
Why should litigators care about Kindred and Taylor? These cases represent the death knell of state court attempts to mitigate what some view as the harsh effect of mandatory arbitration clauses that preclude litigants from seeking redress in court. For plaintiffs’ attorneys, there is a world of difference between litigating before a judge and jury in a public process with possibility of appeals and litigating before one or three arbitrators in a confidential process with limited opportunity to appeal. Many critics question the fairness of these arbitration contracts that appear in everyday agreements like banking, credit card, consumer, employment and even car repair contracts. Many critics also view arbitrations as potentially one-sided, benefiting the company more than the consumer, while businesses find arbitration efficient, predictable and streamlined.

The Pennsylvania Supreme Court in Taylor upheld a mandatory arbitration clause in a nursing home contract, holding that the Federal Arbitration Act, 9 U.S.C. §2 et seq. (“FAA”), preempted Pennsylvania Rule of Civil Procedure 213(a), which requires joinder or consolidation of wrongful death and survival action suits.

The decedent in Taylor had executed an arbitration contract with her nursing home upon admission. When she died from medical complications after her admission into an Extendicare facility, her executors filed suit in court alleging wrongful death and survival claims. The executors filed the survival action on the decedent’s behalf for her personal injuries while they filed the wrongful death action on their own behalf for their own economic loss. They tried to consolidate the two cases under Rule 213(a), notwithstanding the decedent’s arbitration contract with Extendicare.

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Even though adjudicating the similar cases in two different forums raised the possibility of inconsistent decisions, Justice Wecht’s opinion held that the FAA and Supreme Court precedents required enforcement of the arbitration contract.

In so doing, he discussed at length the Supreme Court’s decisions preempting state law in favor of the FAA and quoted critics calling the FAA a “preemption juggernaut.” Id. at 504. He further stated that the FAA is now perceived as applying to almost every arbitration agreement. Although the FAA reserves courts’ power to refuse to enforce arbitration agreement under generally accepted state defenses to contracts, the “savings clause” (9 U.S.C. §2), U.S. Supreme Court decisions raise the question as to whether these defenses exist anymore. See, e.g., AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S.Ct. 1740 (2011) (California Supreme Court rule finding class action waivers in contracts unconscionable violates the FAA).

Justice Wecht’s decision foretold the clash between the Kentucky Supreme Court and the U.S. Supreme Court in Kindred. Justice Kagan, writing for the court, considered the Kentucky Supreme Court’s refusal to compel arbitration under two nursing home contracts. Both contracts had been signed by their respective powers of attorney but contained different language.

Beverly Wellner’s power of attorney gave her expansive authority to take care of her decedent’s estate, including filing legal proceedings and making contracts of “every nature in relation to both real and personal property.” Kindred, 137 S. Ct. at 1425. In contrast, the other power of attorney gave Olive Clark “full power … to transact, handle and dispose of all matters affecting me and/or my estate in any possible way,” including the right to draw, sign and make … contracts …” Id.

The Kentucky Supreme Court acknowledged that Clark’s power of attorney would grant authority to enter into an arbitration contract while the Wellner grant of authority was not sufficiently expansive to include that authority. Id., citing Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 327 (Ky. 2015).

Yet the Kentucky Supreme Court found both agreements invalid because they failed to include a “clear statement” that the principal granted the authority to waive “adjudication by judge or jury.” Kindred, 137 S. Ct. at 1426, quoting Extendicare, 478 S.W. 3d at 329. These rights, ensured by the Kentucky Constitution, cannot be relinquished without a “clear statement” specifically waiving them. Id. at 329-29. Without such a “clear statement,” the power of attorney lacked the authority to enter into an arbitration contract waiving these rights.

The U.S. Supreme Court soundly rejected this argument. The court stated that under the FAA, arbitration agreements are “valid, irrevocable and enforceable, save upon any grounds as exist in law or in equity for the revocation of any contract.” Id. at 1426-27, citing 9 U.S.C. §2. It further stated that “[t]he FAA … preempts any state rule discriminating on its face against arbitration…” Id. at 1426. In addition, the FAA “also displaces any rule that covertly accomplishes the same objective by disfavoring contracts “that… have the defining features of arbitration contracts.” Id. The Kentucky Supreme Court’s “clear statement rule” disfavors arbitration contracts by creating a legal rule that specifically applies to arbitration, whose very definition is a trial without jury. Id.

