The court reached a different result on plaintiff's retaliation claim. Pursuant to recent Supreme Court case law, as noted, employees may not utilize the mixed-motive framework to prove a retaliation action, leaving a plaintiff only the option of demonstrating pretext. The *Johnson* court, recognizing the differences between how a plaintiff must prove discrimination and retaliation, concluded as follows:

> However, in contrast to claims of race discrimination, a plaintiff claiming retaliation must prove that "the desire to retaliate was the but for cause of" his termination—that is, "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the [defendant]." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. —, —, 133 S.Ct. 2517, 2528, 2533, 186 L. Ed. 2d 503 (2013).
>
> . . . . In the court's opinion, each of the [collateral estoppel] elements is satisfied with respect to Johnson's § 1981 retaliation claim. The MDES found not only that Johnson committed safety violations and thus engaged in misconduct but also that he was terminated because he engaged in such misconduct. Johnson, however, seeks to prove in this case that he was terminated because he complained of discrimination and thus seeks to relitigate the cause of his termination. Given the finding of the MDES that he was discharged because of misconduct, he cannot show that he would not have been terminated "but for" his alleged complaints of discrimination, and it follows that he cannot succeed on his claim for retaliation under § 1981.

Id. at *5-*6. Based on this ruling, MDES findings potentially could have differing preclusive effects depending on the type of employment action urged by the employee against the employer. Of course, the scope of the MDES ruling may also be determinative of this issue.

K. Coming Full Circle

While this section is entitled coming full circle, you may feel as if you, instead, have just gone *in* circles. Case law in this area rarely finds itself on solid footing, as preclusion isn't a "one size fits all" weapon for attorneys and/or litigants. Instead, courts are reaching differing results. Some have utilized the preclusive effect of MDES findings to estop an entire cause of action. Others simply have invoked the doctrine to preclude certain facts. Still others have rejected preclusion altogether, even if it may have been warranted under the cause of action urged.

To navigate this area of law, practitioners have to understand the reasoning behind the doctrine as well as how it is being applied. This is true both if you are the one arguing for preclusion and if you end up on the other side of a preclusion argument. Either way, practitioners must be able to modify the doctrine's usage depending on the particular facts of the case. If done correctly, and for better or worse, preclusion can be a game changer. ■

Current Arbitration Issues in Mississippi

By L. Bradley Dillard

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In 1998, the Mississippi Supreme Court reversed its long-standing opposition to arbitration, and for the first time held that arbitration agreements are enforceable. Specifically, in the case of *I. P. Timberlands Operating Co. Ltd. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998), the Court held that:

> Articles of agreement to arbitrate, and awards thereon, are to be liberally construed so as to encourage the settlement of disputes and the prevention of litigation, and every reasonable assumption will be indulged in favor of the validity of arbitration proceeding.
>
> This Court hereby overturns the former line of case law that jealously guarded the Court's jurisdiction. Again, we expressly state that this Court will respect the right of an individual or an entity to agree in advance of a dispute to arbitration or other alternative dispute resolution.

I.P Timberlands Operating Co., 726 So. 2d at 107. Based on this change in policy, the Mississippi Supreme Court overturned a long line of case law rejecting enforcement of arbitration agreements and expressly stated that such agreements are now enforceable under Mississippi law. The Court has followed this decision in many subsequent cases, as have the federal district courts in both the northern and southern districts of Mississippi.

Further, Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. 1 et. seq., states in part that:

> A written provision in .... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction.... shall be valid, irrevocable and enforceable....

9 U.S.C. 2. Under controlling law addressing the FAA, all doubts regarding the enforceability of arbitration agreements are construed in favor of arbitration. The FAA "requires courts to enforce the bargain of the parties to

arbitrate." *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213 (1985).[1]

Following *I.P Timberlands*, and based on application of the FAA, there now exists in Mississippi a "presumption in favor of arbitration". *Qualcomm, Inc. v. AM Wireless License Group, LLC*, 980 So. 2d 295 (Miss. 2007); *Palmer v. Pittmon,* 2011 WL 5372743 (Miss. Ct. App. 2011) (emphasis added); *see also Smith Barney, Inc. et al. v. Henry*, 775 So. 2d 722, 724 (Miss. 2001) (holding all doubts as to enforceability of arbitration "must be resolved in favor of arbitration"). As eloquently noted by the Mississippi Supreme Court, "we can place no more burden or constraint on the enforcement of an arbitration agreement than on an agreement to sell a fig or pay a wage". *Terminix Int'l, Inc. Ltd. P'ship v. Rice,* 904 So. 2d 1051, 1055 (Miss. 2004).

