THE PASCHOS LAW UPDATE NEWSLETTER
THOMAS PASCHOS & ASSOCIATES P.C. ATTORNEYS AT LAW

March 1, 2012

I. FIRM NEWS

We are please to announce that Kevin J. Doyle, Esquire, has joined the Firm. Mr. Doyle is an experienced trial attorney, having graduated from Dickinson College in 1985, and Rutgers University School of Law in 1988.

II. EMPLOYMENT LAW

Pennsylvania Law Deeming Class Action Waivers to Be Unconscionable Is Preempted By the Federal Arbitration Act

In *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, --- F.3d ----, 2012 WL 833742 (3d. Cir. Pa. March 14, 2012), plaintiff, Janice Quilloin worked as a nurse at Hahnemann University Hospital run by Tenet Healthcare Corporation. She had been employed by Tenet twice and she signed the "Employee Acknowledgment" form, which acknowledged receipt of the "Fair Treatment Process" brochure ("FTP") both times. The FTP mandated arbitration in lieu of litigation.

In 2009, Quilloin filed suit on behalf of a class of hospital employees in the United States District Court for the Eastern District of Pennsylvania, against Tenet under the Fair Labor Standards Act of 1938, as well as several state-based class action and common law claims. The theory was that the employees were denied pay for work they performed during meal breaks.

In its Answer, Tenet argued the existence of an arbitration agreement in the FTP as an affirmative defense. Tenet requested that the trial court compel arbitration, based on the FTP. Plaintiff argued that the agreement was unfair and unconscionable. The trial court held in favor of Plaintiff.

On appeal, the Third Circuit noted that state contract principles apply to determine whether an arbitration agreement is unconscionable. However, state rules either prohibit arbitration outright or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, the Federal Arbitration Act ("FAA") pre-empts state law. As such, the court held that in determining plaintiff's claims of unconscionability, it must use principles of Pennsylvania law, to the extent that such law is not displaced by the FAA.

The Trial Court based its denial of the motion to compel on a finding that the arbitration agreement might be substantially unconscionable in three areas, one of which was the potential including of a class action waiver. Regarding the issue of class action waiver, Pennsylvania law

provides that class action waivers are substantively unconscionable where “class action litigation is the only effective remedy” such as when “the high cost of arbitration compared with the minimal potential value of individual damages denie[s] every plaintiff a meaningful remedy.” The Trial Court, while noting that the determination as to whether the agreement contained a class action waiver was for the arbitrator, proceeded to analyze the agreement, and found the agreement would be rendered substantively unconscionable were the arbitrator to determine the agreement contained such a waiver.

The Third Circuit court, relying on *AT & T Mobility LLC v. Concepcion*, ___ U.S.____, 131 S.Ct. 1740, L.Ed.2d 742 (2011) held that the Pennsylvania law deeming class action waivers to be unconscionable was inconsistent with the FAA. In *Concepcion*, the Supreme Court found that “[a]rbitration is poorly suited to the higher stakes of class litigation” because: (1) “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality[,]” (2) it is “at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied[,]” and (3) “class arbitration greatly increases risks to defendants.” *Id*. at 1751–52. California's law did not deem class action waivers to be per se unconscionable, but was based in part on the reasoning that “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.” *Id*. at 1753. The Supreme Court dismissed this reasoning, ruling that “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” *Id*.

Based on the U.S. Supreme Court’s holding in *Concepcion,* the court held class action waivers which are deemed under Pennsylvania law to be unconscionable are preempted by the FAA. Thus, the Third Circuit reversed the Order of the District Court, and remanded the matter with instructions to stay the litigation proceedings and compel arbitration.

III. GENERAL LITIGATION

Court Award of Contractual Interest is Not Discretionary

In *Truserv Corp. v. Morgan’s Tool & Supply Co., Inc.*, ___ A.3d ___, 2012 WL 716639 (Pa. February 21, 2012), Plaintiff, TruServ, a hardware wholesale cooperative for retail hardware, lumber, and building supply dealers entered into a “Retail Member Agreement” with Morgan's Tool & Supply Co., Inc. (“MTS”). The Retail Member Agreement provided that

In the event that the Company initiates proceedings to recover amounts due it by Member or for any breach of this Agreement or to seek equitable or injunctive relief against the Member, the Company shall be entitled to the recovery of all associated costs, interest and reasonable attorney's fees.

MTS ultimately became delinquent on the two accounts it had with TruServ, and, after the parties were unable to agree on a payment plan to bring the accounts current, TruServ advised MTS by letter dated June 3, 1999 that it was terminating its Retail Member Agreement with MTS. On July 19, 1999, TruServ filed a complaint against MTS alleging breach of contract and unjust enrichment. TruServ sought $78,826.93 in damages, which, according to TruServ's complaint, represented “goods and services ordered and received by Morgan's Tool, as well as service charges.” In addition to that amount, TruServ sought “service charges as shall continue to

accrue, prejudgment interest, post-judgment interest, costs, attorney's fees and any other relief" the court deems appropriate.

