the CPSIA required CPSC to adopt the ASTM F963-07 applied to existing inventory as of February 10, 2009.

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33 As defined by the CPSIA (phthalate section), the term “children’s toy” means “a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays” and the term “child care article” means “a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething.” CPSIA Sec. 108(e)(1)(B)-(C) (codified at 15 U.S.C. § 2057c).

34 These provisions became effective on February 10, 2009. Congress enacted the phthalate prohibition as a consumer product safety rule, pursuant to CPSA Sec. 8, 15 U.S.C. 2057. The CPSC’s General Counsel issued an Opinion Letter on November 17, 2008, stating that, unlike the CPSIA’s lead content restrictions, its phthalate prohibitions would not apply to a company’s existing inventory. The CPSC OGC determined that the phthalate ban should not apply retroactively because it was a consumer product safety rule which under the CPSA does not apply to existing inventory, not a federal hazardous substances ban under the FHSA, which typically prohibits all sales as of the effective date. OGC Opinion Letter (Nov. 17, 2008). The CPSC reversed this position on February 6, 2009, based on a decision issued in National Resources Defense Council, Inc. v. CPSC, 597 F.Supp.2d 370 (S.D.N.Y. 2009) (holding that CPSIA clearly prohibited sales of products containing phthalates as of the effective date, even if manufactured prior to that date, and restrictions on CPSC rules did not apply to consumer product safety standards “enacted by Congress”). Consequently, the CPSIA’s phthalate prohibitions became effective as of February 10, 2009.

35 CPSIA Sec. 108(b).


consumer safety specification for toy safety by February 2009. The ASTM standard sets forth material and design requirements and testing procedures, warning and labeling requirements, and limitations of concentrations of metals in “surface-coating materials.” CPSIA Section 104 requires CPSC to review the ASTM standard within one year and determine if stricter standards are needed. In fact, F963-07 has already been superseded by F963-08. Each subsequent ASTM standard becomes the mandatory standard in 180 days if CPSC does not disapprove.\(^{39}\) Thus, through legislative action, Congress is making a voluntary industry standard, promulgated by an independent testing group, a mandatory federal standard. As such, compliance with the standard is subject to testing, certification, reporting, and other requirements discussed in this article. Moreover, plaintiffs in products liability litigation could contend that failure to comply with the standard could be viewed as negligence per se.

D. Other CPSIA Provisions Currently Affecting Only Children’s Products

i. Third-Party Product Testing: CPSIA Sec. 102\(^{40}\) requires testing and certification of all children’s products (e.g., cribs and pacifiers, metal jewelry, baby bouncers, walkers, and jumpers) by accredited independent testing laboratories. The testing is required to ensure compliance with all applicable standards including lead and phthalate requirements and will provide a basis for the compliance with the certificate of conformity requirement (discussed in Section III.A below).

ii. Product Tracking Labels: CPSIA Sec. 103\(^{41}\) requires manufacturers to place a “tracking label” or other permanent distinguishing mark on children’s products “to the extent practicable” identifying the source of the product, the date of manufacture, and additional data regarding the manufacturing process, such as the batch number. The tracking requirement is intended is to facilitate recalls.

iii. Advertising “Labeling” Requirements: CPSIA Sec. 105\(^{42}\) amends the FHSA to require that advertisements (including those on Internet websites or in catalogues) provide warnings that also are required to be included on the product labels. This provision may signal expansion of federal requirements for inclusion of warnings in advertising of consumer products.

III. Provisions Applicable to All Consumer Products

A. General Certification Requirements, CPSIA Sec. 102

Prior to amendment, the CPSA required that manufacturers of products subject to CPSA standards issue certificates of compliance stating that the products met the standards.\(^ {43}\) The CPSIA significantly expands this requirement to apply to all consumer products that are subject to any rule, standard, ban, or regulation under the CPSA, as well as any other act CPSC enforces or administers (e.g., the FHSA). The manufacturer must certify, based on a test of each product or upon a reasonable testing program, that its product complies with all CPSC requirements.\(^ {44}\) The certification requirement extends beyond the lead and phthalate rule to all CPSC-administered rules governing

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39 CPSIA Section 106(g).
consumer products. CPSC has granted a stay of enforcement as to new certification requirements (except for lead jewelry and paint). Although manufacturers are excused from testing and certification requirements for a year, the products they sell must still comply with the new lead and phthalate standards. Manufacturers of products potentially containing lead or phthalates are relieved of the costs of testing and the paperwork burden of certification, but without testing they may risk violation of the Act. Moreover, retailers will want the assurance of compliance that comes with a conformity certificate. Thus, as a practical matter, many manufacturers are likely to comply with the Section 102 certification requirements as part of a quality assurance program.

B. Recalls, CPSIA Sec. 214

Prior to amendment, the CPSA gave CPSC the authority to require the manufacturer, distributor, or retailer of a consumer product that poses a “substantial product hazard” to give public notice of such hazard and repair, replace, or refund the purchase price of the product. The CPSA defined a “substantial product hazard” as a failure to comply with a CPSA product safety rule or a product defect that poses a substantial risk of injury. The CPSIA expands this provision require recalls of products that fail to comply with other rules, regulations, standards, or bans CPSC enforces under other statutes, for example the FHSA (and therefore the lead ban).

The Act gives CPSC additional recall authority, including power to require recalls of “imminently hazardous consumer products.” CPSC may also require manufacturers to cease distribution of any product so described and provide notice to appropriate state and local public health officials. CPSC can order corrective actions of recall, repair, or refund. This also means that the manufacturer has lost the option to choose among those actions. CPSC also can withdraw its approval of a corrective action plan or order amendments to that plan. Finally, the CPSIA prohibits the sale and export of recalled products.

These changes collectively provide the CPSC with greater authority and flexibility regarding product recalls. It can now require recalls for products that violate FHSA or other CPSC-administered standards and has more power as to the details of mandatory corrective action plans. While as a practical matter, the vast majority of recalls have been, and will likely continue to be, “voluntary,” the CPSC will now be in a stronger position to carry out negotiations concerning corrective action plans for such recalls. From a litigation perspective, companies are likely to see more recalls, with attendant litigation risks. In addition, more companies may be subject to litigation risk, as the prohibition of sale of recalled products could impact retailers as well as manufacturers.

C. Recall Notice Requirements, CPSIA Sec. 214(i)

Section 214(i), introduced by then-Senator Barack Obama, sets forth notice requirements for mandatory CPSC recalls. Although most recalls are voluntary, the notice provisions may become required for future voluntary recalls and hence become the standards for exercise of reasonable care

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45 See Section II.A, supra.
48 See 15 U.S.C. § 2061(a). Under the statute, an “imminently hazardous product” is a consumer product which presents imminent and unreasonable risk of death, serious illness, or severe personal injury.” Id.; see, e.g., United States v. Althone, 746 F.2d. 977 (3d Cir. 1984) (CPSC contended that allegedly defective automatic baseball pitching machine was an imminently hazardous consumer product.).
49 CPSIA Sec. 214(b).
in connection with a recall. The Act provide that notices must include specific product descriptions and photos; a description of the substantial product hazard and the reasons for the action; number and a description of any injuries or deaths associated with the product, including the ages of any individuals injured or killed, and the dates on which CPSC received information about such injuries or deaths; and a description of any remedy available to a consumer and actions a consumer must take to obtain a remedy.

D. Substantial Product Hazard Reporting, CPSIA Sec. 214(a)

Prior to the CPSIA, Section 15(b) of the CPSA required manufacturers, importers, distributors and retailers to notify CPSC immediately if they obtained information that reasonably supported the conclusion that a consumer product distributed in commerce (1) failed to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which CPSC has relied as a consumer product safety rule; (2) contained a defect which could create a substantial product hazard; or (3) created an unreasonable risk of serious injury or death.

CPSIA Sec. 214 amended CPSA section 15(b) adding that companies must report products which “fail to comply with any other rule, regulation, standard, or ban under this Act or any other Act enforced by the CPSC.” For example, sellers must report a product if they become aware of a children’s product that exceeds the CPSIA applicable lead limits (which are banned under the FHSA). As a practical matter, the incorporation of voluntary standards will impose even broader reporting obligations. This is, in part, because the CPSC has taken the position that products that fail to comply with voluntary standards are considered defective.

E. Substantial Product Hazard List, CPSIA Sec. 223

CPSIA also amends CPSA Section 15 by granting CPSC the authority to adopt rules to identify a consumer product or class of consumer products as a “substantial product hazard” under CPSA Sec. 15(a)(2). To determine that a product class poses a “substantial product hazard,” CPSC must determine that the hazardous characteristics of the product are readily observable and have been addressed by voluntary standards, such standards have been effective in reducing injury, and conclude there is

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52 RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY (1998), § 11, sets forth a theory of liability for “negligent recall” under which a seller could be held liable for harm resulting from failure to recall a product if the government requires a recall or a seller voluntarily undertakes a recall, and the seller “fails to act as a reasonable person in recalling the product.” Courts thus far generally have not embraced a separate negligent recall theory. See, e.g., Eberts v. Kawasaki Motors Corp., Civil No. A1-02-43, 2004 WL 224683 (D.N.D. Feb. 2, 2004) (no duty to recall). Courts, have, however, found that when a manufacturer assumes a post-sale duty to remedy defects, it has an obligation to complete the remedy using reasonable means. See, e.g., Bell Helicopter Co. v. Bradshaw, 594 S.W.2d 519, 532 (Tex. App. 1979).


54 Codified at 15 U.S.C. §§ 2064(b) (CPSA Sec. 15(b)).


substantial compliance with such standards. Thus, CPSC can now identify, through rulemaking, class-wide defects that constitute substantial product hazards (if the defects are subject to voluntary standards). The provision essentially allows the agency to say, from its perspective, that a class of products that do not comply with specific voluntary standards are defective, thereby essentially transforming voluntary standards into mandatory standards. For example, CPSC has been concerned about certain children’s clothing with neck drawstrings that may pose a choking hazard. CPSC may now issue a rule finding any such products are defective if it determines that effective voluntary standards that address this type of danger are already in place.

**F. Consumer Product Safety Database, CPSIA Sec. 212**

CPSIA Sec. 212 creates a public, internet-accessible Consumer Product Safety Database, which can be used by consumers and public agencies to report information about harm allegedly caused by specific consumer products. Manufacturers will have a very limited time period (10 business days) to respond to these reports, but may seek to correct or redact them based on inaccuracies, trade secrets, or confidential business information. The names of the reporters will not be published, so plaintiffs’ counsel will have no opportunity to contact consumers directly. The Database will likely be mined by aggressive plaintiffs’ attorneys seeking new products about which to file lawsuits and thus have a significant litigation effect.

Further, the types of material included on the Database are not yet certain. The Database will contain “reports of harm related to the use of consumer products” submitted by consumers, local, state or federal agencies, health care professionals, child service providers, and public safety entities. The list of submitters does not include “plaintiffs’ lawyers,” but it is not clear whether CPSC will routinely post information contained in product liability lawsuit complaints or other information provided by plaintiffs’ counsel. It is clear that the Database will not include information that manufacturers or retailers provided to CPSC in CPSA Section 15(b) or 37 reports. CPSC has not yet established guidelines for operation of the Database, which is not anticipated to begin operations until 2010.

**G. Restrictions on Information Disclosure, CPSIA Sec. 211**

CPSA Sec. 6(b) prohibited CPSC from disclosing information about a consumer product that identifies a manufacturer unless CPSC has taken “reasonable steps” to assure that (1) the information is accurate; 2) disclosure of the information is fair in the circumstances; and 3) disclosure of the information is reasonably related to effectuating the purposes of the CPSA and of the other laws CPSC administers.

CPSIA Section 211 amends CPSA Section 6(b) and will require increased diligence by manufacturers to prevent the release of inaccurate information or the publication of trade secrets and other confidential information. The CPSIA halves the time periods for notice to the manufacturer and its opportunity to comment on information prior to CPSC’s disclosure. CPSIA Sec. 211(9) further provides that CPSC need not obtain manufacturer comments when it has reasonable cause to believe a product is in violation of any consumer product safety rule. CPSIA Sec. 207 increases disclosure by allowing CPSC can share section 15(b) product hazard report information with any federal, state, local, or foreign government agencies.

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agency with which CPSC has adopted information sharing agreements (subject to 15 U.S.C. § 2078(f)).

H. State Attorney General Enforcement, CPSIA Sec. 218

The CPSIA provides that a State Attorney General who has reason to believe that a company has violated any consumer product safety rule, regulation, standard, certification, or labeling requirement, may bring an action to obtain injunctive relief in federal District Court (in the district where the defendant is found or transacts business). CPSC must receive notice of the action and has the right to intervene. Attorneys General may not bring such actions if CPSC is pursuing civil or criminal actions for the same alleged violation.

State Attorneys General do not have a right to sue for damages or penalties under the CPSIA, reducing financial incentives for state actions. State Attorneys General have previously pursued actions. However, under state consumer protection, deceptive trade practices, unfair trade practices and other similar state statutes. In 2007, 38 states sued toy manufacturers, which had already recalled lead-containing toys, under state consumer protection statutes; California filed an action also claiming a violation of Proposition 65. Many of the defendants settled the cases in December 2008, with these manufacturers agreeing to pay $12 million to the states and accelerate their compliance with the CPSIA lead deadlines. Attorneys General may be expected to include actions for injunctive relief concerning alleged CPSA violations in future consumer production actions. Currently, CPSC may consult with state Attorneys General, but there is no formal restriction on state Attorneys General actions in connection with CPSC’s enforcement scheme, and manufacturers may be faced with legal actions on various fronts. In particular, CPSC-issued stays of enforcement, e.g., of lead-related actions against ATV manufacturers discussed above are not binding on state Attorneys General.

I. Civil and Criminal Penalties, CPSIA Sec. 217

The CPSIA increases civil penalties for violations of the CPSA with fines increased from $5,000 per violation to $100,000, and the maximum fine for a related series of violations increased from $1.25 million to $15 million. There are similar penalty increases for violations of the FHSA and other CPSC-administered statutes. CPSIA Sec. 217(c) provides criminal penalties for knowing violations of up to five years in jail and deletes the requirement that CPSC provide notice before criminally prosecuting a company’s officers, directors, or agents or individual for noncompliance.

J. Other Chemical or Product Specific Provisions

CPSIA Sec. 234 requires the Comptroller General, in consultation with CPSC, to conduct a study on the use of formaldehyde in the manufacture of textile and apparel articles and their components “to identify any risks to consumers caused by the use of formaldehyde in the

65 Id.
67 Proposition 65 (California Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code §§ 17200 et seq.) requires businesses to provide a “clear and reasonable” warning if their products contain 750 chemicals that allegedly pose a significant risk of causing cancer, birth defects, or reproductive toxicity. No warning is required if exposure to the chemical is low enough to pose no significant risk of cancer or is significantly below levels observed to cause birth defects or other reproductive harm. Proposition 65 may be enforced by consumer groups and private litigants as well as district attorneys and the California Attorney General.

manufacturing of such articles, or components of such articles.” The General Accountability Office is to complete the study by August 2010. Formaldehyde is sometimes used in apparel manufacture (permanent press), and recent analyses disclosed measurable levels in clothing. This analysis led Sen. Robert Casey (D-Pa) to call for formaldehyde testing and standards in the CPSIA, but the Act’s final version merely called for a study. This provision is another example of concern about a specific chemical being addressed in legislation, prior to agency action. It is also interesting that the study is to be conducted by GAO, an agency that carries out and publishes analysis of other agency actions regarding chemicals, but does not typically perform independent risk assessments.

**K. Preemption, CPSIA Sec. 231**

CPSA standards have preemptive effect over different state standards that apply to the “same risk of injury” associated with the same consumer product. States may request approval from CPSC to enact stricter standards, and CPSC is authorized to grant approval. Regulations enacted under the FHSA, such as the CPSIA Sec. 101 lead limits, are also preemptive. Courts have found that CPSA’s preemptive effect, at least as it relates to tort litigation, is weakened by a “saving clause,” which states that compliance with consumer product safety rules “shall not relieve any person from liability at common law or under state statutory law to any other person.”

Courts have given the CPSA limited preemptive effect. For example, in *Moe v. MTD Prods.*, the court held that a CPSC labeling standard involving a lawn mower expressly preempted plaintiff’s failure-to-warn claims, but plaintiff could pursue a design defect claim that would not create a different standard. In *Colon v. Bic, USA, Inc.*, the court held that the savings clause prevented CPSC cigarette lighter standards from expressly preemption common law product liability claims and that the “minimum” CPSC standards did not impliedly preempt state liability claims. Finally, in *In re Mattel*, the court rejected the argument that a voluntary recall conducted pursuant to a CPSC-approved corrective action plan preempted a tort action seeking reimbursement for allegedly hazardous products.

The CPSIA specifically addresses two preemption issues. First, section 231(a) provides that CPSC rules, regulations, regulatory preambles may not expand, contract, limit, modify or extend the preemptive effect of the statutes that CPSC administers. This action apparently results from Congressional disapproval of the Bush Administration practice of having agencies set forth the anticipated preemptive effect of regulations in their preambles. CPSC stated in at least one a preamble that its standards preempted state regulations and civil

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72 15 U.S.C. § 2075(b), (c).
73 FHSA Sec. 18, 15 U.S.C. § 1261n.
75 Moe v. MTD Prods., Inc., 73 F.3d 179 (8th Cir. 1995).
77 Courts have also held that state tort claims are not preempted when they rely on different, and higher, standards of care for design, manufacture and distribution of products than those imposed by applicable CPSC safety standards where there was no conflict with those standards. In Leipart v. Guardian Ind., Inc., 234 F.3d 1063, 1069-70 (9th Cir. 2000), the court held that common law tort requirements were not “regulations” and therefore did not conflict with CPSC standards; more broadly the court considered the CPSC standards to be a floor – a minimum safety standard upon which state common law could impose further duties. The court also held that common law claims premised on violations of CPSC standards were not preempted. *Id.* at 1068. Recent jurisprudence, in particular, the Supreme Court decision in *Wyeth v. Levine*, 555 U.S. __, 129 S.Ct. 1187 (2009) may pose additional hurdles to preemption arguments.
lawsuits. The CPSIA says that such statements should not have any effect.

Second, CPSIA Sect. 231(b) states that: “Nothing in this Act or the Federal Hazardous Substances Act shall be construed to preempt or otherwise affect any warning requirement relating to consumer products or substances that is established pursuant to State law that was in effect on August 31, 2003.” Because California’s Proposition 65, discussed supra, was in effect on that date, it is not preempted.

In general, the CPSA does not prevent states from adopting more aggressive regulatory schemes and states are not waiting for federal action. California, in addition to Proposition 65, has an expanded lead jewelry regulatory system, adopted its own phthalate ban (prior to CPSIA), imposed limits on formaldehyde release from composite wood products, and is evaluating a comprehensive “Green Chemistry Initiative.”

The California phthalate ban addresses the same six phthalates as CPSIA and imposes the same limits. The California statute also covers toys and child care articles, but there are some differences in how such products are defined (i.e., California includes products used for “relaxation” as well as feeding and sleeping), and testing procedures and protocols may not be identical. The CPSIA expressly provides that states can impose additional requirements on “phthalate alternatives” that are not specifically regulated under the CPSIA, but this provision seems to support preemption of state standards as to the six regulated phthalates. Whether the federal phthalate regulations actually preempt California standards, and their effect on products liability litigation has yet to be resolved.

IV. Conclusion

The enactment of the CPSIA, with its unintended consequences, poses both regulatory challenges and liability dangers to business. Litigation risks include a greater likelihood of regulatory violations (and negligence per se claims), increased product recalls with attendant publicity, a greater likelihood of public disclosure of potentially inaccurate information, and increased exposure to attorney general enforcement actions (with pendent state-based damages claims).

The Senate recently confirmed Inez Tenenbaum as the new Chair of the Commission. This appointment will improve the CPSC’s congressional relations and offers an opportunity for Congressional and CPSC leaders to work together to address the most objectionable parts of the Act. The new CPSC leadership, however, also reflects a more activist government approach and a likely increase in regulatory and enforcement actions.

