PROFESSIONAL LIABILITY UPDATE

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This newsletter is intended to summarize the most significant recent cases impacting non-medical professional liability litigation. It is not a comprehensive digest of every case involving professional liability issues during the period or of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice. Any opinions expressed herein are those of the author and do not necessarily reflect the views of Shannon, Gracey, Ratliff & Miller, L.L.P.

***Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 58 Tex. Sup. Ct. J. 1422, 2015 Tex. LEXIS 622 (June 26, 2015).**

Arbitration Clause within attorney-client engagement agreement. Plaintiff sued his attorney for representation in an underlying divorce action. The attorney-client's engagement agreement provided for an arbitration clause. Plaintiff asserted the arbitration clause in the attorney-client agreement was substantially unconscionable and unenforceable. The trial court agreed with Plaintiff and the Defendant's filed an Interlocutory Appeal.

Plaintiff asserted various grounds for the unconscionability of the arbitration clause. The Supreme Court found the arbitration clause was not substantially unconscionable or unenforceable. Once a valid arbitration agreement exists and the claims in question are within the scope of the agreement, a presumption arises in favor of arbitrating those claims and the party opposing the arbitration has the burden to prove a defense to the arbitration. *In re: Palm Harbor Homes, Inc.* 195 S.W.3d 672, 677 (Tex. 2006).

Plaintiff's argued the arbitration agreement was one-sided because a claim for attorney's fees by the lawyers was excluded from the arbitration provision; the attorneys could withdraw at any time; and the client was responsible for cost in the underlying action. The Supreme Court found the Plaintiff failed to provide sufficient evidence to prove the arbitration provision was substantively unconscionable. As the plaintiff-client is presumed to understand the agreement's contents, and is bound by its terms. Furthermore, the Court found the arbitration clause was not one-sided, as both parties were equally bound to arbitrate claims within the scope of the agreement. The fact, the potential attorney fee claim was carved out of the arbitration language did not make the clause unconscionable nor illusory.

Plaintiff also asserted that the Defendants violated Disciplinary Rule 1.03(b), and Professional Ethics Committee Opinion 586, as a lawyer shall explain a matter to a client

to the extent reasonably necessary to permit the client to make an informed decision based upon information regarding the advantages and disadvantages of binding arbitration. Besides the fact the Court found, Plaintiff failed to prove the lawyers did not explain the contract, the Court again concluded that the law regarding arbitration agreements is the same as other contracts. Therefore, parties are presumed to understand the agreements contents. Consequently, the court "declined to impose, as a matter of public policy, a legal requirement that attorneys explain to prospective clients, either orally or in writing, arbitration provisions in attorney-client employment agreements."

***Cadle Co. v. Keyser*, 2015 U.S. Dist. LEXIS 77177 (W.D. Tex. June 15, 2015).**

Evidence supporting the Fracturing of a Legal Malpractice Claims. Plaintiff brought a negligence action against the Defendants for legal malpractice. During the discovery phase, Plaintiff discovered facts which he believed supported a breach of fiduciary duty, fraud, civil conspiracy claims. No specific facts were identified in the opinion, other than the Plaintiff asserted allegations the Defendants willfully made false statements, fraudulently concealed information, placed their own interest before those of their client and engaged in civil conspiracy to defraud the Plaintiff. Defendants argued that the Plaintiff's new causes of action were an attempt to fracture their legal malpractice claim. The Court disagreed and found the Plaintiff had asserted sufficient facts to show the additional claims were independent causes of actions and not simply impermissible fracturing of the legal malpractice claim.

***Chan v. Sharpe*, 2015 Tex. App. LEXIS 8947 (Tex. App. Fort Worth Aug. 26, 2015)**

Switching Sides. Chan wanted to file suit against Wan Fu Foods, Inc. (WFFI) and Chang for money owed to him as a former shareholder. Chan wanted Sharpe to represent him in this cause of action. Sharpe informed Chan that he would not represent him but he would draft a demand letter for him at no cost. Chan's ex-wife confirmed Sharpe's representation. Chan subsequently filed three Pro Se lawsuits against Chang and WFFI. Sharpe was retained by WFFI and Chang to represent them in the suit Chan brought.

Upon learning of Sharpe's representation of the Defendants Chan then brought an action against Sharpe. Chan alleged Sharpe "switched sides" without his verbal or written consent by representing WFFI and Chang, breached his fiduciary duty and conspired against Chan. The court granted summary judgment in favor of Sharpe and Chan appealed.

The court found Sharpe did not breach his fiduciary duty to Chan because (1) Sharpe's switching of sides did not prevent Chan from timely pursuing his claims, (2) Chan still had the ability to enforce his alleged rights against WFFI and Chang after Sharpe allegedly "switched sides," and (3) Sharpe's representation of WFFI and Chang did not cost Chan to incur attorney's fees to "rectify the consequences of Sharpe's misconduct." The court also found that there was no evidence Sharpe benefitted in any way from his drafting a letter for Chan. Further, it was undisputed neither Chang nor WFFI ever paid Sharpe for his legal representation.

***Rossco Holdings, Inc. v. McConnell*, 2015 U.S. App. LEXIS 9197 (5th Cir. Tex. June 1, 2015).**

Beware of How You List Your Claims. Rossco Holdings, Inc. (RHI) filed for bankruptcy in the Western District of Texas. Leonard M. Ross, individually and as Trustee of the Leonard M. Ross Revocable Trust (Revocable Trust), filed for bankruptcy in the Central District of California. Ross then transferred the RHI bankruptcy case to the Central District of California to have both cases heard in conjunction with each other. As a result of rulings made by the California court, a lender was allowed a large claim against both RHI and the Revocable Trust.

RHI and Ross sued their attorneys for negligent misrepresentation and malpractice, in the Northern District of Texas based on the outcome of the bankruptcy case in the 9th Circuit.

The Chapter 11 bankruptcy plan identified claims the Trustee of the bankruptcy estate planned to or could pursue, as well as claims the bankruptcy estate would abandon to Ross and the Revocable Trust. However, the claim against their attorneys was not specifically identified in the plan. Therefore, the attorney's moved to dismiss RHI and Ross' claim for negligent misrepresentation and malpractice, because the claim was not specifically mentioned as a claim retained post-bankruptcy. The District Court found for the attorneys based on 5th circuit precedent that states "for a reservation to be effective, it must be specific and unequivocal—blanket reservations of any and all claims are insufficient." RHI and Ross went back to the District Court in California for a clarification on the Chapter 11 plan. The California court clarified based on 9th Circuit precedent, that the plan expressly stated that "title to all claims and causes of action (except those specifically stated) of the Debtor and of the Estate shall revest in the Reorganized Debtor."

RHI and Ross then brought this clarification on appeal to the 5th Circuit. The 5th circuit found for the attorneys, stating that under 5th Circuit precedent a claim against the debtor's attorneys must be "specifically and unequivocally" stated in the Chapter 11 plan. Although the 9th Circuit does not demand this specificity, RHI and Ross filed the claim against their attorneys within the 5th Circuit, and 5th Circuit precedent applies despite the plan being created in the 9th Circuit. Therefore, because a claim against their attorneys was not specified in the Chapter 11 plan, RHI and Ross did not retain that claim.