As a result, the court reversed the Kentucky Supreme Court’s decision in the Clark case. However, it remanded the Wellner case. Before applying the “clear statement rule,” the court stated that the Wellner power of attorney failed to grant authority to enter into an arbitration contract. Id. at 1425, citing Extendicare, 478 A.3d 325-26. If the court maintained that position independent of the “clear statement rule,” then its position regarding the invalidity of the contract could be sustained. Id. at 1429.

Not surprisingly, on remand, in an opinion representing a clash of federalism, the Kentucky Supreme Court once again found the Wellner arbitration contract invalid. Kindred Nursing Centers Ltd P’ship v. Wellner, 2017 WL 5031530 (Ky. Nov. 2, 2017).

Taking great pains to demonstrate the court’s decision was “[pure] from the taint of anti-arbitration bias,” (Slip op. at 5), the court once again reviewed the language of the Wellner power of attorney. It zeroed in on two grants of authority: the power to “demand, sue for, collect, recover and receive all debts monies, interest and demands… whatsoever” and the power to “institute legal proceedings.” Wellner, Slip op. at 7. It viewed these authorizations as permitting arbitration or mediation of a pending suit, but not authorizing arbitration pre-dispute. Wellner, Slip op. at 8.

Yet there was another grant of author-
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ity: “the power to make ‘contracts … in relation to both real and personal property.’” Kindred, 137 S. Ct. at 1425. Here the court found that the pre-dispute contract had nothing to do with any property rights of the decedent. While the power of attorney might have had the right to arbitrate any personal injury claim for the decedent, she would have no right to enter into a pre-dispute arbitration agreement, relinquishing his constitutional rights.

The dissent noted that the majority opinion had created a false distinction between pre-dispute and post-dispute agreements. An arbitration agreement is entered into, the dissent argued, contemplating that at some time a dispute might arise. As a result, most if not all arbitration contracts are pre-dispute and the majority’s argument is specious. It concluded that the majority’s analysis of the Wellner power of attorney is “…impermissibly tainted by the same anti-arbitration bias as the so-called clear statement rule.” Wellner, Slip op. at 14. As of this writing, the Supreme Court docket does not show that Kindred LLP has filed for certiorari at the U.S. Supreme Court.

What is the clear and fast rule for litigators? Taylor and Kindred appear to be the law in Pennsylvania. However, the Third Circuit offered a glimmer of hope for non-signatories to contracts. See White v. Sunoco, Inc., 2017 WL 3864616 (3d Cir. Sept. 5, 2017) (affirming district court decision refusing to grant Sunoco’s motion to compel arbitration because it was not a signatory to the agreement containing arbitration clause).

Accordingly, litigators should assume most arbitration contracts will prevail. While pockets of resistance remain and some scattered efforts might prevail, the best wisdom is that resistance to arbitration contracts may be futile.

Hon. Stephanie H. Klein (Ret.) is a mediator and arbitrator affiliated with ADR Options in Philadelphia. She focuses her practice in the areas of employment, personal injury, commercial and real estate.

Proposed Adoption of Pa.R.C.P. 241

Motions For an Award of Counsel Fees Under Section 2503 Must Be Filed Within 30 Days

By Matthew E. Selmasska

The Civil Procedure Rules Committee is planning to propose the adoption of Pa.R.C.P. 241 to the Pennsylvania Supreme Court: an entirely new rule governing the timing of filing a motion for an award of counsel fees. The proposed rule would mandate that any award of counsel fees under Section 2503 of the Judicial Code must be made within 30 days of either (1) a discontinuance as to all claims and parties under Rule 229; (2) the entry of a final order; or (3) the entry of a judgment following trial in a trial court.