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79 See CPSC Mattress Open Flame Standard, 71 Fed. Reg. 13472, 13496 (March 15, 2006) (“The Commission intends and expects that the new mattress flammability standard will preempt inconsistent state standards and requirements, whether in the form of positive enactments or court created requirements.”).
81 See <http://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/>.
The Double Edged Sword: Internal Law Firm Privilege and the “Fiduciary Exception”

By Mark J. Fucile

I. Introduction

As law firms have grown in both size and organization, internal ethics and claims advice has increasingly taken on institutional form. Where in years past a law firm lawyer might have informally sought out a seasoned colleague to discuss a sensitive question of professional ethics or a potential claim against the firm, today that same discussion is more likely to be had with a formally designated internal firm counsel or a member of a firm committee charged with providing ethics and claims advice.\(^1\)

Paralleling this institutionalization of internal advice on ethics and claims has been the recognition of the attorney-client privilege for such internal law firm discussions not unlike the privilege long recognized for corporations and other entities.\(^2\) At the same time, however, courts have also increasingly recognized a “fiduciary exception” to internal law firm privilege when a firm’s otherwise privileged discussions put it in conflict with a current firm client. Under the fiduciary exception, the law firm’s fiduciary duty to the client “trumps” the firm’s internal privilege and has led to the discovery of otherwise privileged internal communications concerning the client—typically in subsequent malpractice or related lawyer civil liability litigation by the client against the firm.

The fiduciary exception is not without critics. But, regardless of its relative legal and policy merits, the fiduciary exception’s increasing recognition by courts makes it a very real consideration both for internal counsel providing advice to firm lawyers and for defense counsel handling subsequent disputes in which a former client seeks such communications by way of document request or deposition. This article will examine three aspects of the fiduciary exception. First, it will briefly survey the development of the exception in the law firm context. Second, it will explore the boundaries of the exception. Third, it will then conclude with a discussion of the practical impacts of the exception for both law firm internal counsel and outside defense counsel.

II. The Fiduciary Exception in the Law Firm Context

The fiduciary exception did not originate with law firms. Rather, the

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\(^1\) For a discussion of this trend, see Elizabeth Chambliss & David B. Wilkins, The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms, 44 ARIZ. L. REV. 559 (2002); Douglas R. Richmond, Essential Principles for Law Firm General Counsel, 53 U. KAN. L. REV. 805 (2005); Peter R. Jarvis & Mark J. Fucile, Inside an In-House Legal Ethics Practice, 14 NOTRE DAME J. L. ETHICS & PUB. POL’Y 103 (2000).

exception traces its lineage to the English trust law concept that a fiduciary is prevented from asserting the attorney-client privilege against a beneficiary on a matter of trust administration. In the law firm context, the generally acknowledged starting point is *In re Sunrise Securities Litigation.*

As its name implies, *Sunrise* was a consolidated series of securities claims arising out of the failure of Sunrise Savings and Loan Association (Sunrise) in the 1980s. One of the defendants was the law firm that had served as Sunrise’s outside general counsel. During discovery, the law firm withheld documents that, in part, concerned internal advice from firm attorneys regarding its representation of Sunrise. The firm argued that the documents were protected from discovery by the attorney-client privilege, analogizing them to a consultation with in-house counsel in the corporate context. The claimants moved to compel their production. The court initially rejected the concept that a law firm could claim privilege for internal discussions with lawyers functioning as the equivalent of in-house counsel, but then reversed itself on reconsideration, finding that “it is possible in some instances for a law firm, like other business or professional associations, to receive the benefit of the attorney-client privilege with seeking legal advice from in-house counsel.” The court, however, tempered its recognition of internal privilege by applying the fiduciary exception when the internal advice created a conflict between the law firm’s own interests and that of a current client. The court then returned the specific application of the exception to a special discovery master.

After the *Sunrise* decision, the fiduciary exception in the law firm context was essentially dormant for over a decade. Although the reasons are not completely clear, one possibility is that during the 1990s law firms were expanding the use of designated internal ethics and claims counsel. It was not until that development had become more common that issues relating to internal advice began to surface during discovery in legal malpractice and related lawyer civil liability cases.

The period of quiet ended in 2002 with two decisions, *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283 (S.D.N.Y. 2002), and *Koen Book Distributors, Inc. v. Powell, Trachtman, Logan, Carrié, Bowman & Lombardo, P.C.*, 212 F.R.D. 283 (E.D. Pa. 2002). Both cases involved claims for legal malpractice, and both involved motions to compel internal law firm documents. Of the two, *Koen Book* presented both the privilege and the exception in the starker terms. The documents involved in *Koen Book* included internal discussions concerning ethical and legal issues triggered by a possible malpractice claim that took place while the firm was still representing the client involved.

*Bank Brussels* and the *Koen Book* relied on *Sunrise* for both the

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Footnotes:

3 Although they reach differing conclusions in the specific context of ERISA trustees, United States v. Mett, 178 F.3d 1058 (9th Cir. 1999), and Wachtel v. Health Net, Inc., 482 F.3d 225 (3rd Cir. 2007), both contain extended discussions of the origins, history and general application of the fiduciary exception.


5 *Sunrise* at 595.

6 Id. at 595-98. At the time, conflicts between a law firm’s own interests and those of a current client were governed by ABA Model Rule of Professional Conduct 1.7(b) and its state-adopted counterparts. The ABA Model Rules have since been amended and that category of conflict is now found in ABA Model Rule 1.7(a)(2).

7 Id. at 597-98.

8 See Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 Notre Dame L. Rev. at 1736.

9 See note 1, supra.

10 *Bank Brussels* also included a parallel claim for breach of fiduciary duty.

11 *Bank Brussels*, by contrast, focused largely on conflict checks and related analysis.
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proposition that the attorney-client privilege applies to consultations with internal counsel within law firms and that the fiduciary exception “trumps” the privilege when the discussions involved put the firm in conflict with a then-current client. In the wake of Bank Brussels and Koen Book, knowledgeable commentators criticized both the legal basis for applying the fiduciary exception in the law firm context and the policy reasons for doing so. The former focused primarily on Sunrise’s importation of the fiduciary exception from trust law into a context that, while invoking central fiduciary duties, is governed by its own regulatory structure (both in terms of the professional rules and the application of the attorney-client privilege). The latter noted that the exception puts law firms in a position that other professionals and their corporate counterparts do not face.

Although those criticisms were well-articulated, courts since 2002 have continued to apply the fiduciary exception nonetheless. Because both the privilege and the exception typically arise on motions to compel at the trial court level, most of the reported decisions are from federal district courts. They include, chronologically:

- VersusLaw, Inc. v. Stoel Rives, LLP, 111 P.3d 866 (Wash. App. 2005), in which the Washington Court of Appeals reversed summary judgment in favor of the law firm and in remanding the case also dealt with a motion to compel internal law firm communications that remained pending.


The number of courts that have addressed this issue to date remains relatively small. The exception, therefore, does not yet “prove the rule.” At the same time, the increasing number of decisions and their relative uniformity makes the fiduciary exception a practical feature on the legal landscape that law firms and their lawyers cannot ignore.

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14 Elizabeth Chambliss, The Scope of In-Firm Privilege, 80 NOTRE DAME L. Rev. at 1733-1765.

15 The fiduciary exception, of course, is not the only circumstance in which internal law firm privilege can be waived. In some instances, for example, a firm may choose to waive privilege. See, e.g., Spur Products Corp. v. Stoel Rives LLP,
III. Boundaries of the Exception

Even where the fiduciary exception has been recognized, three important boundaries remain.16

First, the fiduciary exception has never been held to unequivocally require disclosure to a client of any consultation regarding the client by a law firm with its internal counsel. The American Bar Association, in Formal Ethics Opinion 08-453 (2008), which addresses ethics issues associated with internal consultations,17 emphasizes that internal ethics consultations do not automatically create a conflict between a law firm and its client. Formal Ethics Opinion 08-453 notes that a conflict only arises under ABA Model Rule of Professional Conduct (Model Rule) 1.7(a)(2) when “there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.”18 Formal Ethics Opinion 08-453 observes that in most circumstances both the law firm and the client have similar interests in having the law firm’s conduct comport with the applicable professional rules. In those circumstances, Formal Ethics Opinion 08-453 finds that generally a law firm would not have an obligation to inform the client of the consultation under Model Rule 1.4, which governs the duty of communication. By contrast, if a law firm committed a material error in handling a matter for a client, it would have a duty to inform the client (under Model Rule 1.4) and to obtain a conflict waiver from the client (under Model Rule 1.7(a)(2)) to remain on the matter (or withdraw). Formal Ethics Opinion 08-453 concludes that in this latter situation a law firm—at least as a matter of ethics—may, but need not necessarily, inform the client that its conclusion was the result of internal consultation.20

Second, even the decisions applying the fiduciary exception to date noted above have limited it to consultations with internal—rather than outside—counsel. This limitation is inherent in their conflict analysis. Under Sunrise and its descendants, the conflict identified (as articulated in those cases) arises because a law firm lawyer (whether a designated firm counsel or committee or an ad hoc equivalent selected to address a particular matter on behalf of a firm) is advising the firm vis-à-vis a current firm client. ABA Model Rule 1.10(a), the so-called “firm unit rule,” generally imputes a conflict by one firm

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122 P.3d 300 (Idaho 2005). In other instances, the crime-fraud exception may apply. See generally In re SONICblue Inc., 2008 WL 170562 at *11 (discussing the crime-fraud exception generally in the law firm context).

16 The fiduciary exception cases have generally applied it to materials otherwise protected from discovery by both the attorney-client privilege and the work product rule. See, e.g., Koen Book Distributors, Inc. v. Powell, Trachtman, Logan, Carlle, Bowman & Lombardo, P.C., 212 F.R.D. at 286-87; Thelen Reid & Priest LLP v. Marland, 2007 WL 578989 at *8-*9; In re SONICblue Inc., 2008 WL 170562 at *10.

17 The opinion acknowledges the issues of evidentiary privilege raised by the fiduciary exception, but only addresses associated questions under the professional rules. In the Asset Funding Group case noted above, the defendant law firm moved for reconsideration in light of Formal Ethics Opinion 08-453. The court denied reconsideration, noting that Formal Ethics Opinion 08-453 left questions of privilege to evidence law. Asset Funding Group, L.L.C. v. Adams and Reese, L.L.P., No. 07-2965, 2009 WL 1605190 (E.D. La. June 5, 2009) (unpublished).

18 The ABA Model Rules have been adopted (with local variation) in most states. The ABA Center for Professional Responsibility maintains an updated list of jurisdictions which have adopted (again, with local variation) the ABA Model Rules at http://www.abanet.org/cpr/mrpc/alpha_states.html. The ABA Center for Professional Responsibility’s web site also has links to state professional rules throughout the country.

19 As noted earlier, the fiduciary exception usually arises as a matter of evidentiary privilege in subsequent legal malpractice or related lawyer civil liability litigation.

lawyer to the firm as a whole. Therefore, under the rationale advanced in the cases applying the fiduciary exception to date, the law firms’ “self-representation” as described in *Sunrise*\(^{21}\) lies at the heart of the conflict identified. Because the focus is on the lawyer being consulted rather than on the firm seeking the consultation, there is no conflict under the *Sunrise* line when a firm consults with outside counsel who does not have those dual interests. In fact, at least some of the cases state outright that the exception would not apply if the firm consults with outside rather than internal counsel.\(^{22}\) In short, at least to date, the decisions advancing the exception have effectively been self-limiting by the rationale advanced to internal counsel only.

Third, none of the decisions from *Sunrise* forward in any way suggest that the fiduciary exception applies to any law firm communications with counsel—whether internal or external—occurring or generated after the attorney-client relationship comes to an end. A central rationale for the exception (again as expressed in the decisions noted) is that the firm’s fiduciary duty to its *current* client overrides the firm’s internal privilege.\(^{23}\) Indeed, the fiduciary exception decisions find that a remedy to ensure that privilege is preserved (albeit an often impractical one) is to withdraw in advance of the consultation (whether internal or external).\(^{24}\) Again, therefore, the decisions advancing the exception have effectively been self-limiting in this respect as well.

## IV. Practical Impacts of the Exception

The increasing recognition of the fiduciary exception has had two broad practical impacts for law firm internal counsel and their outside defense counterparts.

First, the trend has underscored the importance of establishing privilege in the first place. Just as in-house corporate counsel have long had to take steps to ensure that their legal advice to internal corporate clients was cloaked within the privilege, so, too, must counsel with the increasing number of internal law firm counsel.\(^{25}\) These steps include: (a) formally designating internal counsel (whether by position, title or committee)\(^{26}\) so the “attorney” side of the attorney-client privilege is clearly delineated; (b) not mixing lawyers providing the advice with those receiving it so the “client” side of the attorney-client privilege is equally demarcated; (c) billing internal counsel’s time (and that of the firm lawyers seeking the consultation) to the firm so that it will


\(^{22}\) *In re SONICblue Inc.*, 2008 WL 170562 at *11 (“[R]esearch has not uncovered any decision where a court denied the application of the privilege between a law firm and its outside counsel due to the law firm’s breach of a fiduciary duty owed to its own client[,]”); see also Thelen Reid & Priest LLP v. Marland, 2007 WL 578989 at *7.

\(^{23}\) See, e.g., Koen Book Distributors, Inc. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C., 212 F.R.D. at 286 (“To avoid or minimize the predicament in which it found itself, the firm could have promptly sought to withdraw as counsel[,]”); accord Thelen Reid & Priest LLP v. Marland, 2007 WL 578989 at *7.


\(^{25}\) If a firm lawyer is chosen to conduct an investigation on an ad hoc basis, the lawyer’s appointment should be confirmed by firm management so that the lawyer’s role as special counsel to the firm is clear. See, e.g., United States v. Rowe, 96 F.3d 1294 (9th Cir. 1996).
be clear that the firm itself is the client for the advice rendered; and (d) giving (and keeping) the advice in a confidential setting for the same reasons done so generally for the privilege to attach and to be preserved. All the arguments in the world against application of the fiduciary exception are non-starters if the privilege has not attached to the discussions involved in the first place.

Second, prudent internal corporate counsel has long recognized that even well-grounded assertions of privilege may be subject to claims of waiver. Further, because the fiduciary exception arises most often at the trial court level on motions to compel, avenues for interlocutory appellate review of an unfavorable decision from the law firm’s perspective may be limited. As a practical matter in today’s environment where firm counsel often advise large numbers of lawyers across multiple offices it is simply unrealistic for advice not to be communicated by email in many if not most situations. However, given the expansive nature of the fiduciary exception, internal counsel should remain diligent in crafting advice with the expectation of waiver of privilege.

As an equally practical matter, however, firm counsel and firm lawyers should be mindful of the fiduciary exception cases when both providing and receiving that advice in a world where quick emails dashed off without circumspection often become the fodder of very large demonstrative exhibits for the jury at trial. This is especially the case when the advice concerns conduct which has already occurred and might conceivably lead to a claim against the firm. The latter situation is also one that will most often give rise to a need for a conflict waiver for the firm to proceed. Therefore, even though the client may not have been informed at the time of the internal discussions that led to the conclusion that a waiver was needed, it will not involve “rocket science” for a reasonably astute claimants’ counsel in subsequent malpractice litigation to look there for internal documents. This will, in turn, put the fiduciary exception again in the cross-hairs of discovery.

V. Conclusion

The United States Supreme Court described the essence of the attorney-client privilege in Upjohn Company v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed.2d 584 (1981): “Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” It is well to remember that Upjohn itself addressed (and upheld) the attorney-client privilege as applied to internal corporate counsel. Upjohn’s description of the importance of the attorney-client privilege within organizations highlights that it is precisely when a law firm encounters a difficult issue of professional ethics or a possible claim that advice from internal counsel is of the greatest benefit. Although the ultimate outcome of the debate over the fiduciary exception remains to be written, the exception has gained enough notoriety that law firm internal counsel and their outside defense lawyers need to be acutely aware of it.

27 Under ABA Model Rule 1.13(a), a lawyer’s client when representing an entity is the entity itself acting through its constituents. Like their corporate counsel counterparts, internal firm lawyers need to maintain that boundary so they will not inadvertently take on the lawyers consulted as individual clients as well and thereby create (at least in some circumstances) conflicts between the firm as a client and the individual firm lawyers as separate clients. See Peter R. Jarvis & Mark J. Fucile, Inside an In-House Legal Ethics Practice, 14 NOTRE DAME J. L. ETHICS & PUBLIC POL’Y at 111.

28 See ABA Formal Ethics Op. 08-453 at 3.
Defending Against Suits Brought By Illegal Aliens

By Jerry Joe “J.J.” Knauff, Jr.

I. Introduction

PIERRE LEFAUX is a citizen of Canada who illegally entered the United States. Pierre used a forged birth certificate and false social security card in the name of Peter Jones to obtain employment with XYZ Painting, a Texas company in the business of residential house painting. While on a job in Dallas, Pierre was injured in a fire when combustible materials ignited from a spark.

1 See Immigration and Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1047 (1984) (stating unregistered presence in the U.S., without more, constitutes a crime); U.S. v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999) (holding same); see also Amy K. Myers, What Non-Immigration Lawyers Should Know About Immigration Law, 66 AL. LAW 437, 437 (November 2005) (stating “individuals in U.S. in one of four categories with regard to immigration status: Citizens, either through birth in U.S. or one of its territories, or through naturalization; permanent residents, immigrants who gained status of permanent residents in U.S. through family-based sponsorship, employment, diversity lottery or other means; holders of temporary visas allowing individuals to be in U.S. for limited time for specific purpose, (i.e., student visas); or undocumented aliens.”).


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Pierre sustained severe burns and may be unable to work for the remainder of his life. Pierre brought suit against XYZ Painting for negligence and claimed lost past and future earning capacity damages, among other damages.

This article uses Texas case law, as well as persuasive arguments from other jurisdictions, to provide insight into the following questions defense counsel should address when faced with a suit brought by an illegal alien like Pierre:

- Is Pierre entitled to recover damages for lost future earning capacity in U.S. wages?
- Are Pierre’s lost earnings claims preempted by any federal or state laws?
- Are Pierre’s claims barred by state law or the Unlawful Acts Doctrine?
- May evidence of Pierre’s immigration status be submitted to the jury? and
- Should Pierre’s expert account for his immigration status when formulating opinions?
II. Loss of Future Earning Capacity

An essential question that arises in any tort suit brought by an illegal alien\(^3\) is whether compensatory damages for lost wages should be measured based on the plaintiff’s ability to work in the United States or in his home country. While arguments and analysis regarding claim preclusion and/or preemption are less likely to apply to aliens who are employed by an employer with full knowledge of their illegal status or aliens who obtain employment from an unwitting employer without tendering any fraudulent documents,\(^4\) a strong case may be made in

\(^3\) Many commentators prefer other terms such as “unauthorized worker,” “foreign national,” or “undocumented immigrant,” to use of the term “illegal alien.” However, as the California Court of Appeals in Martinez v. Regents of University of California noted:

[As compared with the term] undocumented immigrant...[w]e consider the term “illegal alien” less ambiguous. Thus, under federal law, an “alien” is “any person not a citizen or national of the United States.” A “national of the United States” means a U.S. citizen or a noncitizen who owes permanent allegiance to the United States. Under federal law, “immigrant” means every alien except those classified by federal law as nonimmigrant aliens. “Nonimmigrant aliens” are, in general, temporary visitors to the United States, such as diplomats and students who have no intention of abandoning their residence in a foreign country.

83 Cal. Rptr. 3d 518, 521–22 n.2 (Cal. Ct. App. 2008), rev’d, 198 P.3d 1 (Cal. 2008) (citations omitted). Because the fact pattern at issue relates to an “alien” who is unlawfully in the United States and has violated federal law by providing fraudulent work documents rather than to the entire class of immigrants, aliens or unauthorized workers (regardless of immigration status), the author uses the term “illegal alien” as the least ambiguous term for this class.

\(^4\) See Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1001 (N.H. 2005) (holding as a matter of public policy, a person responsible for an illegal alien’s employment who knew of the illegal alien’s

many jurisdictions that workers like Pierre are not entitled to compensation based on U.S. wages.

Texas has been cited as a state in which case law provides greater protection for illegal aliens seeking compensation for lost wages based on U.S. wages.\(^5\) Even in Texas, however, the law is unsettled on the issue of whether an illegal alien who was employed under fraudulent circumstances may recover damages for the loss of future earning capacity based on U.S. wages. Four Texas courts have reviewed the issue, but their worth is minimal since the factual scenarios provide alternative protections for these immigrants and none relied upon any authority or performed any analysis to establish such a right.

In Hernandez v. M/V Rajaan, a longshoreman was injured on the job.\(^6\) The longshoreman was an illegal alien who had resided in the U.S. continuously since 1970.\(^7\) The M/V Rajaan court held an illegal alien may recover lost wages in U.S. earnings unless the defendant can establish the illegal alien was about to be or would surely be deported.\(^8\) This holding was predicated on the fact that the longshoreman could remain in the U.S. legally because the Immigration Reform and Control Act provided amnesty/citizenship status to those aliens who “entered the United States before January 1, 1982, and . . . resided

\(^5\) See Fuller, supra note 2, at 991-992.

\(^6\) Hernandez v. M/V Rajaan, 841 F.2d 582, 585 (5th Cir. 1988).