In analyzing whether an arbitration agreement is enforceable or not, courts must "[c]onsider[] (1) whether there is a valid agreement to arbitrate, and (2) whether the dispute in question falls within the scope of the arbitration agreement". *Bell v. Koch Foods of Miss., LLC,* 2009 U. S. Dist. LEXIS 38003, * 12-13 (S.D. Miss. 2009). Arbitration agreements are merely contracts,[2] and therefore when considering "whether the parties entered a valid arbitration agreement, courts are instructed to 'apply ordinary state law principles that govern the formation of contracts'". *Id.; see also Norwest Financial Mississippi, Inc., et al. v. McDonald, et al.,* 905 So. 2d 1187 (Miss. 2005); *Doctors Assoc., Inc. v. Casarotto,* 517 U. S. 681, 686-87, 116 S. Ct. 1652, 1656, 134 L.Ed. 2d 902 (1996). Accordingly, "the usual defenses to a contract such as fraud, [procedural or substantive] unconscionability, duress, and lack of consideration may be implied to invalidate an arbitration agreement...." *East Ford, Inc. v. Taylor,* 826 So. 2d 709, 714 (Miss. 2002). In the absence of such proof, however, basic contract principles mandate enforcement of arbitration agreements.

Since 1998, a more thorough body of law has developed as to arbitration issues, and as may be expected new issues have developed. This article will address some of the arbitration topics that are at the forefront in Mississippi trial and appellate courts.

I. Third-Party Beneficiary Theory

The doctrine of intended third-party beneficiary provides that "[n]on-signatories may be bound by an arbitration agreement if they are determined to be a third-party beneficiary." *Forest Hill Nursing Ctr. v. McFarlan*, 995 So. 2d 775, 783 (Miss. Ct. App. 2008). In analyzing whether a person constitutes a third-party beneficiary, a court must determine that: (1) the contract was entered into for the benefit of the decedent; (2) the promisee owed a legal obligation to the third party; and (3) whether that legal obligation connected the third party to the contract. *Id.* at 782. These principles are well settled in Mississippi contract law, and in many circumstances seems perfectly suited to arbitration agreements. Specifically, in many instances individuals admit family members to long-term care facilities for needed care; although no written power of attorney may exist, the resident's family member will execute all paperwork necessary to effectuate the admission, including an arbitration agreement. There is no question that the admission was for the benefit of the resident, the nursing home upon admission owed a duty to provide nursing and other care, and that this duty is owed to the resident. Applying the factors set forth *supra*, the Mississippi Court of Appeals and federal courts in Mississippi have specifically found nursing home residents to be third-party beneficiaries who are bound to arbitrate claims, even though they did not execute the arbitration agreement nor did the signatory possess a valid power of attorney. *See Estate of Hawkins v. GGNSC Batesville, LLC*, 2011 U.S. Dist. LEXIS 12713 at *4-5 (N.D. Miss. 2011); *Cook v. GGNSC Ripley, LLC,* 786 F. Supp. 2d 1166 (N.D. Miss. 2011); *see also Myers v. GGNSC Holdings, LLC,* 2013 U.S. Dist. LEXIS 65628 (N.D. Miss. 2013); *Forest Hill Nursing Ctr.,* 995 So. 2d at 783.

The Mississippi Supreme Court has recently restricted application of the third-party beneficiary doctrine, however, in *GGNSC Batesville, LLC et al v. Johnson,* 109 So.3d 562 (Miss. 2013). The *Johnson* court did not expressly hold that the third-party beneficiary doctrine is inapplicable to arbitration agreements; the Court instead found that the defendant nursing home had failed to present evidence of the signatory's apparent authority to act on behalf of the nursing home resident. *Johnson,* 109 So. 3d at 565-66.

> To prove that Johnson had apparent authority over Cooper, Golden Living "must put forth sufficient evidence of (1) acts or conduct of the principal indicating the agent's authority, (2) reasonable reliance upon those acts by a third party, and (3) a detrimental change in position by the third person as a result of that reliance." *Reed,* 37 So. 3d at 1160. The record is utterly devoid of any acts or conduct of Cooper indicating that Johnson was his agent for the purpose of making health-care decisions. *See id.* Because Golden Living failed to put forth sufficient evidence, or indeed any evidence at all, of prong one, we need not address prongs two and three. *See id.* Thus, Johnson did not have the apparent authority to bind Cooper to the contract, and consequently, a valid contract does not exist.

Johnson, 109 So. 3d at 565-66. Based on *Johnson*, therefore, defendants seeking to enforce arbitration agreements under a third-party beneficiary theory must as a threshold establish evidence of actual or apparent authority by the signatory. On its face, this requirement seems disingenuous, as existence of actual or apparent authority by the signatory should make it unnecessary to use a third-party beneficiary theory. Nonetheless, pursuant to *Johnson* authority is now a pre-requisite.