The proposed rule emerged following the Commonwealth Court’s decision in Ness v. York Township Board of Commissioners, 123 A.3d 1166 (Pa. Cmwlth. 2015). The Ness court acknowledged that the Pennsylvania Rules of Civil Procedure are silent as to when a motion for attorneys’ fees must be filed and held that a trial court does not have jurisdiction to act on a claim filed more than 30 days after entry of final judgment. Nevertheless, the Ness court noted that under Samuel-Bassett v. Kia Motors America, Inc., 34 A.3d 1 (Pa. 2011), the Pennsylvania Supreme Court has recognized that a trial court would retain jurisdiction on a motion for attorney’s fees during the pendency of an appeal. The proposed rule also requires motions for attorney’s fees include, at a minimum: (1) the Section 2503 grounds that entitle a party to fees; and (2) the particular amount sought or a good faith estimate of the amount sought.

Read the proposed rule at www.pacourts.us.

All public comments, suggestions or objections to the proposed rule should be received by March 2, 2018, and addressed to Karla M. Shultz, Counsel for the Civil Procedural Rules Committee, Supreme Court of Pennsylvania, at civilrules@pacourts.us.

Matthew E. Selmasska is a J.D. candidate, class of 2018, The Pennsylvania State University School of Law. He is executive editor of the Arbitration Law Review.
A divided panel of the Pennsylvania Supreme Court remanded for a new trial plaintiff’s medical malpractice action based on the majority’s holding that the trial court committed reversible error when it instructed the jury to consider information provided by the defendant physician’s “qualified” staff in determining the merits of plaintiff’s informed consent claim. See Shinal v. Toms, 162 A.3d 429 (Pa. 2017) (Opinion by Wecht, J.).

In Shinal, the trial court instructed the jury with respect to the issue of informed consent: “you may consider any relevant information you find was communicated to [the plaintiff] by any qualified person acting as an assistant to [the defendant physician].” The jury returned a verdict in favor of the defendant physician (Geisinger Clinic). The Superior Court affirmed on appeal, relying on Bulman v. Myers, 467 A.2d 1353 (Pa. Super 1983) and Foflygen v. Allegheny General Hospital, 723 A.2d 705 (Pa. Super. 1999), both of which held that a physician may fulfill through an intermediary the duty to provide sufficient information to obtain a patient’s informed consent.

On subsequent appeal, the Pennsylvania Supreme Court, relying on its holding in Valles v. Albert Einstein Medical Center, 805 A.2d 1232, 1239 (Pa. 2002), held that “the duty to obtain a patient’s informed consent is a non-delegable duty owed by the physician conducting the surgery or treatment[,]” and therefore, “a physician cannot rely upon a subordinate to disclose the information required to obtain informed consent. Without direct dialogue and a two-way exchange between the physician and patient, the physician cannot be confident that the patient comprehends the risks, benefits, likelihood of success, and alternatives.” The court further reasoned that its finding was consistent with the plain language of the MCARE Act, 40 P.S. § 1303.504, which does not suggest “that conversations between the patient and others can control the informed consent analysis or can satisfy the physician’s legal burden.” The court overruled the Superior Court’s decisions in Bulman and Foflygen to the extent those decisions permit a physician to fulfill through an intermediary the duty to obtain informed consent. Accordingly, the court reversed the Superior Court order affirming the trial court’s denial of plaintiff’s motion for post-trial relief, and remanded for a new trial. The AMA and the Pennsylvania Medical Society submitted an amicus brief supporting the physician's position that he had fulfilled his obligations under Pennsylvania’s MCARE Act as well as under common law established in previous court rulings.

Three justices dissented from this portion of the majority opinion, cautioning that the holding would “have a far-reaching, negative impact on the manner in which physicians serve their patients. For fear of legal liability, physicians now must be involved with every aspect of informing their patients’ consent, thus delaying seriously ill patients’ access to physicians and the critical services that they provide.” (Baer, J., dissenting (joined by Saylor, J. and Mundy, J.).