\(^7\) Id. at 588.

\(^8\) Hernandez v. M/V Rajaan, 848 F.2d 498, 500 (5th Cir. 1988) (per curiam on rehearing).
continuously in the United States in an unlawful status since such date . . . ".9 Further, M/V Rajaan was decided before the U.S. Supreme Court handed down Hoffman Plastic, and its holding has not been challenged post-Hoffman.

In Wal-Mart Stores, Inc. v. Cordova, the El Paso Court of Appeals, in a footnote without discussion or citation to authority, stated Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for loss of earning capacity.10 The Cordova court, however, did not address whether Texas courts should allow a plaintiff’s illegal status into evidence when determining lost earning capacity.11 More importantly, the Cordova court did not discuss whether the lost earning capacity damages should be measured at United States wages or the wages available in the plaintiff’s country of origin.12

In Tyson Foods, Inc. v. Guzman, the Tyler Court of Appeals relied on the dicta found in the footnote in Cordova for the proposition that Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for lost earning capacity.13 Similarly, the Eastern District of Texas, in Contreras v. KV Trucking, Inc., relied upon Guzman for the same proposition.14 The facts of Cordova and Guzman are inapposite to the facts of Pierre’s suit because neither case involved an illegal alien who used fraudulent documents to obtain employment. Rather, the facts in those cases merely showed each plaintiff was an illegal alien who had not committed any additional criminal offenses,15 and counsel in these cases focused on precluding lost wages claims altogether, rather than addressing the manner in which claims should be measured. Moreover, the issue of federal preemption of lost wages claims by illegal aliens was not properly before either court because the defendants, respectively, failed to plead the affirmative defense of preemption.16 Thus, any discussion of the application of Hoffman Plastic and/or federal preemption by these courts is obiter dictum and not controlling.17

Although it is improbable the statements in Cordova, Guzman, and Contreras have any precedential value, it would be difficult to dispute that an illegal alien has standing to bring suit in the United States because an illegal alien is entitled to the benefits of the Equal Protection Clause of the Fourteenth Amendment, which provides no state shall deny to any person the benefit of jurisdiction in the equal protection of the laws.18 Just because an illegal alien has the right to bring suit, however, does not mean certain of his claims are not barred or limited by

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9 M/V Rajaan, 841 F.2d at 588 (citing 8 U.S.C. § 1255a(a)(2)(A)).
11 See id.
12 See id.
15 See Guzman, 116 S.W.3d at 236-37; Cordova, 856 S.W.2d at 769.
16 Guzman, 116 S.W.3d at 244; Contreras, 2007 WL 2777518 at *1.
17 See Edwards v. Kaye, 9 S.W.3d 310, 314 (Tex. App. 1999) (holding “[d]ictum is an observation or remark made concerning some rule, principle, or application of law suggested in a particular case, which observation or remark is not necessary to the determination of the case (citation omitted). . . [and] is not binding as precedent under stare decisis”); Nichols v. Catalano, 216 S.W.3d 413, 416 (Tex. App. 2006) (holding same); In re Mann, 162 S.W.3d 429, 434 (Tex. App. 2005).
18 Plyler v. Doe, 457 U.S. 202, 210 (1982); see also Comm. Std. Fire & Marine Co. v. Galindo, 484 S.W.2d 635, 636 (Tex. App. 1972) (holding an illegal alien “shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, [and] give evidence”). Galindo stands for the proposition that Texas generally recognizes an alien’s illegal entry alone, will not bar him from receiving workers’ compensation benefits where his of employment is itself legal. Id.
application of various laws. At least one commentator has suggested that while, at first glance, the language used in Cordova, Guzman, and Contreras requires illegal immigrants be paid lost earning capacity damages at United States rates, it may be more accurate to say the issue of the proper measure of those damages has not yet been fully adjudicated.

III. Federal Immigration Statutes

In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA"), "a comprehensive scheme prohibiting the employment of illegal aliens in the United States." IRCA defines an "unauthorized alien" as an individual who is not "lawfully admitted for permanent residence, or . . . authorized to be so employed" in the United States. One of the most important parts of IRCA is an extensive employment verification system, which requires employers to verify the identity and eligibility of all new hires by examining specified documents before the new hire commences work. The specified documents include a "social security account number card" or any "other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable." It is illegal to hire any applicant who fails to provide this documentation.

In addition to examining specified documents, an employer must also complete an I-9 or other similar form for every new worker. The required form includes an attestation by the employee that he is authorized to work in the U.S. The required form also contains an attestation by the employer that it has reviewed the employee-supplied documents and the documents appear genuine. It is unlawful for an employer to continue to employ an alien once the employer knows "the alien is (or has become) an unauthorized alien with respect to such employment." Section 1324c of IRCA makes it "unlawful" for any person to "forge," "alter," "use," or "possess" any false document to obtain a benefit, such as employment. Aliens who use or attempt to use documents described in Section 1324c are subject to a fine or imprisonment of not more than five years, or both.

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19 See TEX. CIV. PRAC. & REM. CODE § 95.001, et seq. (exclusive remedy for suits against landowners); TEX. LAB. CODE § 408.001 (exclusive remedy for suits against employers); TEX. CIV. PRAC. & REM. CODE § 74.301 (limiting recovery against doctors); TEX. CIV. PRAC. & REM. CODE § 82.003 (stating non-manufacturing seller not liable for harm caused by product sold by seller); see, e.g., Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 694-95 (Tex. 2003) (discussing limitation of suits against sovereign).

20 See Fuller, supra note 2, at 996 n. 66.


23 Id. at § 1324(a)(1)(B).


25 Id. at § 1324(a)(2); Mester Mfg Co. v. I.N.S., 879 F.2d 561, 567-68 (9th Cir. 1989) (upholding penalties against employer who had two week delay in terminating undocumented worker after notice of worker's status).

26 Id. at § 1324(a)(b).

27 Id. at § 1324(a)(b)(2).

28 Id. at § 1324(a)(b)(1)(A).

29 Id. at § 1324(a)(a)(2); Mester Mfg Co. v. I.N.S., 879 F.2d 561, 567-68 (9th Cir. 1989) (upholding penalties against employer who had two week delay in terminating undocumented worker after notice of worker's status).

30 8 U.S.C. § 1324c(a)(1)-5 (2006); see also Theodros v. Gonzales, 490 F.3d 396 (5th Cir. 2007) (holding it is a deportable offense for alien to falsely represent he was citizen of the United States in order to gain private sector employment); Villegas-Valenzuela v. I.N.S., 103 F.3d 805 (9th Cir. 1996) (holding it is a violation of the Immigration and Naturalization Service's employment eligibility verification statute for any person to show false documents in order to prove employment eligibility).

31 18 U.S.C. § 1546(b) (2006) (setting forth criminal penalties for using (1) "an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor, [or] (2) an identification document knowing (or having reason to know) that the
fines and imprisonment of not more than three years if a person “fraudulently and willfully represents himself to be a citizen of the United States.” 32 Further, 18 U.S.C. § 1015 allows fines and imprisonment of not more than five years if a person “knowingly makes any false statement or claim that he is . . . a citizen or national of the United States, with the intent to obtain . . . any Federal or State benefit or service, or to engage unlawfully in employment in the United States.” 33 Additionally, 18 U.S.C. § 1028 provides a fine and imprisonment of not more than fifteen years for anyone who “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law.” 34 18 U.S.C. § 1546 provides the penalty of a fine and imprisonment up to ten years for anyone who “utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States.” 35 Finally, in Texas, it is a state jail felony to obtain, possess, transfer, or use identifying information of another person without the other person’s consent. 36 “Identifying information” is defined as “information that alone or in conjunction with other information identifies a person, including a person’s name and social security number, date of birth, or government-issued identification number.” 37

IV. IRCA Preemption

Because the statements in cases like Cordova, Guzman, and Contreras are often dicta and cite no authority, it is prudent to look at IRCA and decisions concerning IRCA preemption to determine whether courts should apply preemption to cases involving illegal aliens who either commit illegal acts or fraudulently obtain employment. The U.S. Supreme Court and numerous federal and state courts have held an illegal alien’s claims for lost earnings may be barred, or, alternatively, the lost earning capacity claim should be based on wages paid in the illegal alien’s home country as opposed to wages paid in the United States.

A. Supremacy of immigration regulations

The supremacy of the Federal government’s regulation of immigration is well established. 38 The Federal government’s power to regulate issues relating to immigration and naturalization is so comprehensive that a state may not interfere with that regulation. 39 Where the state enactment is not at odds with the Federal mandates, the state law will not be

34 18 U.S.C. § 1028(a)-(b) (2006); see also 42 U.S.C. § 1307(a) (2006)(making use of false social security information a misdemeanor punishable by up to $1,000 fine and imprisonment of up to one year).
36 TEX. PENAL CODE § 32.51(b).
37 Id. at § 32.51(a)(1)(A).
38 See U.S. CONST. art I, § 8, cl. 4 (granting Congress authority to “establish an uniform Rule of Naturalization”); Toll v. Moreno, 458 U.S. 1, 10 (1982); Nyquist v. Mauclet, 432 U.S. 1, 10 (1977); DeCanas v. Bica, 424 U.S. 351, 354 (1976); Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 419 (1948) (holding the regulation power of Congress extends not only to admission and naturalization of aliens, but also to the “regulation of their conduct before naturalization”).
39 Nyquist, 432 U.S. at 10.
held to be preempted. However, when the statute or common-law at issue is incongruous with the goals and objectives of federal legislation, there can be no other conclusion than that the statute or common-law principle is preempted by the action of Congress.

B. Hoffman Plastic Compounds, Inc. v. NLRB

In Hoffman Plastic Compounds, Inc. v. NLRB, the United States Supreme Court was asked to determine whether an illegal alien was entitled to back pay for his employer’s violation of the National Labor Relations Act (“NLRA”). In that case, Jose Castro obtained employment with Hoffman Plastic by using fraudulent documents. Hoffman Plastic eventually fired Castro when he supported an effort to unionize the company. The National Labor Relations Board found Hoffman’s actions violated the NLRA and awarded Castro back pay. However, in Hoffman Plastic, the Supreme Court reversed the award and refused to allow the Board to “award back pay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud.” The Court found an award of back pay “trivializes the immigration laws” and “condones and encourages future violations,” and noted Castro would not have been eligible for back pay if he had been deported.

C. Federal Court Treatment of Preemption of Lost Earning Claims by Illegal Aliens

There is currently a split in authority over whether Hoffman Plastic mandates that the IRCA preempts state tort claims. Both before and after Hoffman Plastic, federal courts barred claims by illegal aliens for lost earnings as preempted by IRCA. In Del Rey Tortilleria, Inc. v. NLRB, for example, the Seventh Circuit Court of Appeals held back pay was not available to illegal workers after the enactment of IRCA. Similarly, in Egbona v. Time-Life Libraries, Inc., the Fourth Circuit Court of Appeals held an illegal alien had no cause of action for retaliation under Title VII due to his status as an unauthorized alien. However, in Madeira v. Affordable Housing, Inc., the Second Circuit Court of Appeals refused to extend Hoffman Plastic to state tort claims for lost wages in at least some instances.

After Hoffman Plastic, in Escobar v. Spartan Security Services, Inc., the United States District Court for the Southern District of Texas considered the issue of an illegal immigrant’s claim for remedies under Title VII of the Civil Rights Act of 1964. In that case, Enrique Escobar, a security officer employed by Spartan Security, was sexually harassed and propositioned by the company’s president. When he refused the advances, Escobar’s hours were decreased, he was relocated, and

41 See Hoffman Plastic, 535 U.S. at 147-149.
42 535 U.S. at 140-42.
43 Id. at 140-41.
44 Id. at 140.
45 Id. at 140-41.
46 Id. at 149.
47 Id. at 150.
48 See Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1122 (7th Cir. 1992).
50 Madeira, 469 F.3d at 227-229 (concluding New York law does not conflict with federal immigration law in allowing undocumented workers to be compensated in U.S. wages when, among other things, “it was the employer and not the worker who violated IRCA by arranging for employment . . . [and] the jury was instructed to consider the worker’s removability in assessing damages”).
52 Id. at 896.
was ultimately fired. Escobar filed a claim with the Equal Employment Opportunity Commission and Spartan Security moved for summary judgment arguing the decision in *Hoffman Plastic* barred Escobar from a Title VII remedy because Escobar was an unauthorized immigrant worker. The *Escobar* court disagreed that *Hoffman Plastic* precluded all remedies under Title VII; however, it applied the reasoning in *Hoffman Plastic* to hold an illegal alien is not entitled to back pay otherwise provided by Title VII.

In *Ambrosi v. 1085 Park Ave. LLC*, a federal court in New York held "undocumented workers who violate IRCA may not recover lost wages in a personal injury action." The *Ambrosi* court dismissed the plaintiff's lost wages claims because the plaintiff used fraudulent documentation to obtain employment in violation of IRCA. In *Veliz v. Rental Service Corporation USA, Inc.*, a federal appeals court in Florida determined "[b]ackpay and lost wages are nearly identical; both constitute an award for work never to be performed." The *Veliz* court then applied the principles of *Hoffman Plastic* to hold an undocumented worker's lost wages claims were preempted by IRCA when the worker used false identification to obtain employment. In *Hernandez-Cortez v. Hernandez*, a federal appeals court in Kansas applied Kansas's unlawful conduct rule, the precedence in *Hoffman Plastic*, and 8 U.S.C. § 1324a to find an undocumented alien’s tort suit for future lost earnings was preempted.

Finally, in *Lopez v. Superflex Ltd.*, a federal court in New York stated, in dicta, that the holding in *Hoffman Plastic* would disqualify an illegal alien from collecting punitive and compensatory damages under the Americans with Disabilities Act.

**D. State Court Action on Claims by Illegal Aliens**

The appellate courts in California provide an example of one way in which state courts address the issue of lost earnings claims by illegal aliens. In addressing these issues, California courts perform a balancing test: if the alien establishes he has taken steps to correct his deportable condition, then he may recover damages for lost earnings in U.S. wages; however, if the alien cannot show any steps to correct his deportable condition, the alien may only recover lost future earnings in the wages of his country of origin.

In *Gilharry-Jones v. De Souza*, the plaintiff, an illegal immigrant from Belize, sued for lost wages arising out of an
automobile accident. The plaintiff brought forth evidence that she was married to a permanent resident, had children who were born in the U.S., consulted an immigration attorney, and prepared immigration documents. The trial court determined the plaintiff was deportable, rejected the claims for lost U.S. wages but allowed recovery of future lost wages based on the plaintiff’s prospective income in Belize. The plaintiff appealed and the Second District Court of Appeals in California affirmed the judgment of the trial court. The Gilharry-Jones court, applying the holding from Rodriguez v. Kline, found the steps taken were insufficient to correct the deportable condition since none of the documents had been filed and the plaintiff waited until the time of trial to make any attempts to correct her status.

In addition to the foregoing California authorities, other jurisdictions provide additional guidance on how courts manage claims by illegal aliens. In Ortiz v. Cement Products, the Nebraska Supreme Court held an unauthorized immigrant was not entitled to vocational benefits because the purpose of such benefits is to restore workers to employment and this could not be done in light of the immigrant’s “avowed intent” to remain an unauthorized worker. In Doe v. Kansas Department of Human Resources, the Kansas Supreme Court allowed for the suspension of workers’ compensation benefits to an illegal alien who was injured on the job because the worker’s use of an assumed name and fake social security number to obtain employment constituted a fraudulent act. In Tarango v. State Industrial Insurance System, the Nevada Supreme Court upheld a workers’ compensation appeals officers’ decision to deny vocational rehabilitation benefits to an illegal alien. In that case, the Nevada Supreme Court determined IRCA preempted Nevada’s worker’s compensation scheme because the worker was an illegal alien who was not entitled to employment in the United States and, as such, the provision of vocational rehabilitation benefits, training, and/or modified employment would circumvent the provisions of IRCA.

In Macedo v. J.D. Posillico, Inc., an appellate court in New York held a “plaintiff’s violation of IRCA, by producing a false social security number in order to obtain employment, bars his claim for lost wages.” In Martines v. Worley & Sons

66 Id. at *4-5.
67 Id. at *3.
68 Id. at *8.
69 Id. at *5.
70 708 N.W.2d 610, 613 (Neb. 2005).
71 90 P.3d 940, 948 (Kan. 2004).
Defending Against Suits Brought By Illegal Aliens

Construction, the Georgia Court of Appeals held an employer could suspend disability benefits to an injured worker who was released to work light duty but could not accept the employment because he was not authorized to work in the United States. 76 In Sanchez v. Eagle Alloy, Inc., an appellate court in Michigan found an undocumented worker who was injured on the job was ineligible for wage-loss benefits under the state worker compensation law because the worker’s use of fake documents to obtain employment constituted the commission of a crime. 77 An appellate court in Virginia, in Rios v. Ryan, Inc. Central, held an illegal alien is not an employee under Virginia’s Workers’ Compensation Act because “under [IRCA], an illegal alien cannot be employed lawfully in the United States.” 78 In Crespo v. Evergo Corp., the Superior Court of New Jersey was faced with determining whether an illegal alien was entitled to remedy under the state’s Law Against Discrimination (“LAD”) after she was terminated when she informed her superior she was pregnant. 79 The Crespo court determined LAD had been violated but relied on Hoffman Plastic to deny the plaintiff’s economic and non-economic damages because same were counter to IRCA. 80

In Mora v. Workers Compensation Appeal Board, the court relied on precedence set forth by the Pennsylvania Supreme Court to suspend benefits to an injured worker and found the Pennsylvania Supreme Court, in effect, held loss of earning power need not be shown because it is presumed an illegal alien cannot work in the U.S. and, as such, there can be no way to measure his earning power. 81 Interestingly, in Mora, the injured worker attempted to obtain disability benefits for the difference in pay he received prior to his accident and the pay he received for work obtained after his accident but the court rejected this argument and found this measure of earnings may not be used “because only employers who fail to follow the federal immigration laws can offer [an unauthorized worker] a position.” 82 A California court held an unauthorized alien, fired after requesting leave to undergo surgery to treat ovarian cancer, was not entitled to remedies under the state’s anti-discrimination statute because she obtained the position using false documents. 83 Similarly, in Murillo v. Rite Stuff Foods, Inc., another California court concluded the unclean hands doctrine barred the wrongful discharge claims of an alien when the alien obtained and presented false identification cards to secure employment. 84

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80 Id. (cited with approval in Cicchetti v. Morris County Sheriff’s Office, 947 A.2d 626, 640 n. 7 (N.J. 2008)).
82 Id.
E. Application of Hoffman Preemption to Illegal Aliens

The issue of an illegal alien’s ability to recover damages in U.S. wages for lost earning capacity will likely continue to gain ground with the persistent influx of illegal immigrants into the United States. In the case of Pierre LeFaux, who obtained employment by fraudulently providing documentation of a false identity, 8 U.S.C. §§ 1324a and 1324c; 18 U.S.C. §§ 911, 1015, 1028, and 1546; 42 U.S.C. §§ 408 and 1307, and the arguments provided in Hoffman Plastic should be used to argue for preemption of all claims for past lost earnings since Pierre was illegally in the country and obtained his employment by criminal fraud. Likewise, 8 U.S.C. §§ 85

See Fuller, supra note 2, at 986 (stating "Millions [of illegal immigrants] work in America’s fields (up to 1,400,000), factories (1,200,000), and construction sites (over 600,000)—some of the nation’s most hazardous working environments."); see also Nurith C. Aizenman, Harsh Reward for Hard Labor, WASH. POST, Dec. 29, 2002, at C01 (stating foreign-born Latino workers are two-and-one-half times more likely to suffer fatal injuries at work than the average working citizen).

See Passell, supra note 2 (estimating inflows of unauthorized immigrants averaged 800,000 a year from 2000 to 2004, and 500,000 a year from 2005 to 2008); Michael Hoefer, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2007, Office of Immigration Statistics (Sept. 2008), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf> (last visited June 24, 2009) (finding between 2000 and 2007, the unauthorized population increased 3.3 million; the annual average increase during this period was 470,000; nearly 4.2 million (35 percent) of the total unauthorized residents in 2007 entered in 2000 or later; and an estimated 7.0 million (59 percent) were from Mexico); see also Donald L. Barlett & James B. Steele, Who Left the Door Open?, Time, March 30, 2006, at 51, 52 (stating in a single day, more than 4,000 illegal aliens will walk across the 375-mile border between Arizona and Mexico, which is the busiest unlawful gateway into the U.S.).

See Hoffman Plastic, 535 U.S. at 149; see also Macedo, 2008 WL 4038048 at *7-*9 (approving partial summary judgment for defendant on plaintiff’s lost wages claims where plaintiff obtained employment with fraudulent documents).