The matter proceeded to a nonjury trial and the trial court concluded MTS had breached its Retail Member Agreement with TruServ by failing to pay for the merchandise it had ordered and received. The court awarded TruServ $78,826.93 in damages, plus $23,648.08 in costs and counsel fees. The court, however, concluding "the decision of whether to award prejudgment interest is at the discretion of the court," and that TruServ was dilatory in prosecuting its claim.

Thereafter, TruServ appealed to the Superior Court, arguing the trial court erred in failing to award TruServ "contractual pre-judgment interest" when the Retail Member Agreement, which the trial court found controlling, expressly provided for such an award. The Superior Court affirmed the trial court's order on the basis that TruServ had breached its duty to mitigate its losses.

TruServ filed a petition for allowance of appeal with this Court. The Supreme Court granted allowance of appeal to consider the following issue: "Whether a trial court has discretion to refuse to award contractual interest based on the dilatory conduct of the victorious party." The Court held that in cases where the contract expressly provides for the payment of interest, or the payment of interest is implied by the nature of the promise, the interest is said to become an integral part of the debt itself, and, therefore, is recoverable as of right under the terms of the contract. The Court provided "we have no hesitation in concluding that, where the terms of a contract provide for the payment of interest, a court's award of such interest in favor of the prevailing party is not discretionary." Further, the Court concluded that, to the extent the Superior Court affirmed the trial court's decision on the ground that TruServ failed to take reasonable steps to mitigate its losses, the court erred. The Court recognized that, in situations involving a breach of contract for the payment of a sum certain, the breaching party could always reduce its obligation for losses incurred by the non-breaching party simply by paying the amount due and performing the contract. Nevertheless, the Court concluded that a party who breaches a contract containing an express promise to pay interest may not be permitted to reduce or escape entirely his contractual obligation by subsequently arguing that the nonbreaching party did not prosecute its breach of contract claim with dispatch. Thus, the Court remanded this matter to the trial court for recalculation of its award in favor of TruServ.

IV. INSURANCE LAW

Information Regarding Pending Lawsuit Provided on Insurance Renewal Application Does Not Constitute Formal Notice of a Claim

In *Atlantic Health System Inc. v. National Union Fire Ins. Co. of Pittsburgh*, 2012 WL 640033 (3d. Cir. (N.J.) February 29, 2012), Atlantic Health System, Inc., AHS Hospital Corp., and Atlantic Ambulance Corp. (collectively, "AHS") brought an action against National Union Fire Insurance Company of Pittsburgh and American International Group (collectively, "National Union"), challenging the denial of coverage under an insurance policy.

The underlying case involved an antitrust complaint filed by Med Alert Ambulance, Inc. ("Med Alert") against AHS on April 5, 2004. AHS contended that it was entitled to defense and

indemnification in connection with the Med Alert action under its National Union claims-made insurance policy that was in effect from May 1, 2003 to May 1, 2004. AHS ultimately settled the Med Alert action for $800,000, and allegedly incurred more than $1.3 million in attorneys' fees and costs in defending against the Med Alert action.

On July 23, 2004, AHS sent a “First Notice of Loss” letter to National Union, requesting coverage under Policy No. 316–29–70, which was effective from May 1, 2004 to May 1, 2005 (the “2004–2005 Policy”). The request for coverage under the 2004–2005 Policy was denied because AHS had notice of the underlying Med Alert claim prior to the inception of the 2004–2005 Policy coverage.

On August 17, 2004, AHS sent a second letter to National Union marked “First Report of a new loss” and requested coverage under Policy No. 382–77–89, which was in effect from May 1, 2003 to May 1, 2004 (the “2003–2004 Policy”). That request was denied because notice of the Med Alert claim had not been provided to National Union during the policy period, or within the policy's 30–day notice period. Because the Med Alert action was filed on April 5, 2004, AHS was required under the terms of the 2003–2004 Policy to provide written notice of the Med Alert claim to National Union no later than May 5, 2004.

Within the 2003–2004 policy period, however, AHS had submitted to National Union two renewal applications, one handwritten and the other typed, that revealed AHS's involvement in the Med Alert suit. Specifically, AHS answered in the affirmative the questions on the renewal applications related to the company being involved in litigation charging it with a violation of antitrust laws.

AHS further clarified these answers by noting that “AHS and Atlantic Ambulance have been named, . . ., in a civil action filed by Med Alert Ambulance Co. alleging unfair trade practices and anti-trust violations . . . .” The renewal applications were sent to Christine McSweeny, a National Union underwriter who worked at 80 Pine Street, New York, NY.

Article VII of the 2003–2004 Policy, which is titled “NOTICE/CLAIM REPORTING PROVISIONS,” provided that notice should be given in writing to National Union at “175 Water Street, New York, NY.” Though the renewal applications were not sent to the Water Street address, AHS argued that statements made in the renewal applications gave National Union actual notice of the Med Alert claim, and National Union therefore should not have denied coverage under the 2003–2004 Policy.

The Third Circuit affirmed the District Court's grant of summary judgment finding that plaintiffs' renewal application to National Union's underwriters was not a formal notice of claim and that plaintiffs' did not comply with the claims-made policy's notice requirements, which must be applied strictly. The court held that plaintiffs were properly denied coverage.

Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.