Although finding no reversible error, the court also considered whether the trial court erred in failing to strike for cause three jurors and one alternate juror due to their employment, or the employment of a close family member, by non-party Geisinger entities. In doing so, the court clarified the standard of appellate review applicable to for-cause challenges, holding that an appellate court's standard of review should differ depending on whether bias is presumed, as resulting from the juror's close familial, financial, or situational relationships with the parties, counsel, victims, or witnesses, or bias is actual, as revealed by the juror's conduct and answers to questions. Where bias is presumed, appellate courts must review for an error of law, i.e., de novo, and where bias is actual, appellate courts must review for abuse of discretion. The majority opined that these two scenarios are not mutually exclusive, suggesting that at times, an appellate court should utilize some combination of a de novo and an abuse of discretion standard.
The majority concluded that, although some jurors perceived their relationships or those of their family members to be closer to the defendant physician’s employer than they actually were, “[n]one of the jurors believed that a verdict against [the defendant physician] would financially impact their employer or a family member’s employer, and each stated that he or she could act impartially.” Upon detailed review of the jurors’ answers during voir dire, the majority concluded that the trial court did not abuse its discretion in refusing to strike the jurors for cause.

While agreeing with the outcome reached by the majority, two justices dissented with respect to the standard of review articulated, finding that a more simplistic approach was warranted. (Baer, J., dissenting (joined by Saylor, J.)). One justice dissented with respect to the outcome, concluding that the trial court abused its discretion in failing to strike the jurors based on a finding that the juror testimony suggested actual bias, and that this error also warranted remand. (Todd, J., dissenting).

Katherine A. Hopkins, of Ward Greenberg Heller & Reidy LLP, focuses her practice in the areas of products liability, premises liability and commercial disputes. She also has experience handling mass tort, toxic tort and Dram Shop matters. Her clients include product manufacturers, commercial retailers, restaurants, hotels and child care facilities. Hopkins has published articles in the American Bar Association’s Real Property, Trusts & Estates Law Newsletter, the University of Toledo Law Review and the Rutgers Law Journal. She also serves as a reviewer for the Midwest Law Journal.

What's Going On at PBA

The PBA Conference of County Bar Leaders Seminar is Feb. 22-24 at the Lancaster Marriott at Penn Square, Lancaster.

The PBA Labor & Employment Section Council Retreat is March 2-3 at The Hotel Hershey, Hershey.

The PBA Commission on Women in the Profession Spring Conference is March 22 in Erie, Pittsburgh, Mechanicsburg, Scranton, Allentown and Philadelphia.

The PBA Statewide High School Mock Trial Competition is March 23-24 in Harrisburg.

The PBA Administrative Law Section Commonwealth Court Practicum is April 10. Details will be announced soon.

The PBA Civil Litigation Section Annual Retreat is April 13-15 at Skytop Lodge, Skytop.

The PBA Annual Meeting is May 9-11 at the Hershey Lodge, Hershey.

Save the Dates

The PBA Young Lawyer Division Executive Council Retreat is June 8-9 at the Gettysburg Hotel, Gettysburg.

The PBA Family Law Section Summer Meeting is July 12-15 at The Hotel Hershey, Hershey.

The PBA Young Lawyer Division Summer Summit is July 18-20 at the Penn Stater Hotel and Conference Center, State College.

The 21st Annual Elder Law Institute is July 19-20 at the Hilton Hotel, Harrisburg.

The PBA Solo and Small Firm Practice Section Conference is July 25-27 at the Omni Bedford Springs Resort, Bedford Springs.

The PBA Real Property, Probate & Trust Law Section Annual Retreat is Aug. 8-10 at the Wyndham Gettysburg Hotel, Gettysburg.

Unless otherwise noted, find more information in the PBA Events Calendar at www.pabar.org or call the PBA Member Services Center at 800-932-0311.
Section News

PBA Civil Litigation Section Retreat April 13-15

By Nicole Pérez-Lengel

Join fellow Civil Litigation Section members and other colleagues for an informative and entertaining weekend at the PBA Civil Litigation Section Retreat. Located at the Pocono Mountain premier resort Skytop Lodge, the retreat offers attendees up to 7.5 of CLE credits, including 5 hours of substantive credits and 1.5 hours of ethics credits.