Co. v. Johnson. Under this doctrine, “a plaintiff cannot recover for his claimed injury if, at the time of the injury, he was engaged in an illegal act.” This defense has been interpreted to mean “that if the illegal act is inextricably intertwined with the claim and the alleged damages would not have occurred but for the illegal act, the plaintiff is not entitled to recover as a matter of law.”

In Fuentes v. Alecio, Geovany Fuentes attempted to illegally enter the United States and hired Estuardo Alecio to help with entry. Fuentes died from heat exhaustion after crossing the U.S. border and his family sued Alecio for negligence. Alecio moved to dismiss the claims based on the Unlawful Acts Rule. At the time of his death, Geovany Fuentes was in violation of 8 U.S.C. § 1325(a), which makes it illegal for an alien to “enter or attempt to enter the United States at any time or place other than as designated by immigration officers,” and to “elude examination or inspection by immigration officers.” The court determined the decedent was “engaged in an illegal act at the time of his death, namely attempting to enter the United States illegally in violation of 8 U.S.C. § 1325(a).” The decedent’s act clearly contributed to his injury because he would not have been exposed to heat exhaustion had he not illegally entered the U.S. Because the decedent violated the law and was injured as a result of this violation, the Fuentes court granted Alecio’s motion to dismiss.

In Denson v. Dallas County Credit Union, a licensing case involving tort and contract issues, the Texas Fifth Court of Appeals affirmed a trial court’s granting of summary judgment on the Unlawful Acts Doctrine because the appellant was an unlicensed car dealer. In that case, the Court held “in situations where public policy concerns have led to a governmentally supervised statutory licensing scheme, courts have consistently held the unlawful and unlicensed participation in such regulated businesses cannot form the basis for recovery.” “To hold otherwise would allow a person to accomplish indirectly what he is prohibited from doing directly and frustrate the public policies behind the legal protections.” In Denson, the appellant argued the application of the unlawful acts defense would provide the appellee with a windfall. The court agreed that a windfall might accrue but decided the public policy behind the licensing statute required the appellant to carry a dealer’s license and the court would not allow the car dealer to circumvent the statute. In coming to its conclusion, the Court noted “there is nothing inherently illegal about selling cars in Dallas County; however . . . the transaction of selling the cars was illegal because on the day of the transactions, appellants did not have the statutorily required license.”
Under the factual scenario described in Section I, counsel may also argue that Pierre LeFaux’s claims should be barred by the Unlawful Acts Doctrine. Pierre admitted to illegally entering the United States, in violation of 8 U.S.C. § 1325c(a) and to obtaining employment using fraudulent papers, in violation of 8 U.S.C. § 1324c(a)(1)-(5), 18 U.S.C. §§ 911, 1015(e), 1028(a)-(b), and 1546(a)-(b); and 42 U.S.C. §§ 408(8) and 1307(a). Pierre should not have been able to obtain employment in the United States without illegally breaching the border and utilizing fraudulent documents.107 For citizens and authorized aliens, the act of working is not inherently illegal; however, in this case, Pierre’s illegal alien status and procurement of employment through fraudulent means transformed the act of working into an illegal act because Pierre did not have the statutorily required authorization to work on the date he was injured.108 Thus, counsel may argue that Pierre’s injuries were sustained while in the commission of an illegal act and his fraud was inextricably intertwined with his injuries because he would not have been injured if he had not unlawfully obtained employment with XYZ Painting using fraudulent means, relying on the Unlawful Acts Doctrine to bar Pierre’s claims.109

VI. Admissibility of Immigration Status at Trial

Assuming that Pierre LeFaux is entitled to make a claim for lost earning capacity and has not obtained employment by fraudulent means, trial courts should allow the illegal alien’s status to be submitted to the jury. Numerous jurisdictions have been asked to determine whether a plaintiff’s immigration status should be admitted to rebut claims for recovery of lost earnings.110

A. Admissibility of Immigration Status

In addressing questions of admissibility, Texas precedent again proves

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108 See 8 U.S.C. § 1324a(b)(2) (2006); § 1324c(a)(1)-(5); Denson, 262 S.W.3d at 855.

109 Fuentes, 2006 WL 3813780, at *3 & n.7.

110 The Texas Second Court of Appeals, for example, addressed the issue of the admissibility of the immigration status of a witness for impeachment purposes in TXI Transp. Co. v. Hughes, 224 S.W.3d 870, 896-97 (Tex. App. 2007). In that case, the driver of the defendant’s company was involved in an accident. The driver testified he never lied about his citizen status in order to obtain a driver’s license; however, there was evidence the driver had been arrested and pleaded guilty to an immigration violation in 2000 and did not have any valid form of identification at the time he pleaded guilty. Id. at 896. There was also evidence the driver filled out an application for employment with his employer in 2001 and answered “Yes” to the following question: “Do you have the legal right to work in the United States?” Id. The driver’s company lost a jury verdict and appealed claiming the driver’s immigration status was inadmissible per Rule 608(b); however, the Fort Worth Court of Appeals disagreed and affirmed the judgment. Id. at 896-97. See also Infante v. State, 25 S.W.3d 725, 727 (Tex. App. 2000) (finding no error in asking about an alien’s legal status in this country); In re State Farm Mut. Auto. Ins. Co., 982 S.W.2d 21, 23 (Tex. App. 1998) (finding party’s status as illegal alien with no Social Security number was relevant to support fraud counter-claim); U.S. v. Zimeri-Safie, 585 F.2d 1318, 1320-21 (5th Cir. 1978) (allowing jury consideration of immigration status on question of knowledge or intent and to rebut defense); Magallon v. State, No. 01-04-00718, 2005 WL 1364899 at *1-*3 (Tex. App. June 9, 2005) (determining “citizenship status is relevant to an objective determination of the ability to understand English” and to rebut defense of unknowing participation); Delacruz v. State, No. 05-03-00236, 2004 WL 330067 *1 (Tex. App. Feb. 19, 2004) (not designated for publication) (holding no error when trial court admitted evidence of appellant’s immigration status); but see Sports-Theme Rests. of N. Tex. v. Hernandez, 2001 WL 476537, at *1 (Tex. App. May 7, 2001) (not designated for publication).
instructive in demonstrating the questions faced by courts. The Texas Rules of Evidence provide “[a]ll relevant evidence is admissible.”¹¹¹ Relevant evidence means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹¹²

In determining what a plaintiff could have earned had he not been injured, the jury may consider the plaintiff’s stamina, age, past earnings, education, benefits, prospects for job advancement and raises, and work-life expectancy.¹¹³ To succeed with a lost earning capacity claim, a plaintiff must present evidence the plaintiff had the capacity to work prior to the injury, and his capacity was impaired as a result of the injury.¹¹⁴ A plaintiff’s immigration status, which prohibits him from earning income in the United States, is relevant and admissible since it bears directly on the amount of income he could have legally earned but for the accident at issue.¹¹⁵

The Texas Fourth Court of Appeals, in ABC Rendering of San Antonio, Inc. v. Covarrubias, addressed the propriety of a trial court’s exclusion of evidence that the plaintiff illegally entered the United States.¹¹⁶ The plaintiff in Covarrubias sought damages for the loss of past and future earning capacity and the jury awarded $153,156.00 in such damages.¹¹⁷ The plaintiff’s expert established the cash value of plaintiff’s lost earnings based on the probable earnings and the rate of inflation in the United States over the plaintiff’s life expectancy.¹¹⁸ To counter plaintiff’s expert, the defendant sought to introduce evidence of the plaintiff’s illegal entrance into the U.S. to establish the plaintiff was not entitled to work in the U.S.; however, the trial court excluded such evidence.¹¹⁹ The court of appeals reversed and remanded the case for a new trial.¹²⁰ In so doing, the court of appeals reasoned, “the fact that plaintiff was subject to immediate deportation to a drastically lower standard of earnings would have an effect on his future earning capacity.”¹²¹ Accordingly, the Covarrubias court held if there is evidence “as to the anticipated future earnings of a laborer in the United States, the jury should be permitted to consider the effect of the plaintiff’s illegal entry upon [these] future earnings.”¹²²

In order to put the issue to the jury, defense counsel may propose a jury charge instruction similar to the following instruction from Madeira v. Affordable Housing Foundation, Inc.:

Plaintiff’s status as an undocumented alien should not be considered by you when you deliberate on the issue of defendant’s liability. However, you may conclude the Plaintiff’s status is relevant to the issue of damages, specifically to the issue of lost wages which the Plaintiff is claiming. You might consider, for example, whether the Plaintiff would have been able to obtain other employment since as a matter of law, it is illegal for an employer in the United States to employ an undocumented alien, although of course it does happen that some

¹¹¹ TEX. R. EVID. 402.
¹¹² TEX. R. EVID. 401 (emphasis added).
¹¹⁶ Id.
¹¹⁷ Id. at *5.
people violate that law. If the Plaintiff did not lose any income because you conclude he would not have been able to work due to his alien status, you could not award him any damages for lost wages. You might also want to consider his status in determining the length of time he would continue to earn wages in the United States and in considering the type of employment opportunities that would be available to him. The fact that an alien is deportable does not mean deportation will actually occur, but you are allowed to take the prospect of deportation into account in your deliberations.

Finally, even if you conclude the Plaintiff would be deported at some point, you could conclude he would lose income from employment in his native country if you have a basis for making that calculation. In short, you must decide what weight, if any, to give Plaintiff’s alien status just as you would any other evidence. Alien status is not relevant to items of damage other than lost earnings.

Courts in other jurisdictions are in accord with the reasoning applied in Covarrubias. In Balbuena v. IDR Realty LLC, the New York Supreme Court held a jury should be allowed to consider immigration status as one factor in the jury’s analysis, stating that “a jury’s analysis of a future wage claim proffered by an undocumented alien is similar to a claim asserted by any other injured person in that the determination must be based on all of the relevant facts and circumstances presented in the case.” In Rosa v. Partners in Progress, Inc., the New Hampshire Supreme Court held an illegal alien’s status, though irrelevant to the issue of liability, is relevant on the issue of lost earnings and although such evidence may be prejudicial, it is essential should an illegal alien wish to pursue a claim for lost earning capacity. In Salas v. Hi-Tech Erectors, the Washington Court of Appeals court held “evidence of a party’s illegal immigration status should generally be allowed when the defendant is prepared to show relevant evidence that the plaintiff, because of his status, is unlikely to remain in this country throughout the period of claimed lost future income.”

Like the foregoing courts, a Florida Court of Appeals found no error where the trial court allowed evidence of the plaintiff’s illegal immigrant status on the limited issue of the plaintiff’s claims for lost future earnings. That court determined the plaintiff’s “status as an illegal alien is indeed relevant to her ability to obtain lawful employment in the United States... [and] relevant to the calculation of future earnings capacity.”

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123 See Hoffman Plastic, 535 U.S. at 148 (stating IRCA makes it “impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies”).
124 Madeira, 469 F.3d at 225.
125 Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1259 (N.Y. 2006); see also Oro v. 23 East 79th St. Corp., 810 N.Y.S.2d 779, 781 (N.Y. App. Term 2005) (holding a plaintiff’s “immigration status in the United States is material to [plaintiff’s] lost earnings claim, and thus the defense [is] entitled to reasonable inquiry into this area.”); Cano v. Mallory Mgmt., 760 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 2003) (determining plaintiff’s undocumented alien status was not a bar to recovery, but rather evidence that should be presented to the jury on the issue of lost wages); Collins v. N.Y. City Health and Hosps. Corp., 607 N.Y.S.2d 387 (N.Y. App. Div. 1994) (holding length of time an illegal alien may have continued to earn U.S. wages and the likelihood of the illegal alien’s potential deportation were fact issues for a jury to decide at trial); Barahona v. Trustees of Columbia Univ. in the City of N.Y., 816 N.Y.S.2d 851, 853 (N.Y. Sup. Ct. 2006).
126 Balbuena, 845 N.E.2d at 1259.
127 Rosa, 868 A.2d at 1002.
of the wage rate on which projected future earnings should be based, in the event she prevails on her claim." 130 In Metalworking Machinery, Inc. v. Superior Court, an appellate court in California held the defendant was entitled to discovery on plaintiff’s immigration status because “projected loss of future earnings must be based upon the wage scale and availability of employment in the country of citizenship and not upon those in the country where [plaintiff] is, allegedly, an illegal alien.” 131 In Romero v. California Highway Patrol, a federal court in California held a plaintiff’s claims for past and future wage loss make relevant the issue of the plaintiff’s immigration status and work history. 132 Finally, in Melendres v. Soales, a Michigan appellate court stated the issue of the plaintiff’s illegal alien status, while irrelevant on the question of liability, was material and relevant on the issue of determining the present value of the plaintiff’s future lost earnings. 133 The Melendres court determined that to avoid any issues of prejudice the retrial of the case should be bifurcated with a separate damages phase where the plaintiff’s immigration status would be presented to the jury. 134

B. Equal Protection Rights of Defendants

If courts refuse to apply the reasoning of Covarrubias and similar cases and reject the admission of a plaintiff’s immigration status in discovery and at trial, it could be argued that by so doing the courts infringed upon the defendant’s equal protection and due process rights. The concern over the effect of an illegal alien being relieved of the duty to mitigate damages is reflected in the following exchange between Justice Scalia and Paul Q. Wolfson, Assistant Solicitor General for the Department of Justice, during the oral argument of Hoffman Plastic:

QUESTION: In most back pay situations where the employer has committed an unfair labor practice and dismisses an employee improperly, the amount he’s going to be stuck with for back pay is limited by the fact that the person unlawfully fired has to mitigate. He has to find another job. If he could have gotten another job easily and doesn’t do so, the employer doesn’t have to pay. Now, how is this unlawful alien supposed to mitigate?

WOLFSON: Well --

QUESTION: Mitigation is quite impossible, isn’t it?

WOLFSON: I’m not sure I agree with that exactly, Justice Scalia. Here’s -- I wouldn’t say that the undocumented alien has a duty to mitigate. I have to emphasize that the board is not --

QUESTION: He does not have a duty to mitigate?

WOLFSON: I will agree with that. I have today the board has not examined this issue in detail, but first of all, of course, anything that he does obtain in the matter of interim wages will be deducted from his backpay --

QUESTION: Oh. Oh.

WOLFSON: -- and that is quite consistent with --

130 Id. (citing Veliz v. Rental Serv. Corp. USA, Inc., 313 F.Supp.2d 1317 (M.D. Fla. 2003); see also Majilinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56 (N.Y. 2005)).
134 Id.; see also Gonzalez v. City of Franklin, 403 N.W.2d 747, 759-60 (Wis. 1987) (citing Melendres with approval but affirming prohibition of evidence on plaintiff’s immigration status because defendant failed to request bifurcation).
QUESTION: If he unlawfully obtains another job that will be deducted?
WOLFSON: And -- yes, and that is quite consistent --
QUESTION: But if he’s smart, he need not do that.
WOLFSON: Not --
QUESTION: If he’s smart he’d say, how can mitigate, it’s unlawful for me to get another job.
WOLFSON: Justice Scalia --
QUESTION: I can just sit home and eat chocolates and get my back pay.
WOLFSON: I don’t agree that the board would have to accept such a representation. That is, the board might plausibly conclude that an undocumented alien should not be any better off than an authorized worker by virtue of his undocumented status, so if an employer could say, well, if a person with the same credentials, background, education, and so forth, would have made a job search and would have obtained employment and would have obtained thus-and-such wages, this undocumented alien worker would have --
QUESTION: Should have done so.
WOLFSON: Should have done -- or should have --
QUESTION: Should have violated the law.
WOLFSON: Or should not benefit from the fact that he is an undocumented alien and being relieved of -- and getting more back pay than the similarly situated authorized worker. Now, the board was faced with the task here of reconciling two important Federal statutory schemes, the Federal labor laws and the immigration laws, consistent --

Justice Scalia went on to state, “I mean, but what you’re saying is when both the employer and the employee are violating the law, we’re going to -- you’re asking the courts to give their benediction to this stark

violation of United States law by awarding money that hasn’t even been worked for. I - - it’s just something courts don’t do.”

Interestingly, Justice Scalia’s aversion to rewarding unlawful behavior found its way into the holding in Hoffman Plastic.

As in Hoffman Plastic, proof of an attempt at mitigation is required for Pierre to recover his lost earnings. If Pierre’s immigration status is not admitted, then XYZ Painting can neither offer expert testimony nor present other evidence of mitigation because to do so would be to argue to the jury that Pierre has an affirmative duty to violate the law. Defense counsel’s presentation of mitigation evidence at trial would also presuppose the legality of Pierre’s employment in some capacity; however, Pierre cannot be lawfully employed in any capacity due to his immigration status. Further, defense counsel can neither argue nor present mitigation evidence on Pierre’s employability because defense counsel is aware Pierre is unemployable due to his illegal status. To make such argument may expose XYZ Painting’s counsel to sanctions or result in violations of the Texas Disciplinary Rules by knowingly making a false statement of law or fact, using false evidence at trial, and advancing an argument that is without merit. Thus, if defense is prevented from presenting

135 Oral Argument Transcript at 31-33, Hoffman Plastic, 535 U.S. 137 (No. 00-1595).
138 See TEX. RULE CIV. PROC. 13 (providing sanctions for unmeritorious claims and argument); TEX. DISCIPLINARY R. PROF’L CONDUCT 3.01 (unmeritorious claims and arguments); TEX. DISCIPLINARY R. PROF’L CONDUCT 3.03 (false statements and false evidence to tribunal); TEX. DISCIPLINARY R. PROF’L CONDUCT 3.03(a)(false evidence); TEX. DISCIPLINARY R. PROF’L CONDUCT 8.04(a)(1) (knowingly assist in violation of the Rules); TEX. DISCIPLINARY R. PROF’L CONDUCT 8.04(a)(3) (a lawyer shall not “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation”); TEX. DISCIPLINARY R. PROF’L CONDUCT 8.04(a)(6) (a lawyer shall not “knowingly assist a judge . . . in conduct in violation of applicable rules of judicial conduct or other law”).
evidence of Pierre’s immigration status, then its equal protection rights under the Federal and State Constitutions will be implicated because XYZ Painting cannot legitimately present evidence of mitigation, and Pierre’s legal disability would relieve him of the duty to mitigate damages.139

D. Application of Covarrubias

The reasoning set forth in the Covarrubias opinion makes sense. Jurors are regularly required “to perform such intellectually Herculean feats as establishing what actions a truly reasonable man might have taken in a given situation, fixing the appropriate price to be paid for a described amount of subjective pain and anguish, weighing in comparative balance varying degrees, and even dissimilar types.”140 For instance, jurors may weigh the testimony of a plaintiff and his medical doctors, fact witnesses, medical transcripts, and a plaintiff’s pre- and post-accident lifestyle to make a determination as to a plaintiff’s pain and suffering damages.141 With regard to lost earning capacity, jurors must weigh the plaintiff’s age, past earnings, education, benefits, prospects for job advancement and raises, and work-life expectancy to determine the measure of damages.142

Each of the foregoing elements is also important to determine the lost earning capacity of an illegal alien plaintiff. Counsel may argue that if the jury is presented with evidence of a plaintiff’s immigration status, the jury will have the capacity to weigh the prospects for the plaintiff to remain in the United States or return to his country of origin, either voluntarily or involuntarily,143 take into account the permanent or temporary nature of the plaintiff’s residency, and properly weigh the true prospects for job advancement. Such a balance of the evidence allows the jury to award reasonable damages and prevents a windfall.144 This is especially true considering the majority of non-English speaking immigrants have been demonstrated to return their country of origin within a relatively short period of time.145 Moreover, fears of prejudice can be assuaged by bifurcating the liability and

139 See Truax v. Corrigan, 257 U.S. 312, 333 (1921) (holding “[i]mmunity granted to a class however limited, having the effect to deprive another class however limited of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class”).
140 Rodriguez, 232 Cal. Rptr. at 158.
141 See Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 761 (Tex. 2003) (stating jurors are the sole judges of the credibility of the witnesses and the weight to be given their testimony).
142 See Guadian, 868 S.W.2d at 898-99; Tagle, 155 S.W.3d at 519-20 (stating a plaintiff must present evidence the plaintiff had capacity to work prior to injury, and his capacity was impaired as a result of injury).
143 The evidence of illegal alien migration into and out of the United States demonstrates there is a significant turnover rate and lack of stability for any particular alien. From 1925 until 2007, over 49 million illegal aliens have been removed from the United States. Office of Immigration Statistics, Yearbook of Immigration Statistics: 2007, at Table 33 (Sept. 2008), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/table33.xls> (last visited June 24, 2009). Between 2000 and 2007, over ten million illegal aliens were removed from the United States and, in 2007, the most recent year of available statistics, almost 1 million aliens were deported. Id. These statistics demonstrate there is a high likelihood that any particular illegal alien will be removed from the country in the near future. Therefore, it is unlikely and wholly speculative to assume Pierre will be able to remain in the United States for the rest of his life.
144 See Fuller, supra note 2, at 1009.
145 One study relying on data from the Mexican Migration Project estimated the number of years the average Mexican migrant will be active in the U.S. workforce was between 6.1 and 11.1 years. See Dwight Steward, Amy Raub, and Jeannie Elliott, “How Long do Mexican Migrants Work in the U.S.?” (November 28, 2006) (available at SSRN: http://ssrn.com/abstract=949632) (last visited June 24, 2009).
damages phases of trial so that a just result may ensue.\textsuperscript{146}

VII. Illegal Aliens and Expert Opinions

In addition to the standard calculations performed on lost wages, it would be wise for the plaintiff’s experts to account for the plaintiff’s illegal status when formulating opinions regarding lost earning capacity because failure to do so could be to the plaintiff’s own peril.

In \textit{Garay v. Missouri Pacific R.R. Co.}, the United States District Court for the District of Kansas was faced with determining whether an expert’s opinions were reliable when the expert failed to account for a plaintiff’s illegal alien status.\textsuperscript{147} The court found the failure of plaintiff’s expert to take into account the decedent’s illegal status in the United States rendered his opinion as to future lost wages wholly unreliable.\textsuperscript{148} The \textit{Garay} court determined the decedent’s immigration status could have potentially precluded altogether any future employment opportunities in the United States and would have made any such employment unlawful.\textsuperscript{149} Plaintiff’s expert testified he was not familiar with wages in Mexico, gave no weight to the fact that the decedent was a temporary worker at the time of his death, and did not consider the decedent’s actual employment history in Mexico.\textsuperscript{150} The \textit{Garay} court determined “a projection of future wages that wholly fails to take into account such critical factors as are shown by the evidence in the case is speculative and unreliable, and must be excluded.”\textsuperscript{151}

The holding in \textit{Garay} comports with Supreme Court precedent in \textit{Sure-Tan, Inc. v. N.L.R.B.},\textsuperscript{152} and the analysis of the New Hampshire Supreme Court. In \textit{Sure-Tan, Inc. v. N.L.R.B.}, the Supreme Court held the award of back pay to an illegal alien is “obviously conjectural” and “constitutes pure speculation” because of the real potential for deportation of the alien.\textsuperscript{153} Likewise, the New Hampshire Supreme Court found “an illegal alien could, in theory, be deported at any time” and “an illegal alien’s potential to remain in the country and continue to work here may be uncertain and difficult to prove.”\textsuperscript{154}

With the knowledge that a plaintiff’s immigration status may be submitted to the jury, the plaintiff’s expert should take into account the plaintiff’s illegal status, worklife expectancy in his country of origin, and wage rates in his country of origin. The plaintiff’s expert should also account for the illegal alien’s worklife expectancy in the U.S. and wage rates in the U.S. The balancing of such opinions would have the effect of setting the floor of lost earnings with the plaintiff’s country of origin and setting the ceiling with U.S. wage rates.\textsuperscript{155} In turn, such expert analysis would allow the illegal alien plaintiff to recover some measure of lost earnings damages in anticipation of the jury charge instruction proposed in Section VI(A), above. Failure to complete this extra analysis may render the expert’s opinions speculative and unreliable and foreclose on a plaintiff’s recovery of any lost earnings damages.\textsuperscript{156}

\begin{footnotesize}
\begin{enumerate}
\item See Melendres, 306 N.W.2d at 402; Gonzalez, 403 N.W.2d at 759-60.
\item Id.
\item Id.
\item Id.
\item Id.
\item Sure-Tan, 467 U.S. at 901.
\item Rosa, 868 A.2d at 1001.
\item Such an approach is similar to the approach currently used by many economic experts who set a floor of damages for post-accident employment at minimum wage and the ceiling at the wages earned prior to the injuries.
\item See Rosa, 868 A.2d at 1001.
\end{enumerate}
\end{footnotesize}
VIII. Conclusion

Defense counsel possesses specific additional arguments when confronted with a suit brought by an employee who is an illegal alien, particularly when the plaintiff used fraudulent means to obtain employment. When, as in the case of Pierre LeFaux, a defendant is faced with a suit by an illegal alien who fraudulently obtained employment, the defendant should look to *Hoffman Plastic* to preclude an award of lost past earnings. The defendant should also look to IRCA to determine whether the illegal alien violated this Act and, if so, argue the case is therefore pre-empted. When the plaintiff was engaged in illegal acts at the time of injury, the defendant should plead the affirmative defense of the Unlawful Acts Doctrine and seek summary judgment on this issue. Finally, the defendant should also attempt to have the plaintiff’s illegal status submitted to the jury on the lost wages claim and move to strike any opposing expert who fails to take into account the plaintiff’s immigration status.
Arbitration has been used in commercial disputes since at least the 13th century. George Washington included an arbitration provision in his will, and arbitration remains the preferred choice for parties engaging in international transactions – especially those involving foreign direct investment in another country. Litigation in the home courts of the government who owes you money for a dam or power plant is an unattractive option. At home, some states have been hostile to arbitration while others have not. Congress reconciled those differences by adopting the New York approach in the Federal Arbitration Act (“FAA”) of 1925. The Supreme Court has interpreted the FAA broadly – Congress invoked the full preemptive power of the Commerce


2 “My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants--each having the choice of one--and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States.” available at: http://gwpapers.virginia.edu/documents/will/text.html.

3 Theodore Eisenberg & Geoffrey P. Miller, The Flight From Arbitration: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts, 30 CARDOZO L. REV. 1475, 1483-84 (2009) (hereinafter, Eisenberg & Miller (2009)) (“As the early leading venue for commercial arbitration, New York’s arbitration business was hampered by the legal doctrine that arbitration agreements were revocable at will and not specifically enforceable in court. . . The New York business community and attorneys persuaded the New York legislature to repeal the rule of revocability in 1920 . . . The New York arbitration advocates sought enactment of a federal law, leading to passage of the Federal Arbitration Act of 1925, which requires federal courts to enforce pre-dispute arbitration agreements.”).

Trends In Litigating Arbitration

Clause, stated a “national policy favoring arbitration,” preempted inconsistent state laws, and separated the arbitration clause from the surrounding contract for purposes of deciding who decides arbitrability.

When court dockets clogged in the 1970s, Chief Justice Burger convened the Pound Conference in 1976 to explore “multi-door courthouse” solutions that offered litigation alternatives. The modern

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10 Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 420-421 (1967) (Under the Separability Rule, the arbitrator should resolve claims that the entire agreement, as opposed to the arbitration agreement in particular, was fraudulently induced.); see also Aaron-Andrew P. Bruhl, The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law, 83 N.Y.U. L. REV. 1420, 1471 (2008).
avoid arbitration by raising a variety of common law contract defenses, such as lack of assent, lack of consideration, administrative pre-emption, unconscionability, fraud and duress, and material breach. Beyond litigating arbitration, legislative efforts are pending in Congress and statehouses to expand or curtail the use of arbitration in specific contexts.

This article examines litigation trends associated with the rapid expansion of private arbitration as a dispute resolution mechanism. In particular, this article evaluates the two most common legal measures associated with arbitration proceedings, the Motion to Compel Arbitration, which attempts to enforce arbitration agreements against unwilling participants, and the Motion to Vacate Arbitration Award, which attempts to void the result of a consummated arbitration. This article traces the procedure underlying these motions, discusses trends in case law with respect to each of these motions, and considers the future role of each of these motions in practice.

I. DISPUTE RESOLUTION OPTIONS

Parties have options in resolving disputes. They range from ignoring a problem (many go away and some get worse) to legislative or constitutional attempts to alter the playing field. Absent agreement between the disputants, litigation is the default mechanism. For the party desiring to avoid litigation, there are a wide number of choices, even within the broad categories of dispute resolution alternatives. Mediation comes in flavors ranging from facilitating open discussions to actively helping parties put deals together and evaluating issues. It may be instructive to take a wide-angled look at some of the dispute resolution options available to parties negotiating deals or picking up the pieces of one that may have gotten off track. Here is a graphical depiction of many dispute resolution options.

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23 Donald R. Philbin, Jr., Comprehensive Trial Preparation Includes ADR Process Design: What Type of Mediator Best Fits This Case?, 11 CONFLICT MANAGEMENT Newsletter 17 (ABA, Section of Litigation, Fall 2007), reprinted as Donald R. Philbin, Jr., Trial Preparation Includes ADR Process Design: What Type of Mediator Fits Best?, 9 ABA COMMERCIAL & BUSINESS LIT. 1 (ABA LIT. WINTER 2008).
CHART 1: DISPUTE RESOLUTION OPTIONS GRAPHED

Dispute Arises

- Consensual
  - Mediation
    - Transformative
    - Facilitative
    - Illicitative
    - Evaluative
    - Evaluative - Directive
    - Wisely Directive
    - Directive
    - Med / Arb
  - Minitrail (Mock Trial)
  - Summary Jury Trial (Mock Jury)
  - Non-binding Arbitration
- Early Neutral Evaluation
  - Private Judging
- Arbitration
  - Arb / Med
  - Appellate Panel
  - Class Actions
  - Commercial Finance
  - Complex / Large
  - Consumer
  - Construction
  - Employment
  - Expedited Proceedings
  - Foreign Direct Investment
  - International
  - Labor
- Litigate
- Legislation
A. Pre-Dispute Actions

Arbitration is the focus of this article. There are a host of arbitration providers, and many of these administering agencies have specialized rules for different kinds of disputes. The American Arbitration Association, for example, has multiple sets of rules.24 So the question facing drafters is not simply whether to leave disputes to the default system or select an alternative, but how each will be modified pre- and post-dispute.25 Parties often elect to use the judicial system and choose to select a particular judicial forum, apply a certain state’s substantive law, or agree to waive a jury trial. Recently, arbitration clauses are increasingly added26 or even included as boilerplate when entering a deal. For example, arbitration agreements are now found in most types of commercial contracts, including in nearly thirty-seven percent of executive employment contracts.27

With the increase in the use of ADR clauses has come criticism of boilerplate contractual terms. An individual arbitration clause was found to be substantively unconscionable in Bexar County, Texas because the billed arbitration costs were three-times the contract price and amounted to 28% of plaintiff’s annual household income.28 Even beyond these cases, some fear that arbitration has become “arbigation,” and too expensive by itself.29

Unfortunately, dispute resolution clauses are often lightly negotiated when deals are coming together because no one anticipates that their deal will ever have to be unwound. And research confirms that deal-makers are not the only ones afflicted with optimistic overconfidence early in a relationship. Couples marrying estimate their chances of divorce at zero, even when they know the divorce rate in general hovers between 40 – 50%.30 Carefully tailoring ADR clauses to the specific deal may still be one of the most effective ways to avoid costly collateral litigation.

B. Post-Dispute Arbitration

Adapting to changing needs or hoping to control costs, counsel often must negotiate and guide parties through customized processes on an ad hoc basis after a dispute arises. This option appears tempting because of the parties’ mutual interest in controlling the course of litigation. Parties may elect to settle their dispute using a less expensive regional arbitration provider or tee a couple of issues up for a quick summary judgment motion or bench trial, even though their contract calls for use of a standard arbitration provider.31 However Hall Street Associates v. Mattel,32 has shown the limits to this approach. In Hall Street, companies in the middle of a federal court trial over environmental damage to leased premises decided to

24 Available at http://www.adr.org/arb_med.
26 See Stipanowich, supra note 10, at 870.
27 Eisenberg & Miller (2007), supra note 3, at 351.
29 See Arthur B. Pearlstein, The Justice Bazaar: Dispute Resolution Through Emergent Private Ordering as a Superior Alternative to

31 Robert W. Loree, Contesting the Motion to Compel Arbitration, SAN ANTONIO LAWYER at 7 (May-June 2009).
arbitrate a single issue and return to court if they thought the arbitrator misapplied the law. The Supreme Court subsequently limited their ability to provide contractually for such expanded judicial review, even though expanded review had been recognized in the First, Third, Fifth and Sixth Circuits when the parties crafted their provision. 33 Hall Street Associates has clearly had “the effect of further restricting the role of federal courts in the arbitration process.”34 By concluding “that §§ 10 and 11 provide the exclusive regimes for review under the FAA,”35 the Court raised serious questions about whether “manifest disregard of the law” survived as a ground for vacatur, placing counsel on notice that even mutually agreed upon arbitration provisions remain subject to the constraints of the FAA.

II. AVOIDING AND ENFORCING ARBITRATION

Arbitration litigation has two main pressure points: (1) arbitrability – is the asserted claim covered by an arbitration clause to which no defenses have been sustained; and (2) award confirmation – are there statutory reasons why the award should be vacated or modified?

A. Before Arbitration Begins (Motions to Compel)

If the parties have entered into an agreement containing an arbitration clause that encompasses the dispute (or, if a third-party is claiming the benefits of a contract containing such a clause in many instances), the burden generally shifts to the party seeking to avoid arbitration to prove a defense. Appendix A uses representative Texas state precedent to illustrate some of the available defenses and their success rates at different levels of appeal.36 If the party seeking to compel arbitration demonstrates that a valid agreement to arbitrate exists, and the party seeking to avoid arbitration does not present a valid defense, a motion to compel arbitration will be granted, and any legal proceedings will generally be stayed pending the conclusion of arbitration.

1. Interlocutory Appeals of Orders Denying Motions to Compel

The methods for appealing the grant or denial of a motion to compel have historically been convoluted in some jurisdictions, though state legislatures have recently begun the process of streamlining their arbitration appellate procedure.37 At the risk of oversimplification, interlocutory appeal is available under the FAA for a denial of a Motion to Compel Arbitration. Congress added a ban on interlocutory appeals of orders compelling arbitration in 1988 to “prevent arbitration from bogging down in preliminary appeals.”38 Since the FAA has been interpreted as the full exercise of the Commerce Clause and to preempt inconsistent state statutes, most appeals arise under the FAA. Because the FAA does not confer independent subject-matter jurisdiction on the federal courts absent diversity of parties or another independent jurisdictional ground, state courts are generally left to interpret the federal statute.

2. Standard of Review of Motions to Compel Arbitration

36 See generally Philbin & Maness, Alternative Dispute Resolution in the Fifth Circuit Survey, supra note 12, at 448-452.
37 For example, Texas S.B. No. 1650 (2009) attempts to homogenize Texas appellate practice with the interlocutory appeals permitted by 9 U.S.C. § 16.
Though the FAA and state arbitration laws are not identical, they generally agree on the court’s limited role in deciding issues of arbitrability. Judicial review under the FAA is limited to determining (1) whether a valid arbitration agreement exists between the parties before the court, and (2) whether the scope of the agreement encompasses the claims raised. In deciding the former question, courts apply state law principles regarding the formation of contracts. Accordingly, courts look to state law contract principles to determine whether the parties assented to an agreement to arbitrate or whether state law provides a defense to a contract to arbitrate.


40 In re Oakwood Mobile Homes, Inc., 987 S.W.2d 571, 573 (Tex. 1999) (per curiam), abrogated by In re Halliburton Co., 80 S.W.3d 566 (Tex. 2002).

41 Kaplan, 514 U.S. at 944.

42 See id.; see also Buckeye Check Cashing, 546 U.S. at 446; see generally Saavedra v. Dealmaker Developments, LLC, 8 So.3d 758 (La. Ct. App. 2009); In re Labatt Food Service, L.P., 279 S.W.3d 640 (Tex. 2009).

Appendix A provides a graphical trend analysis by court level. Will Pryor summarized such outcomes recently: “The message of Texas appellate decisions is clear: arbitration provisions are going to be enforced in almost any circumstance and, when requested, trial courts shall not delay the referral of the dispute.”

3. The Unconscionability Defense

As discussed above, litigants have alleged a wide-variety of defenses based on state contract law principles. As the Supreme Court has narrowed the list of successful claims (finding, for example, that the FAA covers employment contracts) and referred many of these questions to the arbitrator to decide under the Prima Paint separability rule, unconscionability has become the most attractive tool to those trying to avoid arbitration. In fact, one commentator recently sampled the increase in unconscionability-related arbitration cases over a thirteen year period, finding “squishy state law doctrines like unconscionability” were up from virtually no cases in 1994 to nearly twenty percent of all vacatur challenges in 2007.

43 Will Pryor, Alternative Dispute Resolution, 61 S.M.U. L. REV. 519, 524 (2008); the Texas sampling contained in Appendix A concentrates in courts affecting the San Antonio region.

44 Bruhl, supra note 8, at 1425; see also Robert W. Loree, Contesting the Motion to Compel Arbitration, SAN ANTONIO LAWYER 6 (May-June 2009). See also, Christopher R. Drahozal, Arbitration Costs and Contingent Fees Contracts, 59 VAND. L. REV. 729, 750-57 (2006).

45 Id. at 1440.

46 Id. at 1463.
The increase is borne both of necessity and creativity. Many of the other traditional defenses often argued have become less successful as “the Court has shut off various means of resisting arbitration.” 47 Some of the defense’s popularity is a by-product of Prima Paint severability – the arbitrator generally decides defensive issues unless they are only directed at the arbitration clause, rather than the contract as a whole. 48 Rather than proving to an arbitrator that an entire contract was fraudulently induced, litigants are aiming procedural and substantive unconscionability rifle shots at the clauses – challenging the arbitration clause itself, rather than the entire contract. 49 Such questions usually go to the court, not the arbitrator. 50 And the containing the arbitration provision, then the question of whether the agreement, as a whole, is unconscionable must be referred to the arbitrator. When the crux of the complaint is not the invalidity of the contract as a whole, but rather the arbitration provision itself, then the federal courts must decide whether the arbitration provision is invalid and unenforceable under 9 U.S.C. § 2 of the FAA.” Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1263-64 (9th Cir. 2006) (en banc), citing Prima Paint (internal citations omitted); see also Bruhl, supra note 8, at 1472-73 (“[I]t is fair to say that, rightly or wrongly, many courts have for a long time ruled on unconscionability challenges to various aspects of arbitration agreements (and many courts still do) – occasionally expressly stating that the matter was for the court, other times simply so assuming without a second thought. Even fairly recently, defendants did not even argue that such matters were for the arbitrator. But this may be starting to change. In the last several years, one can discern the outlines of a nascent trend toward a federal rule shifting more authority over such challenges to the arbitrator, so that the arbitrator would decide whether (for example) a bar on punitive damages or collective proceedings or discover in arbitration is valid.”) (internal citations omitted).

47 Id. at 1425.
49 See Chalk v. T-Mobile USA, Inc., 560 F.3d 1087, 1093-97 (9th Cir. 2009).
50 “[W]hen the crux of the complaint challenges the validity or enforceability of the agreement
unconscionability argument takes advantage of a rub between federal and state law to give sympathetic judges a route to denying the motion to compel with a better chance of appellate success.\textsuperscript{51} The success of these challenges varies geographically, with litigants finding considerably more success in New York, Connecticut and California than in other states.\textsuperscript{52}

Because courts cannot hold arbitration clauses \textit{per se} unconscionable, their analyses typically “focus on particular aspects of arbitration clauses that allegedly render them unconscionable or otherwise impermissibly frustrate the plaintiff’s substantive rights.”\textsuperscript{53} Examples include:

1. limitations on the type or amount of relief (punitive damages);
2. provisions forbidding class-wide relief;
3. “nonmutual” clauses;
4. clauses that select allegedly biased arbitrators;
5. cost allocating clauses; and
6. confidentiality provisions.\textsuperscript{54}

As a practical matter, it becomes difficult for appellate courts to determine whether the trial court has analyzed the arbitration clause for unconscionability in a way that it would not do to the contract if it did not have an arbitration clause.\textsuperscript{55} Those “apples-to-apples” comparisons are often difficult to make.\textsuperscript{56}

The Supreme Court has declined dozens of petitions for certiorari raising the issue since 2000,\textsuperscript{57} despite clarion calls from dissenting judges, prominent Supreme Court litigators, and influential interests groups.\textsuperscript{58} “Pro-arbitration forces decry the rise of unconscionability analysis, while consumer activists and employee advocates find unconscionability an unsatisfactory defense against the spread of arbitration.”\textsuperscript{59} The Supreme Court could extend \textit{Prima Paint} separability, but has thus far passed on a number of opportunities to do so.\textsuperscript{60}

Alternatively, Congress could amend the FAA to specify that “courts, rather than arbitrators, should rule on challenges to the validity of arbitration agreements.”\textsuperscript{61} For now, the unconscionability defense appears to be the pressure valve that holds the system in an equally disagreeable state of equilibrium.