This exciting program includes presentations by experienced litigators, experts and exceptional judges from throughout the commonwealth, including the following:

- Hon. Cathy Bissoon, District Judge, Western District of PA
- Hon. Marilyn Heffley, Magistrate Judge, Eastern District of PA
- Hon. Cynthia M. Rufe, District Judge, Eastern District of PA
- Hon. John H. Foradora, President Judge, C.C.P., Jefferson County
- Hon. Lisa M. Rau, C.C.P., Philadelphia County
- Hon. Stephanie Domitrovitch, C.C.P., Erie County
- Hon. Arthur L. Zulick, C.C.P., Monroe County
- Hon. Terrence R. Nealon, C.C.P., Lackawanna County

This year’s retreat includes CLEs on jury selection, proving and rebutting economic damages, electronic discovery and methods of retrieval, maintaining civility in depositions, effective mediation tips and winning strategies for bench trials.

The retreat includes plenty of time for networking with colleagues, experts and members of the bench. Friday features a cocktail reception and dinner with keynote speaker, Hon. Cynthia M. Rufe, U.S.D.J., Eastern District of Pennsylvania. Saturday includes a buffet dinner and a Quizzo Team Competition.

There will be plenty of free time throughout the weekend to enjoy the beautiful scenery, explore the area and take advantage of the many activities and amenities the resort has to offer. There will also be optional afternoon planned activities available to all attendees.

Additional Information

Registration Fees
- $450 members
- $375 members practicing fewer than 10 years
- $395 non-Civil Litigation Section members
- $795 non-PBA members

A limited number of special section member pricing of $450 are available; it includes guest room accommodations on Friday and Saturday nights and access to conference meals and CLE credits.

Nicole Pérez-Lengel is a member in the Philadelphia office of Bennett, Bricklin & Saltzburg LLC. She focuses her practice in premises liability, products liability, municipal law and motor vehicle liability.
The Civil Litigation Section is pleased to announce that it has selected a full editorial board for its *Civil Litigation Update* newsletter. The board and positions are as follows:

**Editor in chief:** Pamela A. Lee is a senior litigation attorney at DiOrio & Sereni LLP, Media, and focuses her practice in civil litigation, real estate tax litigation, personal injury and school law.

**Lead articles editor:** Thomas G. Wilkinson Jr., Cozen O’Connor, Philadelphia, is a past president of the PBA and past chair of the Civil Litigation Section. He concentrates his practice in commercial litigation and the law governing lawyers.

**Assistant lead articles editor:** Katherine Hopkins is an attorney with Ward Greenberg in Philadelphia, representing corporate clients in civil litigation defense and commercial disputes.

**Legislative and rules editors:** Matthew E. Selmasska is a J.D. candidate, Class of 2018, The Pennsylvania State University School of Law. He is executive editor of the Arbitration Law Review.

**Case reports editors:**
- Erin Kernan Aronson is an attorney in the litigation practice group at Eastburn and Gray, P.C. in Doylestown, Bucks County. She routinely represents clients in litigation relating to employment, corporate, education and real estate matters.
- Thomas E. Cocchi is an associate with Swartz Campbell LLC, Pittsburgh. He focuses his practice in toxic tort and workers’ compensation defense litigation.
- Ryan S. MacDonald, Saxton and Stump, Lancaster, focuses his practice in healthcare law, construction law, commercial litigation, and insurance.
- Bradley Smith is an associate attorney with Galfand Berger LLP in Philadelphia, where he represents plaintiffs in negligence and product liability matters.

**Sebastian Conforto** is an associate at McQuaide Blasko Inc., Hershey, and focuses his practice on medical professional liability defense.

**Nicole Pérez-Lengel** is a member in the Philadelphia office of Bennett, Bricklin & Saltzburg LLC. She focuses her practice in premises liability, products liability, municipal law and motor vehicle liability.

**Advertising editor:** position open

The *Civil Litigation Update* will be published quarterly. If you would like to write an article for the *Civil Litigation Update*, please contact Pamela A. Lee at plee@dioriosereni.com or Thomas G. Wilkinson Jr. at twilkinson@cozen.com.

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Use your PBA website login to access Casemaker. Once you have logged into the website, click on the Casemaker button on the right navigation bar and then click on the “Click here to enter Casemaker” link. That will put you directly into Casemaker. If you do not know your website login, contact PBA Member Services at 800-932-0311.