\textsuperscript{51} Bruhl, supra note 8, at 1442-43; See also id. at 1456 (quoting one appellate judge as saying: “‘We have had case after case where we have written our way around the federal United States Supreme Court law. And they have denied certiorari.’”).

\textsuperscript{52} One California study found that “unconscionability challenges to arbitration agreements, which accounted for about two-thirds of all unconscionability challenges, succeeded at a rate several times higher than the rate for other types of contracts.” Bruhl, supra note 8, at 1457, citing Stephen A. Broome, \textit{An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act}, 3 HASTINGS BUS. L.J. 39, 44-48 (2006); see also Lawrence R. Mills et al., \textit{Vacating Arbitration Awards: Study Reveals Real-World Odds of Success by Grounds, Subject Matter and Jurisdiction}, DISP. RESOL. MAG., SUMMER 2005, at 23. 25 (“The figures also indicated that vacatur was attempted more often and succeeded more often, both on an absolute and on a percentage basis, in just three states than anywhere else in the nation. Of 120 cases in which vacatur was sought in a state court, 27 were brought in California, 25 in New York and 12 in Connecticut.” In these states, the grant rate was 30 percent, compared with 21 percent in other states studied.).

\textsuperscript{53} Bruhl, supra note 8, at 1437.

\textsuperscript{54} Id. at 1439.

\textsuperscript{55} Id. at 1449.

\textsuperscript{56} Id. at 1450.

\textsuperscript{57} Id. at 1465-66.

\textsuperscript{58} Id. at 1466, citing Nagrampa, 469 F.3d at 1313 (9th Cir. 2006) (en banc) (Kozinski, J., dissenting) (“I would not be the least surprised to see the Supreme Court of the United States soon take a close look at whether the unconscionability doctrine, as developed by some state courts, undermines the important policies of the Arbitration Act.”).

\textsuperscript{59} Bruhl, supra note, 8 at 1486.

\textsuperscript{60} See id.

\textsuperscript{61} Id. at 1487. The proposed \textit{Arbitration Fairness Act} of 2009 (H.R. 1020; S. 931) contains such a provision. See Edna Sussman, \textit{The Unintended Consequences of the Proposed Arbitration Fairness Act}, 56 FED. LAWYER 48 (May 2009).
B. Challenging an Arbitration Award After It’s Made (Motions to Vacate)

If it sounds increasingly difficult to defeat the question presented by a motion to compel arbitration, vacatur of an arbitration award after it has been made is even more difficult. At a recent CLE seminar, a panelist asked roughly 200 participants if anyone had ever heard of an arbitration award being vacated. No one had. The panelist used the response to underscore the point that litigants should attack arbitration prior to attending it. A well-respected federal judge recently noted that, “Judicial review of arbitration awards is essentially limited to review for extreme arbitrator misconduct such as fraud or corruption.”

Under § 10 of the FAA, courts are permitted to vacate an arbitration award:

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators, or either of them;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). Other grounds have been judicially added. These additional grounds spring from the FAA or have been forged in common law. And courts are now sorting out whether such grounds stem from common law or are derived from §10(a)(4). The answer to that question has been resolved differently in different courts.

“Manifest disregard of the law” was an oft-used ground for vacatur, prior to the U.S. Supreme Court’s action in Hall Street Associates. In Hall Street Associates, the Court limited the grounds for vacatur of an arbitration award to those expressly set forth in the FAA. “[T]he text [of the Federal Arbitration Act] compels a reading of the §§ 10 and 11 categories as exclusive.” Hall Street Associates threw the entire doctrine of “manifest disregard” into question. The Fifth Circuit has already dispensed with it, while the Second has retained it, but has drawn a certiorari grant on the question.

The question then is what vacatur grounds realistically remain if manifest disregard dies. Prior to Hall Street Associates, several practitioners and arbitrators conducted a study of federal and state vacatur cases during a ten-month period in 2004. What they found was that vacatur challenges were more prevalent in some states than others, and there was variability in success rates for different grounds.

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64 See Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349, 352 (5th Cir. 2009).
65 See Hall Street Associates, 128 S.Ct. at 1403.
66 Id. at 1404
68 Lawrence R. Mills et al, supra note 52, at 23.
69 Id. at 25.

See also Loree, supra note 44, at 22.
According to Judge Furgeson, “The results of this study show the remote likelihood of having an arbitration award vacated under this system of limited review.”70 To some, these trends demand fundamental reform of the FAA. To others, *Hall Street Associates* simply reinforced the view that arbitration is to be quicker, less expensive, and final. For now, success rates on vacatur challenges to arbitration awards made after hearings are low. In fact not a single one of the sample cases in Appendix A vacates an arbitrated case on vacatur grounds.

### Chart 3: Challenging Arbitration

![Diagram of challenging arbitration process]

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70 Furgeson, *supra* note 63, at 870.
Conclusion

Arbitration has become a widely used litigation alternative. “For those to whom our current civil justice system now represents a grossly inefficient and costly mechanism for conflict resolution, the increasing use of mediation, arbitration, and collaboration for all types of disputes will be as beneficial to society as it is inevitable.”71 While attempts to avoid arbitration remain controversial in the courts, in Congress and in various state legislatures, whichever side of the policy debate you take, litigating arbitration will continue to be a dynamic area. The frequency of appeals relating to arbitration, in itself, adds variability to the process. Variability leads to further litigation, and most all litigation is settled short of judgment.72

71 Pryor, supra note 43, at 529.

## APPENDIX A: ARBITRATION CASE TREND CHART

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Compel Arbitration?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Interlocutory</strong></td>
<td></td>
</tr>
<tr>
<td><em>In re</em> Gulf Exploration, LLC, 2009 WL 1028049 (Tex. April 17, 2009, orig. proceeding).</td>
<td>Yes</td>
</tr>
<tr>
<td><em>In re</em> Bank of America, N.A., 278 S.W.3d 342 (Tex. 2009, orig. proceeding).</td>
<td>Yes</td>
</tr>
<tr>
<td><em>In re</em> Int’l Profit Associates, Inc., 274 S.W.3d 672 (Tex. 2009, orig. proceeding).</td>
<td>Yes</td>
</tr>
<tr>
<td><em>In re</em> Lyon Financial Services, Inc., 257 S.W.3d 228 (Tex. 2008, orig. proceeding).</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Preemption</strong></td>
<td></td>
</tr>
<tr>
<td><em>In re</em> Eastland v. Camp Mystic, Inc., 2009 WL 260523 (Tex. App. Feb. 4, 2009), petition for review filed (Feb 17, 2009).</td>
<td>Yes</td>
</tr>
<tr>
<td><em>In re</em> Olshan Foundation Repair Company, 277 S.W.3d 124 (Tex. App. 2009, orig. proceeding).</td>
<td>Yes</td>
</tr>
<tr>
<td><em>In re</em> MP Ventures of South Texas, Ltd., 276 S.W.3d 524 (Tex. App. 2008, orig. proceeding).</td>
<td>Yes</td>
</tr>
<tr>
<td><em>In re</em> Nexion Health at Humble, Inc., 173 S.W.3d 67 (Tex. 2005, orig. proceeding) (per curiam).</td>
<td>Yes</td>
</tr>
<tr>
<td><em>In re</em> Palacios, 221 S.W.3d 564 (Tex. 2006, orig. proceeding) (per curiam).</td>
<td>Yes</td>
</tr>
<tr>
<td><em>In re</em> Wilson D. Construction Co., 196 S.W.3d 564 (Tex. 2006, orig. proceeding).</td>
<td>Yes</td>
</tr>
<tr>
<td><em>In re</em> Heritage Building Systems, Inc., 185 S.W.3d 539 (Tex. App. 2006, orig. proceeding).</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Pre-Arbitration Challenge Agreement Formation</strong></td>
<td></td>
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<td><em>In re</em> Dillard Department Stores, Inc., 198 S.W.3d 778 (Tex. 2006, orig. proceeding) (per curiam).</td>
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<td>Forest Oil Corporation v. McAllen, 268 S.W.3d 51 (Tex. 2008).</td>
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<td><em>In re</em> Bank One, N.A., 216 S.W.3d 825 (Tex. 2007, orig. proceeding)</td>
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<td>Structured Capital Resources Corp. v. Arctic Cold Storage, LLC, 237 S.W.3d 890 (Tex. App. 2007)</td>
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<td><em>In re</em> RLS Legal Solutions, LLC, 221 S.W.3d 629 (Tex. 2007, orig. proceeding)</td>
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<td>USB Financial Services, Inc. v. Branton, 241 S.W.3d 179 (Tex. App. 2007)</td>
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<td><em>In re</em> Labatt Food Service, L.P., 279 S.W.3d 640 (Tex. 2009, orig. proceeding)</td>
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<td><em>In re</em> H &amp; R Block Financial Advisors, Inc., 235 S.W.3d 177 (Tex. 2007, orig. proceeding)</td>
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<td><em>In re</em> Weekley Homes, L.P., 180 S.W.3d 127 (Tex. 2005, orig. proceeding)</td>
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<td><em>In re</em> Kellogg Brown &amp; Root, Inc., 166 S.W.3d 732 (Tex. 2005, orig. proceeding)</td>
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<td><em>In re</em> Vesta Ins. Group, Inc., 192 S.W.3d 759 (Tex. 2006, orig. proceeding) (per curiam)</td>
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<td><em>In re</em> Kaplan Higher Education Corp., 235 S.W.3d 206 (Tex. 2007, orig. proceeding) (per curiam)</td>
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<td><em>In re</em> Merrill Lynch Trust Co., FSB, et al., 235 S.W.3d 185 (Tex. 2007, orig. proceeding)</td>
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<td><em>In re</em> Bayer Materialscience, LLC, 265 S.W.3d 452 (Tex. App. 2007, orig. proceeding)</td>
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<td>In re Palm Harbor Homes, Inc., 195 S.W.3d 672 (Tex. 2006, orig. proceeding).</td>
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<td>Chambers v. O’Quinn, 242 S.W.3d 30 (Tex. 2007).</td>
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<td>Statewide Remodeling Inc. v. Williams, 244 S.W.3d 564 (Tex. App. 2008)</td>
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<td>Lee v. Daniels &amp; Daniels, 264 S.W.3d 273 (Tex. App. 2008),</td>
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<td>City of Beaumont v. Int’l Ass’n. of Firefighters, 241 S.W.3d 208 (Tex.</td>
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<td>2007) (not reported).</td>
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<td>Teel v. Beldon Roofing &amp; Remodeling Co., 281 S.W.3d 446 (Tex. App. 2007),</td>
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<td>review denied (Jan 25, 2008).</td>
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International Association of Defense Counsel Committee members prepare newsletters on a monthly basis that contain a wide range of practical and helpful material. This section of the Defense Counsel Journal is dedicated to highlighting interesting topics covered in recent newsletters so that other readers can benefit from committee specific articles.

STRATEGIES FOR DEFEATING THE FRAUDULENT JOINDER OF SALES REPRESENTATIVES IN PHARMACEUTICAL AND MEDICAL DEVICE LITIGATION

This article originally appeared in the May 2009 Drug, Device, and Biotechnology Committee Newsletter.

THE TREND OF FRAUDULENT JOINDER

Over the past decade, plaintiffs have stepped up their assaults on federal diversity jurisdiction in pharmaceutical and medical device litigation. Along with their efforts to chip away at the learned intermediary doctrine, plaintiffs increasingly are attempting to fraudulently join local sales representatives in order to defeat diversity. In recent years, many plaintiffs have not been so concerned with “valid” claims and, instead, have named local parties against whom they have no legitimate claims.

In mass tort and individual cases alike, plaintiffs often allege that the sales representative is individually liable for fraudulent or negligent verbal representations to the patient’s physician and/or the patient that supersede or interdict the manufacturer’s written warning to the physician or other information contained in the product’s labeling. Plaintiffs may also allege that the sales representative knew or should have known of the alleged harmful effects of the pharmaceutical or device, but failed to inform the physician and/or the patient of those effects. Depending on the

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applicable state law, plaintiffs may also allege such claims as infliction of emotional distress, fraudulent concealment, breach of warranty, unfair or deceptive acts or trade practices, loss of consortium, conversion, breach of contract, unjust enrichment, conspiracy, invasion of privacy, failure to warn, and strict liability against the sales representative. Plaintiffs typically allege that under the local state’s laws, the sales representative is not merely an agent of the company, but is individually liable as a joint-tortfeasor for his or her own alleged tortuous conduct. In many instances, these allegations are nothing more than a sham at the expense of the foreign defendant, and which unfairly and unnecessarily drag individual sales representatives into litigation.

With the growth of direct-to-consumer advertising and ever increasing criticism from the national media as to the manner in which medical drugs and devices are developed, approved, and sold, the trend of naming as defendants individual sales representatives in pharmaceutical litigation is likely to continue and grow in the coming years. In fact, as courts continue to strike down plaintiffs’ efforts to forum shop, plaintiffs will craft new theories of individual liability against the sales representatives.

This trend threatens to destroy one of the most important weapons in a foreign defendant’s arsenal—the right to have the case tried in federal court. In response to this trend, manufacturers of pharmaceuticals and medical devices throughout the country have been waging an intensifying battle over forum selection.

The remainder of this article offers some strategies for defeating fraudulent joinder. While the specific strategies employed in individual cases will vary depending on the facts and circumstances of each case and the jurisdiction in which the case is pending, there are some fairly common approaches that may help arm the district court with the information it needs to retain jurisdiction.

SUGGESTED STRATEGIES FOR DEFEATING FRAUDULENT JOINDER

The defendant bears the burden (typically a heavy one) of demonstrating that the plaintiff fraudulently joined the resident defendant. See Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97-98, 42 S. Ct. 35, 66 L. Ed. 144 (1921). Since the burden on a defendant to demonstrate fraudulent joinder is typically heavy and inferences are resolved in favor of the plaintiff, claims of fraudulent joinder have not been overwhelmingly successful. Nevertheless, a defendant can increase the likelihood the district court will find fraudulent joinder and retain jurisdiction over the case. Below are a few general strategies to consider when challenging the joinder of a local sales representative:

1. **Demonstrate the Cause of Action against the Sales Representative Is Legally Inadequate Under Applicable State Law.**

If you decide that an attempt at removal is worthwhile, perhaps the least complicated and most inexpensive method for demonstrating fraudulent joinder is to show that the claim asserted against the sales representatives in the complaint is either legally barred or is not recognized under applicable state law--issues that typically are raised as affirmative defenses to the complaint, and which do not necessarily require significant factual investigation.

There are a number of potential affirmative defenses that could be used to demonstrate that the claim is legally inadequate under the applicable state law. For instance, if Plaintiff’s claim against the resident sales representative is clearly time-barred under the applicable statute of limitation or repose or is preempted under federal law, it would be unfair for the plaintiff to avoid removal simply by suing the resident sales representative. Similarly, under the learned intermediary doctrine, a plaintiff should not be able to prevail against
a sales representative for an alleged failure to warn if the sales representative does not owe a legal duty to warn the patient of the risks associated with a product. See Catlett v. Wyeth, Inc., 379 F. Supp. 2d 1374, 1381 (M.D. Ga. 2004). But see, e.g., Salazar v. Merck & Co., Inc., No. 05-445, 2005 U.S. Dist. LEXIS 27776 (S.D. Tex. Nov. 2, 2005). Likewise, if the plaintiff asserts a strict liability claim against a salesperson on the grounds that the salesperson is a “seller” in the chain of distribution of the product, but state law does not recognize the cause of action, you may succeed in getting the claims against the salesperson dismissed in connection with the removal. See e.g., Thompson v. Medtronic, Inc., 2006 U.S. Dist. LEXIS 91846, at *8 (D. Nev. Dec. 8, 2006) (sales representative was not a “seller” because plaintiff purchased product directly from the manufacturer and sales representative was fraudulently joined).

Aside from the issue of whether the cause of action is legally barred or is not recognized under state law, you also may be able to show that the plaintiff has not provided sufficient factual support in the Complaint to sustain the cause of action. The most obvious example of this is a state fraud claim. Since fraud typically has heightened pleading requirements, you may be able to show that the fraud claim cannot survive dismissal because it has not been pled with sufficient particularity under applicable state law. See, e.g., Grennell v. W. S. Life Ins. Co., 298 F. Supp. 2d 390, 400 (S.D.W.V. 2004) (finding plaintiff’s allegations failed to satisfy the particularity requirements of West Virginia Rule of Civil Procedure 9(b)).

2. When Allowed, Pierce the Complaint with Extrinsic Facts and Evidence.

While the district court usually is cautioned not to analyze the merits of the plaintiff’s claims in a jurisdictional inquiry, a certain amount of this analysis is inevitable when a defendant provides the court with sworn evidence in the form of an affidavit, declaration or deposition testimony, showing that the plaintiff’s claims are neither proper nor substantiated. See, e.g., Dacosta v. Novartis AG, No. 01-800-BR, 2002 U.S. Dist. LEXIS 21313 (D. Ore. Mar. 1, 2002) (finding the sales representative was a “sham defendant” who had been fraudulently joined after reviewing the sale representative’s affidavit and facts developed during jurisdictional discovery).

The rules regarding what type of evidence is allowed and how it is presented to the Court differs by jurisdiction, with some jurisdictions allowing very limited piercing and others allowing considerably more. For example, the Third and Tenth Circuits have permitted only limited piercing, and the Fifth Circuit allows piercing only to identify “discrete and undisputed facts” that would demonstrate plaintiff cannot prevail against the resident defendant. See Smallwood v. Illinois Cent. R. Co., 385 F.3d 568, 573 (5th Cir. 2004). The Fourth and Eleventh Circuits permit a more extensive review of the record, but make clear that the district court should not make a decision on the merits. See Hartley v. CSX Transp., Inc., 187 F.3d 422, 425 (4th Cir. 1999); Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997).

3. Submit an Affidavit from the Sales Representative

The most common, and perhaps easiest and cost effective means for rebutting the factual allegations in the complaint, is to obtain an affidavit from the local sales representative setting forth facts showing that the plaintiff cannot prevail under applicable state law. Defendants have had greater success when they have established that the sales representative did not:

- meet, speak with, or provide any materials or products directly to the plaintiff;
- make any statements or representations to the patient’s physician regarding the safety...
or efficacy of the product at issue;
• have any knowledge regarding the alleged side effects or harms resulting from the use of the product;
• call on the patient’s physician regarding the product at issue;
• provide any verbal or written information to the patient’s physicians regarding the product at issue;
• have any involvement in the manufacture, development or preparation of the prescribing information, including the written warnings and labels, for the product at issue;
• conduct any independent research regarding the product at issue;
• promote the product at issue in any manner not identified in the manufacturer’s written policies;
• sell, take or process orders for the product at issue;
• play any role in the purchase of the product at issue by the physician;
• have any ownership interest in the product at issue;
• have any control over the design of the marketing or advertising materials for the product at issue; or
• provide any information regarding the product at issue that was used during the course of the sales representative’s employment that was not provided by the manufacturer.


4. Try to Obtain an Affidavit from the Patient’s Physician

In addition to an affidavit from the sales representative, an affidavit or deposition testimony from the patient’s physician can also be very helpful in demonstrating that the plaintiff has no cause of action against the sales representative, specifically by breaking the chain of proximate cause. For example, the physician might state that even if the information had been given to the physician just as the plaintiff claims it should have been, the information would not have been material to the physician, and the physician would not have changed the manner in which the physician provided advice, care and treatment to the patient. See, e.g., Bloodsworth v. Smith & Nephew, 417 F. Supp. 2d 1249, 1252 (M.D. Ala. 2006). Sworn testimony from the physician might also recite that the physician independently decided to use the product, and did not rely upon any information provided by the sales representative, and, thus, the actions of the sales representative are not linked to plaintiff’s alleged injuries or damages. See Motus v. Pfizer, Inc., 358 F.3d 659, 661 (9th Cir. 2004).

While some jurisdictions tend to view affidavit testimony as creating factual issues on the merits that are not appropriate in a jurisdictional inquiry, some jurisdictions have found uncontroverted affidavits sufficient to establish fraudulent joinder. See In re Diet Drugs Products Liab. Litig., No. 03-20611, 2004 U.S. Dist. LEXIS 19848, at *5-6 (E.D. Pa. Sept. 28, 2004). Significantly, some jurisdictions have held that when a defendant presents affidavits that are not contested by plaintiffs, the court cannot then resolve the facts in the plaintiff’s favor based solely on the unsupported allegations in the Complaint. See, Southern v. Pfizer, Inc., 471 F. Supp. 2d 1207, 1214 (N.D. Ala. 2006). Thus, depending on the jurisdiction in which the case is pending, obtaining affidavit testimony can be an extremely valuable tool in helping a
defendant shift back to the plaintiff some of the burden in a fraudulent joinder analysis.

5. If an MDL Has Been Established, Consider Moving to Stay Proceedings in the District Court and Allow the MDL to Decide the Issue of Fraudulent Joinder.

Since the MDL likely will be reviewing numerous claims of fraudulent joinder in mass tort litigation, it is in a better position to analyze and decide such claims in a more expeditious and efficient manner. Allowing the MDL to review claims of fraudulent joinder promotes judicial efficiency because it allows one court to uniformly review the claims of fraudulent joinder. See, e.g., In the Matter of Civil Actions Against Merck & Co., Inc., No. 6:05-cv-06621-DGL, 2006 U.S. Dist. LEXIS 86347 (W.D.N.Y., Mar. 1, 2006). Having the MDL decide the issue of fraudulent joinder after transfer also helps to avoid inconsistent and conflicting rulings by the district courts, which may force a defendant to litigate in a state court in one forum and in federal court in another, when the allegations against the sales representatives are virtually identical.

While the Plaintiff’s complaint, standing alone, may appear sufficient, the MDL is in a better position to fairly evaluate Plaintiff’s claims, and may be more likely to find that the Plaintiff has fraudulently joined the sales representative.

CONCLUSION

In most circumstances, the advantage of being in federal court for defendants remains significant. If you suspect a salesperson for your client or any co-defendant in your case is not a legitimate defendant, investigate carefully and prepare well in advance of filing your removal papers. While the burden of proving fraudulent joinder is typically steep, the benefits of such a motion can be well worth the effort.

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THE U.S. SUPREME COURT: NO FEDERAL PREEMPTION OF FAILURE TO WARN TORT ACTIONS AGAINST PHARMACEUTICAL MANUFACTURERS

This article originally appeared in the June 2009 Toxic and Hazardous Substances Litigation Committee Newsletter.

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On March 4, 2009, the U.S. Supreme Court handed down its much-anticipated opinion in Wyeth v. Levine.1 The Court held 6-to-3 that “failure-to-warn” state tort actions against drug manufacturers are not preempted by federal law.2 Justice Stevens delivered the opinion of the Court, with Justices Kennedy, Souter, Ginsburg, Breyer, and Thomas concurring. Justices Alito, Roberts, and Scalia dissented.

Wyeth had appealed its case to the U.S. Supreme Court after a Vermont state jury had found that Wyeth, the manufacturer of the drug Phenergan, had failed to provide in its label an adequate warning regarding the risk of injecting Phenergan via the IV-push method and, as a result, Diana Levine suffered the amputation of her arm.

Levine had visited her local clinic for treatment of a migraine headache. She received intramuscular injections of Demerol

2 Id. at 1196-1197.
for her headache and Phenergan for her nausea. She returned later that day and received a second injection of both drugs. However, during the second visit, the physician assistant administered the drugs by the IV-push method. Either because the needle penetrated an artery directly or because the drug escaped from the vein into surrounding tissue, Phenergan came into contact with Levine’s arterial blood. As a result, Levine developed gangrene. Doctors first amputated her right hand and then her entire forearm because of the infection.

Levine settled her claims against the health facility and clinician and then brought a lawsuit against Wyeth, relying on Vermont common law negligence and strict-liability theories.

Although Phenergan’s label warned of the danger of gangrene and amputation following inadvertent intra-arterial injection, Levine alleged that the labeling was defective because it failed to instruct clinicians to use the IV-drip method of intravenous administration instead of the higher risk IV-push method. The warnings on Phenergan’s label had been deemed sufficient by the federal Food and Drug Administration (FDA) when it approved Wyeth’s new drug application in 1955 and when it later approved changes in the drug’s labeling.

In its appeal to the U.S. Supreme Court, Wyeth made two separate preemption arguments: first, that it would have been impossible for Wyeth to comply with the state law duty to modify Phenergan’s labeling without violating federal law, and second, that recognition of Levine’s state tort action created an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress because it substituted a lay jury’s decision about drug labeling for the expert judgment of the FDA.

Regarding the second argument, the majority opinion narrowed the question to whether federal law preempted Levine’s claim that Phenergan’s label did not contain an adequate warning about using the IV-push method of administration.3

I. Congressional Intent

The majority opinion started its analysis by stating that it is guided by two cornerstones of preemption jurisprudence. First, “the purpose of Congress is the ultimate touchstone in every preemption case.”4 Second, in all preemption cases, and particularly in those in which Congress has “legislated . . . in a field which the States have traditionally occupied . . . we start with the assumption that the historical police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”5

Additionally, the majority pronounced that the presumption against preemption is out of respect for the States as independent sovereigns in the federal system and leads the Court to assume that Congress does not cavalierly preempt state-law causes of action.6

In the majority’s preemption analysis, the Court first examined Congress’ intent in enacting the Food Drug and Cosmetics Act (FDCA), which was enacted during the 1930s in response to Congress’ concern about unsafe drugs and fraudulent marketing. In 1962, Congress amended the FDCA. The 1962 amendments added a saving clause, indicating that a provision of state law would only be invalidated upon a direct and positive conflict with the FDCA.7 Conversely, when Congress enacted an express preemption provision for medical devices in 1976,8 Congress declined to enact such a provision for prescription drugs.9

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3 Id. at 1194.
4 Id. (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed. 2d 700 (1996)).
5 Id. at 1194-1195.
6 Id. at 1195 n. 3.
7 Id. at 1196.
8 See § 521, 90 Sat. 574 (codified at 21 U.S.C. § 360k(a)(2006)).
9 Wyeth, 129 S.Ct. at 1196.
II. Impossibility Preemption

Wyeth argued that Levine’s state law claims were preempted because it was impossible for Wyeth to comply with both the state-law duties underlying those claims and its federal labeling duties, as a manufacturer may only change a drug label after the FDA approves a supplemental application. Wyeth insisted that it was impossible for it to discharge its state law obligation to provide a stronger warning about IV-push administration without violating federal law. In addition, Wyeth argued that a 2008 amendment provides that a manufacturer may only change its label to reflect newly acquired information and, therefore, Wyeth could have changed Phenergan’s label only in response to new information that the FDA had not considered during the FDA’s premarket approval process or the supplemental application review.10

Wyeth argued that if it had unilaterally added such a warning, it would have violated federal law governing unauthorized distribution and misbranding. Wyeth also argued that a change in Phenergan’s labeling would have subjected it to liability for unauthorized distribution.

The majority disagreed with Wyeth’s position and found that Wyeth could have revised Phenergan’s label even in accordance with the amended regulation because the gangrene risks were not “newly acquired information.” According to FDA regulations, “newly acquired information” is not limited to new data, but also encompasses “new analysis of previously submitted data.”12 Further, strengthening the warning about IV-push administration would not have made Phenergan a new drug or a misbranded drug.13

The majority opinion refused to decide whether the 2008 “changes being effected” regulation is consistent with the FDCA and the previous version of the regulation, as Wyeth and the United States urged, because Wyeth could have revised Phenergan’s label even in accordance with the amended regulation. The Court pointed out that the FDA explained in its notice of the final rule, “newly acquired information” is not limited to new data, but also encompasses “new analyses of previously submitted data.”14 The majority stated that this rule accounts for the fact that risk information accumulates over time and that the same data may take on a different meaning in light of subsequent developments.15

III. Implied Preemption

Wyeth argued that requiring it to comply with a state law duty to provide a stronger warning about IV-push administration would obstruct the purposes and objectives of federal drug labeling regulation. Levine’s tort claims, it maintained, were preempted because they interfered with Congress’ purpose to entrust an expert agency to make drug labeling decisions that strike a balance between competing objectives. Wyeth maintained that, because the FDCA required the FDA to determine that a drug is safe and effective under the conditions set forth in its labeling, the agency must be presumed to have performed a precise balancing of risks and benefits and to have established a specific labeling standard that leaves no room for different state law judgments. In advancing its argument, Wyeth relied on the preamble of a 2006 FDA regulation governing the content and format of prescription drug labels that declared that the FDCA establishes “both a ‘floor’ and a ‘ceiling’” so that “FDA approval of labeling . . . preempts conflicting or contrary State

10 Id. at 1196.
11 Id.
12 Id. at 1197 (citing 73 Fed.Reg. 49604).
13 Id. (citing 21 U.S.C. §§ 321(p)(1), 331, 332, 334(a)-(b); 21 CFR § 310.3(h)).
14 Id. at 1196-1197 (citing 73 Fed.Reg. 49609, 49604).
15 Id. at 1197.
16 Id. at 1199.
The preamble further stated that certain state law actions, such as those involving failure-to-warn claims, “threaten FDA’s statutorily prescribed role as the expert federal agency responsible for evaluating and regulating drugs.”

The majority again disagreed with Wyeth. The Court found that if Congress thought state law suits posed an obstacle to its objectives, it surely would have enacted an express preemption provision at some point during the FDCA’s 70-year history. But despite its 1976 enactment of an express preemption provision for medical devices, Congress has never enacted such a provision for prescription drugs. Congress’ silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness.

The majority also recognized that an agency regulation with the force of law can preempt conflicting state requirements. In such cases, the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of preemption. However, the majority proclaimed that it was faced with no such regulation in this case, but rather with an agency’s mere assertion that state law is an obstacle to achieving its statutory objectives. The majority stated that because Congress has not authorized the FDA to preempt state law directly, the question is what weight the majority should accord the FDA’s opinion.

In prior cases, the Court has given some weight to an agency’s views about the impact of tort law on federal objective when the subject matter is technical and the relevant history and background are complex and extensive. Even in such cases, however, the court has not deferred to an agency’s conclusion that state law is preempted. Rather, the court has attended to an agency’s explanation of how state law affects the regulatory scheme. While agencies have no special authority to pronounce on preemption absent delegation by Congress, they do have a unique understanding of the statutes they administer and the ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The weight the Court accords the agency’s explanation of state law’s impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.

Under this standard, the majority found that the FDA’s 2006 preamble does not merit deference. The FDA previously had explained that the rule would not contain policies that have federalism implications or that preempt state law. In 2006, when the FDA finalized the rule, it did so without offering states or other interested parties notice or opportunity for comment when it articulated a sweeping position on the FDCA’s preemptive effect in the regulatory preamble. Further, the majority found that the preamble is at odds with what evidence the court has regarding Congress’ purposes and reverses the FDA’s own longstanding position without providing a reasoned explanation.

The majority held that Wyeth did not persuade the Court that failure-to-warn claims like Levine’s obstruct the federal regulation of drug labeling. Congress has repeatedly declined to preempt state law, and the FDA’s recently adopted position that

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17 Id. at 1200 (citing 71 Fed.Reg. 3922, 3934-3935).
18 Id. (citing 71 Fed.Reg. 3935).
19 Id. at 1201.
21 Id. at 1201.
22 Id. (citing Geier, 529 U.S., at 883, 120 S.Ct. 1913).
23 Id.
24 Id.
25 Id.
state tort suits interfere with its statutory mandate is entitled to no weight. 26

IV. Additional Opinions

Justice Breyer wrote a separate concurring opinion, pointing out that the FDA may seek to determine whether and when state tort law acts as a help or a hindrance to achieving the safe drug-related medical care that Congress sought. Congress may seek to embody those determinations in lawful specific regulations describing, for example, when labeling requirements serve as a ceiling as well as a floor. It is possible that such determinations would have preemptive effect. However, Justice Breyer stated that such a regulation was not at issue in this case. 27

Justice Thomas wrote a separate concurring opinion, stating that he could not join the majority’s implicit endorsement of far-reaching implied preemption doctrines. He has become skeptical of the Court’s “purposes and objectives” preemption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of Congressional purposes that are not embodied within the text of federal law. Because implied preemption doctrines that wander far from the statutory text are inconsistent with the Constitution, Justice Thomas concurred only in the judgment. 28

Justice Alito, with whom Chief Justice Roberts and Justice Scalia joined, wrote a dissenting opinion, stating that the majority opinion cannot be reconciled with Geier v. American Honda Motor Co., 29 or the general principles of conflict preemption. The dissent stated that narrowly reframing the question to whether Wyeth has a duty to provide an adequate warning about using the IV-push method to administer Phenergan, ignores the antecedent question of who – the FDA or a jury in Vermont – has the authority and responsibility to determine the adequacy of Phenergan’s warnings. Congress authorized the FDA and not state tort juries to determine when and under what circumstances a drug is safe. Further, it is unclear how a stronger warning could have helped Levine. The physician’s assistant who treated Levine disregarded at least six separate warnings already on Phenergan’s labeling. 30

V. Public’s Reaction

Pharmaceutical Research and Manufacturers of America (PhRMA) Senior Vice President Ken Johnson issued the following statement regarding the Wyeth decision:

PhRMA is still reviewing the various opinions in the Wyeth v. Levine case. We continue to believe that the expert scientists and medical professionals at the Food and Drug Administration (FDA) are in the best position to evaluate voluminous information about a medicine’s benefits and risks and to determine which safety information to include in the drug label.

Healthcare providers and patients rely on FDA-approved drug labeling every day in making critical decisions about whether a medicine is the best treatment for an individual.

Unfortunately, patients could ultimately suffer if the Supreme Court’s decision forces healthcare

26 Id. at 1202.
27 Id. at 1204.
28 Id. at 1204-1217.
30 Wyeth, 129 S.Ct. at 1218.
providers and patients to second-guess FDA-approved labeling.\(^{31}\)

The California Medical Association argued in favor of Levine’s claims in an amicus brief filed with the U.S. Supreme Court. “Because preempting failure to warn claims would make the U.S. Food and Drug Administration approval the final word on a drug’s safety, it would significantly weaken manufacturers’ incentives to conduct new safety studies, to monitor their drugs in the marketplace, to improve them post-approval, and to supply FDA and doctors with new or revised safety information,” the brief said. “Moreover, it would deprive physicians of the important drug safety information that has unfortunately come to light only in failure-to-warn litigation. In the absence of viable alternative sources for this information, physicians would be unable to provide patients with the best possible care and patient safety would be at risk.”\(^{32}\) The American Tort Reform Association’s general counsel, Victor Schwartz, issued the following statement regarding the decision in Wyeth:

> Personal injury lawyers will applaud today’s Supreme Court division, but we caution against any over-reading of the Court’s ruling. As the Court’s decision makes clear, implied preemption cases are fact-intensive, turning on what information the agency considered in a specific instance.

The Supreme Court’s decision focuses more attention on the flipside of the federal preemption coin. Several states have already determined, through courts or legislatures, that due deference should be given to the FDA in assessing the validity of a medicine’s warnings, particularly when there has been no wrongdoing by the defendant. The unfortunate truth is that all medicines come with risks. States should pick up the baton left for them today and join these other states in yielding to FDA scientists when, after years of earnest study, the FDA stamps a drug as safe and effective when accompanied by warnings explaining a medicine’s known risks.\(^{33}\)

### VI. Congress’s Reaction

One day after the Supreme Court announced its decision in Wyeth, Democratic lawmakers reintroduced a bill that also would allow state common law actions against companies that make heart devices, catheters, hip replacements and other medical devices. If enacted, the federal legislation would overturn the U.S. Supreme Court’s decision in Riegel v. Medtronic, Inc.,\(^{34}\) that held that state common law suits against manufacturers of regulated medical devices are preempted by federal law.

On February 20, 2008, the U.S. Supreme Court held that the federal Medical Device Amendments (MDA) of 1976 preempted common-law claims challenging the safety or effectiveness of a medical device marketed in a form that received premarket approval from the FDA.\(^{35}\)

In Riegel, Charles Riegel and his wife brought suit against Medtronic, Inc., after a Medtronic catheter ruptured in Charles Riegel’s coronary artery during heart surgery. The catheter was a Class III device that received FDA premarket approval. The Riegels alleged that the device was designed, labeled, and manufactured in a manner that violated New York common law.

In the 8-to-1 decision, the Supreme Court observed that the Medical Division Amendments of 1976,\(^{36}\) (MDA) imposed a

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\(^{35}\) Id.

\(^{36}\) 21 U.S.C. § 360e et seq.
regime of detailed federal oversight and included an express preemption provision.\(^{37}\)

The Court proceeded to determine whether the federal government had established requirements applicable to Medtronic’s catheter and, if so, whether the Riegel’s common law claims are based upon New York requirements with respect to the device that are different from, or in addition to, the federal one, and that relate to safety and effectiveness.\(^{38}\) The Court found that Medtronic’s catheter fell under the federal government’s medical devices requirements.\(^{39}\) Next, the Court found that the MDA’s preemption clause removed all means of judicial recourse for consumers injured by FDA-approved devices.\(^{40}\) Even though the FDA supported the Court’s position regarding the preemption, the Court “found it unnecessary to rely upon that agency view because the state itself speaks clearly to the point at issue.”\(^{41}\)

In the sole dissenting opinion, Justice Ginsburg wrote that “Congress . . . did not intend § 360k(a) to effect a radical curtailment of state common-law suits seeking compensation for injuries caused by defectively designed or labeled medical devices.\(^{42}\) Prior to Riegel, seven federal appeals courts, including the one in Riegel’s case, had interpreted federal law on medical devices as prohibiting state lawsuits. Only the 11th U.S. Circuit Court of Appeals had ruled otherwise.

Justice Roberts spoke to the difference between Riegel decision and the Wyeth decision. According to Justice Roberts, “In the medical device area, of course, you have an express preemption clause, while [in the medications area] in contrast you don’t,” Roberts said. “And one reason perhaps that it didn’t is that when the Drug Act was passed, you had an established background of state actions; when the Medical Device Act was passed, you didn’t.”

* * *

\(^{37}\) Riegel 129 S.Ct. at 1003.
\(^{38}\) Id. at 1006.
\(^{39}\) Id. at 1007.
\(^{40}\) Id. at 1008-1009.
\(^{41}\) Id. at 1009.
\(^{42}\) Id. at 1013.
sport. It was more soap opera than anything else. And it created a culture that transformed, and some would say, disfigured, our profession.

Today the evidence is pretty clear that our profession is suffering from a spate of bad behavior. Almost 70% of lawyers surveyed for “The Pulse of the Legal Profession,” a comprehensive 2006 ABA study surveying the opinions of 800 lawyers, believe that “lawyers have become less civil to each other over time.” Anecdotal evidence reinforces this conclusion as well. It’s no surprise that happiness in the profession is sliding as well. The New York Times reported in January 2008 that lawyers, as well as doctors, find less satisfaction in their work, and quoting an ABA Survey, stated “Forty-four percent of lawyers recently surveyed by the ABA said they would not recommend the profession to a young person.”

You can look for other evidence of a decline of civility. In 2005, before a high school civics class, Senate President Harry Reid called President Bush a “loser” and no one flinched. The next year, Venezuela President Hugo Chavez joined the fray likening President Bush to the devil.

And how many of us have received requests from friends or other attorneys requesting counsel, often in domestic relations cases, for the proverbial “pit bull.” Or maybe not a jerk, but an aggressive, obnoxious, contentious zealot to do the client’s heavy lifting. Some potential clients obviously think they need a jerk on their side. And with the Supreme Court allowing advertising by lawyers, the race to the bottom started many years ago, with lawyers invoking imagery that would hardly represent the legacy of Mason or Matlock.

As reported in a February, 2008 Wall Street Journal article, the Florida bar “filed a complaint in 2004 against a Fort Lauderdale personal-injury attorney Marc Andrew Chandler over advertisements that featured a pit bull wearing a spiked collar.” The Florida Supreme Court sided with the Bar in 2005, ruling that pit bulls conjure up images of viciousness. “Were we to approve,” the court wrote, "images of sharks, wolves, crocodiles, and piranhas could follow.” Attorneys who used 1-800-PITBULL were disciplined by the Florida Supreme Court.

Which raises the question – are aggressive, obnoxious attorneys successful? Does that represent a successful trial strategy? In other words, do nice guys win out over the jerks of the world? Do juries like pit bulls? And do they consider their style effective? Turns out, what evidence we have, suggests, no, they don’t. And the debate is not even close.

Jo-Ellan Dimitrius is one of the most famous jury consultants, having the distinction of serving as a consultant on O.J.’s first criminal trial. She wrote a book with Mark Mazzarella entitled Put Your Best Foot Forward. Their conclusions reflect that countless juror surveys confirm that “aggressive behavior, while sometimes associated with confidence, gives rise to predominately negative impressions of truthfulness, caring, humility and capability. People like to be led, not pushed. An aggressive, in-your-face, dominant approach is seen as an effort to achieve with force what cannot be achieved with reasoned, caring, and honest behavior.”

There is additional evidence of this point. As part of a CLE presentation to the Kansas Bar Convention last year, I interviewed two prominent jury consultants, Pete Rowland and Merrie Jo Pitera of Litigation Insights, Inc. Pete offered these observations: “For roughly 20 years, we have been conducting interviews of jurors.

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43 Alex Williams, The Falling Down Professions, THE NEW YORK TIMES, Style at 1 (January 6, 2008).
45 Id.
46 Dimitrius, Jo-Ellan and Mazzarella, Mark, Put Your Best Foot Forward: Make a Great Impression by Taking Control of How Others See You (Fireside, 2002).
47 Id. at 138.
Using either exit interviews with jurors or questionnaires with mock jurors. We frequently ask them to evaluate the attorneys. And the most productive question we ask them is ‘If you had to hire one of the attorneys for a case that was going to trial, which of these attorneys would you hire? And why?’ And some very consistent results come out of that.”

“First of all, they will reference the attorney they like the most by how confident he or she was, and how credible he or she was. If we asked them follow-up – what led you to those attributions, they will reference commitment – and their examples usually have to do with organization – how they knew their case, they knew their questions, they didn’t waste the juror’s time, concession – willingness in a courteous way to admit points that, in the juror’s mind, was obvious and needed to be conceded, and then, the word they used was respect – it’s cued by a perception of courtesy – respect to the court, respect to the jurors, and respect to those witnesses who had to be there. It’s particularly important nowadays to corporate defendants. The jurors want to see the plaintiff treated with respect.”

Merrie Jo has this observation: “What jurors tell us about an aggressive style in cross examination – many attorneys feel that from a dramatic stand-point, that may be appreciated by the jurors – and what we learn from our exit interviews is that an aggressive style can adversely affect the attorney’s credibility. What they do appreciate is more of an assertive, confident style. What that translates to is a specific example for interruptions. An assertive attorney, who recognizes that a witness is going on and on and on, and nicely interrupts the witness to stop the ramble. That approach is seen as a good method for interruption – it keeps a tone of politeness to it. However the attorney who is aggressive, picking on the witness, cutting them off, and just being disrespectful – that approach has two effects: 1) It increases the credibility of the witness; and 2) It decreases the attorneys’ credibility as now you are seen as the “badgerer” – showing disrespect, and that affects your credibility going forward.”

In the ground-breaking 1993 law review article, Valerie Hans and Krista Sweigart concluded: “The first misconception is that many attorneys believe that they should not be concerned about whether or not the jury likes them….. People accept a message more readily when they like the messenger.” An additional misconception is that “jurors want to see a warrior or “Rambo” attorney… warrior tactics reduce the attorney’s credibility when it counts: An attorney who is constantly on the attack loses the opportunity to signal to the jury when he or she feels the witness really is lying.”

Hans and Sweigart further found that issues that appeared to influence the way jurors evaluated attorneys were the credibility and demeanor of the attorneys, the emotionality of their arguments, and their organization of the case. Attorneys who were not credible, had poor demeanor, used excessive appeals to the jurors’ sympathy, or were poorly organized, tended to alienate the jurors. These points are best illustrated by specific examples from cases in which one attorney was considered to be better than the other. In one case involving a sports injury that left the plaintiff paralyzed, the majority of the jurors who favored the plaintiff’s attorney referred to the level of the attorney’s organization in explaining why they preferred him. Since he appeared to be better organized, the jurors concluded that he was a better attorney. Moreover, the defendant’s lawyers did not seem to be as involved in the proceedings.

“In a case in which the defense attorney was reported by the jurors to have badgered a medical witness, the witness performed well under the circumstances and increased his credibility in the minds of many jurors…. By constantly pressing the plaintiff’s witness, the defendant’s attorney made the jurors feel uncomfortable and sympathetic to

the witness. Because the witness was consistently able to answer the attorney’s questions during the cross-examination, the attorney actually increased the witness’s credibility, instead of decreasing it. Thus, in these cases the attorneys seemed to gain nothing from badgering a witness. The jurors were more likely to sympathize with roughly treated witnesses, and less likely to believe, when witnesses were badgered, that inconsistencies in their testimony were a result of weaknesses in the case.49

IADC Member Chilton Varner in Atlanta offered her own observations: “Good manners come in lots of different forms. Deference and politeness to court officials (judge, court reporter, bailiff, clerk) shows the jury who you are (and, my mother would say, how you were raised). Jurors notice whether courtroom personnel like you. Helpfulness to the opponent can reap benefits, too, such as helping with an easel or assisting in straightening out a snafu with exhibits. Such instances can suggest that you are the one actually in control. There can be other advantages. In a most difficult trial involving catastrophic injuries, the jury had deliberated for several days. At long last the parties and attorneys returned to hear the verdict. Before the jury had fully assembled back in the jury box, the federal marshal turned to me and asked "How are you doing?" "I don't know," I responded; "guess it depends on this jury." The marshal gave me a discreet wink and murmured "I think you'll do okay." That wink lifted the pressure of that awful wait for the jury to read the verdict. It later turned out that as the jury was being escorted from the jury room, the marshal had overheard a telling comment by one of the jurors as to how they had decided the case. On a later trip to the venue I stopped by the courthouse to give that marshal an Atlanta Braves baseball hat - he was a fan.”

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49 Id. at 1325.
*Philip Morris* is the third decision in a line of Supreme Court decisions reflecting the Court’s intent to limit punitive damages. In *Gore*, the Court held that the punitive amount must bear a reasonable relationship to compensatorily or harm to the plaintiff. Seven years later, the Court in *State Farm* held that punitive damages can only punish the conduct that harmed the plaintiff, not the other bad conduct. More recently, the Court decided *Philip Morris*, holding that punitive damages cannot punish a defendant for causing harm to persons not before the court.

In *Philip Morris*, the Supreme Court held that a punitive damages award based in part on the jury’s desire to punish a defendant for harming nonparties, i.e., strangers to the litigation, was tantamount to taking of property from the defendant without due process. 127 S.Ct. at 1060. The underlying action, litigated in Oregon, arose out of the death of Jesse Williams, whose estate brought suit against Philip Morris. At trial, the jury found that Williams’ death was caused by smoking, that he smoked because he thought it was safe to, and that Philip Morris knowingly and falsely led him to believe it was safe to smoke. The jury awarded compensatory damages of about $821,000, along with $79.5 million in punitive damages. The trial judge found the $79.5 million punitive damages award excessive, and reduced it to $32 million. Both sides appealed.

The Oregon Court of Appeals restored the $79.5 million punitive damages award. Philip Morris then sought review in the Oregon Supreme Court, which denied review, and then sought review before the United States Supreme Court, which granted review and remanded the case in light of *State Farm*. On remand, the Oregon Court of Appeals adhered to its prior decision, but this time the Oregon Supreme Court heard the appeal. Before the Oregon Supreme Court, Philip Morris argued: (1) that the trial court should have accepted a proposed jury instruction telling the jury that it could not seek to punish Philip Morris for injury to persons not before the court; and (2) that the roughly 100-to-1 ratio of punitive damages to compensatory damages was grossly excessive. The Oregon Supreme Court rejected both of Philip Morris’ arguments, and the United States Supreme Court once again granted certiorari, this time, to consider whether Oregon had unconstitutionally permitted it to be punished for harming nonparty victims, and whether Oregon had disregarded “the constitutional requirement that punitive damages be reasonably related to the plaintiff’s harm.” *Id.* at 1062.

The Court ultimately considered only the first of the questions for which it accepted certiorari, and held that punitive damages cannot be awarded for harm to nonparties, because a State cannot punish an individual without first providing that individual with “an opportunity to present every available defense.” *Id.* at 1063. The Court reasoned that “a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant’s statements to the contrary.” *Id.* The Court also anticipated the problem of jury speculation regarding how many nonparty “victims” there were, how seriously they were injured, and under what circumstances they were injured, thus magnifying the risk of arbitrariness, uncertainty, and lack of notice in whatever award was rendered. *Id.*

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50 One issue of potential concern to a product liability defendant relying on *Philip Morris* is its discussion regarding the admissibility of evidence of actual harm to nonparties to help show reprehensibility of the conduct—namely, that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public. *Id.* at 1064. In a product liability action arising out of a defect claimed in a mass-produced product, however, the response to this argument is that evidence of actual harm to nonparties is almost never necessary because the very nature of a mass produced product necessarily creates a risk of injury to many persons. Since that aspect of “reprehensibility” is a given, the trial court should
The Court remanded the case to the Oregon Supreme Court to apply the correct constitutional standard set forth in its decision. Anticipating that the application of the standard might lead to a new trial, the Court did not consider the second question raised—whether the award was “grossly excessive.” Id. at 1065.

The Oregon Supreme Court’s decision on remand imports a valuable lesson to those seeking to have a trial court limit the evidence on which a punitive damages award may be based. The Oregon Supreme Court, applying the Supreme Court’s constitutional standard, held that Philip Morris’ proposed jury instruction to the trial court was flawed, and reaffirmed its prior decision that the trial court did not err in refusing to give the instruction. Williams v. Philip Morris Inc., 344 Or. 45, 176 P.3d 1255 (2008). In so holding, the Oregon Supreme Court focused on Philip Morris’ argument that the trial court failed to give a proposed jury instruction, determining that Philip Morris did not raise and therefore failed to preserve for review any claim that the jury instructions actually given were erroneous. Id. at 56, 176 P.3d at 1261. The court relied on an Oregon standard that an appellate court will not reverse a trial court’s refusal to give a proposed jury instruction unless that instruction was “free from error.” Id.

Given the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State’s (or one jury’s) policies upon other States … it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance.

Because the proposed jury instruction, which included more than the instruction that a jury is not to consider harm to nonparties, was not free from error, and in fact misstated Oregon law (according to the court), the court held that the trial court did not err in refusing to give it. Id. at 61, 176 P.3d at 1263.51

One lesson to be learned from it is to make sure to object to the instructions given by the Court as a whole, rather than just objecting to the failure to give the instruction, if required in the relevant jurisdiction to preserve an appeal. Philip Morris is not just a jury instruction case. It stands for an important procedural due process principle involving the right to be heard and to defend those other claims. Philip Morris can, and should, be used in conjunction with Gore and State Farm for the argument that the standards for imposing punitive liability in product liability actions are unconstitutionally vague.

**Exxon Shipping Co. v. Baker**

Last year, the Supreme Court again revisited the issue of punitive damages in Exxon Shipping Co. v. Baker, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008). This time, however, the Supreme Court was not addressing constitutional issues because the case arose under federal maritime jurisdiction. Still, Exxon Shipping went beyond a mere discussion of punitive damages as applied to maritime cases and provides a useful insight into the Court’s current position on the excessiveness of punitive damages awards.

In Exxon Shipping, the Court denounced the “stark unpredictability of punitive

51 The Supreme Court again granted certiorari on June 9, 2008, limited to the question of whether the Oregon Supreme Court properly followed the Court’s direction to apply the proper constitutional standard. Philip Morris USA v. Williams, 128 S.Ct. 2904, 171 L.Ed.2d 840 (2008), but dismissed the grant of certiorari on March 31, 2009, Philip Morris USA Inc. v. Williams, 129 S.Ct. 1436, 173 L.Ed.2d 346 (2009), following oral argument heard on December 3, 2008.
awards,” and declared its skepticism at “verbal formulations, superimposed on general jury instructions.” Exxon Shipping Co., 128 S.Ct. at 2625. Setting forth its doubt “that anything but a quantified approach will work,” id., the Court imposed a 1:1 ratio between compensatory damages and punitive damages in “such maritime cases.” Id. at 2634. But while the case applies to maritime law, the Court focused on the inconsistency of punitive damages awards across the board, giving a revealing look into its concern over current punitive damages awards throughout the country in civil cases. The Court analyzed figures of punitive damages awarded by juries in state civil trials, and found that:

Starting with the premise of a punitive-damages regime, these ranges of variation might be acceptable or even desirable if they resulted from judges’ and juries’ [sic] refining their judgments to reach a generally accepted optimal level of penalty and deterrence in cases involving a wide range of circumstances, while producing fairly consistent results in cases with similar facts. Cf. TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 457-458, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (plurality opinion). But anecdotal evidence suggests that nothing of that sort is going on. One of our own leading cases on punitive damages, with a $4 million verdict by an Alabama jury, noted that a second Alabama case with strikingly similar facts produced “a comparable amount of compensatory damages” but “no punitive damages at all.” See Gore, 517 U.S., at 565, n. 8, 116 S.Ct. 1589. As the Supreme Court of Alabama candidly explained, “the disparity between the two jury verdicts … [w]as a reflection of the inherent uncertainty of the trial process.” BMW of North America, Inc. v. Gore, 646 So.2d 619, 626 (1994) (per curiam). We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances.

Id. at 2625-26. The Court noted that the state law cases could only be considered under the constitutional due process issue, and “could provide no occasion to consider a ‘common-law standard of excessiveness.’” Id. at 2626.

Exxon Shipping, being such a recent decision, has not been interpreted or applied by many courts. The Western District of Pennsylvania has looked at it in the context of a Section 1983 claim, and discussed in dicta that while not applicable to the issue before it, “[a]lthough Exxon is a maritime law case, it is clear that the Supreme Court intends that its holding have a much broader application.” Hayduk v. City of Johnstown, 580 F.Supp.2d 429, 484 n.46 (W.D. Pa. 2008).

Exxon Shipping is not just a maritime law case. Rather, it provides instructive insight into the Court’s concern over the vague standards used by most states for imposing punitive liability, and the resulting problem of “outlier” punitive damages awards that are inconsistent between the same types of cases, causing the very arbitrariness, uncertainty, and lack of notice that Philip Morris denounced.

Conclusion

With the recent cases of Philip Morris and Exxon Shipping, the Supreme Court has continued to expand upon the Court’s prior decisions in Gore and State Farm, further limiting punitive damages and criticizing the framework upon which punitive liability is imposed. After Philip Morris, a court cannot permit a jury to render a punitive damages verdict based on harm to nonparties. But more than that, it can and should be used to argue that the standards for imposing punitive liability in product liability actions are unconstitutionally vague. Exxon Shipping provides the reasons and data showing that current standards for imposing punitive
liability are unconstitutionally vague, and nothing more than a quantified approach will work.

**CONFLICTS**

This article originally appeared in the June 2009 Professional Liability Committee Newsletter.

IADC Member CARTER L. HAMPTON is Board Certified in Civil Trial Law, a retired judge and is a nationally recognized expert in Law Firm Risk Management and Loss Prevention. You may contact Carter at his office phone: 817-877-4202; cell phone: 972-896-8696; or email: CLHampton@HamptonLawOnline.com

The one word answer for why the firm made the headlines in the newspaper today. Yes, the most severe legal malpractice settlements and verdicts all come from conflict claims. Visualize the sting of seeing “Breach of Fiduciary Duty” and “Punitive Damage” when reading the demand letter or pleadings.

While it’s true that conflicts are a complicated matter particularly in larger firms with thousands of clients, keep this short newsletter as a referral primer when a thought or concern arises. Remember the top ten causes of conflict problems and know the rules.

There are six primary Model Rules of Professional Conduct that govern most conflict situations as well as your own state code of professional conduct on rules to which lawyers should be familiar. These rules should be reviewed every time a conflict disclosure or waiver is prepared. Such time should be accounted for and may or may not be billed. Why do it and account for the time you ask? Draw near and I will tell you a horrifying tale.

Imagine you are in court defending the spurious claim, because it will not occur during your deposition. Plaintiff’s counsel has discovered all your time records prior to trial and now comes to the close of your direct examination. He finishes something like this. “Counselor prior to asking your ex-client to sign this conflicts waiver (better yet if there is no writing) did you have an occasion to refer to the State Rules of Professional Conduct on Conflicts?” Whether this line of questioning goes forward or not, the damage is done. Follow-up “Counselor prior to asking your ex-client to sign this conflict waiver did you review the case law in this great state, the court decisions concerning conflicts?” Again, the damage is done.

Plaintiff’s counsel gleaned from your time records that you had not spent any time so she knew the answer or was prepared to impeach the answer. If your review had been time entered you would be defending the real facts.

The second thing to refer back to in this newsletter is the top ten problem areas and why, which came from real legal malpractice suits and claims.

10. Representing Multiple Plaintiffs – One is one. Two or more is never one. Always follow the one client one lawyer rule. We are all granted the same rights not the same results.

9. Representing multiple defendants – who is the client? Is the client the board, president, shareholders, general partner or limited partner, etc. Picture a minefield.

8. Agreeing to a matter that is adverse to a current client.

7. Agreeing to a matter that is adverse to a former client.

Both 7 & 8 run the risk of alleged misuse of information acquired in confidence.

6. Representing all the parties in a transaction. The “I was only the Scrivener”
defense never works and both sides can sue you for malpractice.

5. Insured vs. Insurer. You really do need the three legs to balance the stool of the tri-partied relationship.

4. Doing business with your clients. This creates the perception that the attorney has an advantage and that the dealings are unfairly weighted in your favor.

3. Changing the terms of your service (fee) agreement. Again the perception is that the client is at a disadvantage and you the attorney took advantage to line your pockets.

2. Prejudging the matter based upon a concern of not getting paid. Word to the wise, always place payment concerns in a separate letter that starts with the sentence: “Just a follow up on our conversation . . .”

1. The continued representation after a conflict develops. This is number one because it is a sleeper issue. Conflicts are checked at the beginning of the representation but should be checked again when facts unfold by way of witness or documents and/or when parties are added or subtracted. Does the firm have a procedure in place to catch subsequent activity?

Now keep up the good work!

* * *
Law Review Highlights:

The right of publicity is a tort that was initially considered derivative of a person’s right to privacy. Over the years, however, the tort has morphed into a right that is more prominently built on property interests. Two recent student articles look specifically at developments in the tort of the right of publicity.

In his note Goodbye, Norma Jean: Marilyn Monroe and the Right of Publicity’s Transformation at Death, Michael Decker considers whether a right of publicity should exist after the death of the person whose image is at issue.1 Using the case Shaw Family Archives Ltd. v. CMG Worldwide, Inc.2 as a starting point, Decker argues that a postmortem right of publicity is unjustified. He asserts that, in fact, such an extension of the right does more to protect the economic interests of licensing companies than it does the persona of the deceased celebrity or public figure. As a result he concludes that the result in Shaw, which does not allow for a right of publicity after death, should remain the standard.

A second student article, Image As Personal Property: How Privacy Has Influenced the Right of Publicity,3 looks more closely at the transformation of the right of publicity from a privacy-based tort to a property-based tort. In his comment, Robert Thompson notes that in spite of this move toward the view of the right of publicity as a property right over the years, recently there has been a trend in the courts that swings the pendulum back toward a more privacy-based justification for the right of publicity. While acknowledging some of the limitations of a strict property-based theory of publicity, the author argues that using privacy as the sole basis for the tort does not address other equally troubling concerns in applying the law. Because of the drawbacks of both theories when used separately, Thompson argues for a synthesis of these competing justifications when courts analyze the right of publicity.

The following list is a selective bibliography of current law review literature thought to be of interest to civil defense counsel.

U.S. and International Damages

Manuel A. Abdala, Key Damage Compensation Issues in Oil and Gas


**Insurance**


**Procedure**

[<http://www.law.wfu.edu/lawreview.xml>]

[<http://lawreview.stanford.edu/>]

[<http://www.sule.edu/sjournalLawReview.php>]

[<http://law.unl.edu/illlawreview.html>]

[<http://www.utexas.edu/law/journals/law/journal.cfm?id=1>]


[<http://www.smu.edu/lra/lr/>]

[<http://www.law.umn.edu/mjil/index.html>]

[<http://lawreview.law.edu/page.cfm?id=1>]

[<http://www.chapman.edu/law/students/lawReview/default.asp>]

[<http://www.law.nyu.edu/journals/lawreview/>]


[<http://law.richmond.edu/lawreview/default.htm>]

**Products Liability**

[<http://www.uiowa.edu/~lawjcl/>]

[<http://www.wsulawreview.org/>]


[<http://www.thefederation.org/process.cfm?PageID=2054&TopLevel=2054>]


**Professional Responsibility**


**Torts**


[http://www.law.emory.edu/students/eilr/]

[http://www.law.wfu.edu/lawreview.xml]

[http://www.law.emory.edu/students/elj/]

[http://students.law.umich.edu/mjlr/]

[http://new.stjohns.edu/academics/graduate/law/journals/catholiclegal/]

[http://www.valpo.edu/law/studentlife/lawreview.php]


[http://www.law.harvard.edu/students/orgs/jol/]

[http://www.law.emory.edu/students/elj/]

[http://www.georgetownlawjournal.org/]

[http://www.gmu.edu/departments/law/gmucljr/]


Joseph H. King, *Defamation Claims Based on Parody and Other Fanciful Communications Not Intended to Be Understood As Fact*, 2008 UTAH L. REV. 875.  
[http://www.law.utah.edu/academic/utahlawreview/]