The question then becomes: what evidence of agency or authority is required? Under Mississippi law an agency relationship may be express or implied. *Stripling v. Jordan Prod. Co.,* 234 F. 3d 863 (5th Cir. 2000); *Barnes, Broom, Dallas and McLeod, PLLC v. Estate of Cappaert*, 991 So. 2d 1209 (Miss. 2008). An express agency relationship exists where the principal authorizes someone to act on his or her behalf. *Monticello Comm. Care Ctr., LLC v. Estate of Martin,* 17 So. 3d 172 (Miss. Ct. App. 2009). Evidence of authority may be demonstrated by the acts

[1] The FAA's principal purpose is to "ensure that private arbitration agreements are enforced according to their terms". *Volt Info. Scis., Inc. v Board of Trustees,* 489 U.S. 468, 479 (1989).

[2] Contracts are solemn obligations, and the Court must give them effect as written. *B. C. Rogers Poultry, Inc. v. Wedgeworth,* 911 So. 2d 483, 487 (Miss. 2005).

of the parties, and an agent's testimony is competent to establish the facts of an agency. *Walters v. Stonewall Cotton Mills,* 101 So. 495 (Miss. 1924); *Cosmopolitan Ins. Co. v. Capital Trailor & Body, Inc.*, 145 So. 2d 450 (Miss. 1962). Ultimately, the question of whether an agency relationship exists depends on the intention of the parties. *In Re: Evans,* 460 B.R. 848 (S.D. Miss. Bankr. 2011); *Aladdin Const. Co., Inc. v. John Hancock Life Ins. Co.*, 914 So. 2d 169 (Miss. 2005). A principal-agent relationship is not required to be in writing, but rather may be manifested "either by words or conduct". *Forest Oil Corp. v. Tenneco, Inc.*, 626 F. Supp. 917, 921 (S.D. Miss. 1986); *see also Butler v. Bunge Corp.*, 329 F. Supp. 47 (N.D. Miss. 1971) (same). This principle is further explained as "an express agency is an actual agency created as a result of an oral or written agreement of the parties...." 3 Am.Jur.2d, *Agency*, Section 18.

In *Adams Comm. Care Ctr., LLC v. Reed,* 37 So. 3d 1155 (Miss. 2010), the Mississippi Supreme Court declined to find apparent authority sufficient to enforce an arbitration agreement signed by the resident's two sons. *Adams* discussed only apparent authority, not the grant of actual authority, and found "the record is devoid of any action on the part of [the resident] indicating that either of her sons was her agent..." *Adams,* 37 So. 3d *1160*. Further, the complaint in that case was filed by the resident's daughter, and not by either of the signatories to the arbitration agreement.

Apparent authority exists where (1) the acts or conduct on the part of the principal indicates the agent's authority; (2) there is reasonable reliance on these actions; and (3) there is a detrimental change in position as a result of such reliance. *Cook v. GGNSC,* 786 F. Supp. 2d 1166 (N.D. Miss. 2011); *see also Mladineo v. Schmidt,* 52 So. 3d 1154 (Miss. 2010) (holding apparent authority exists when a reasonably prudent person having knowledge of the nature and usages of the business involved, would be justified in supposing based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have).

The Mississippi Supreme Court has held in regard to apparent authority that the fact of agency may be assumed (1) from the improbability that one would without authority, assume to act for another for a considerable length of time and (2) from the fact that such would naturally become known to the principal. *Russell v. Palentine Insurance Co.*, 63 So. 644 (Miss. 1913). Evidence sufficient to establish apparent authority, therefore, would include the signatory's practices of handling business affairs for the person in question, such as banking, insurance, Medicaid, Medicare, transferring real or personal property, and similar acts.

Often defendants will not possess such evidence of actual or apparent authority when efforts are made to enforce an arbitration agreement. Mississippi law provides that arbitration agreements may be waived by engaging in the litigation process (*Nutt v. Wyatt*, 107 So. 3d 989 (Miss. 2013)) thus leaving a defendant to decide whether it should engage in discovery and risk a waiver of its arbitration rights, or proceed with efforts to enforce the agreement without sufficient evidence of authority. This quandary emphasizes the frequent need for arbitration related discovery.

Neither the Mississippi Supreme Court nor the Mississippi Court of Appeals have specifically addressed the issue of arbitration related discovery. In a 2009 opinion in *Bell v. Koch Foods of Mississippi, LLC,* U.S. District Judge William Barbour acknowledged that "courts generally have denied arbitration-related discovery absent a compelling showing that such discovery is required. *See e.g., Kulpa v. OM Fin. Life Ins., Co.*, 2008 WL 351689 at *1 (S.D. Miss. Feb. 6, 2008) [citation original] [emphasis added]". *Bell v. Koch Foods of Mississippi, LLC,* 2009 WL 1259054 at *3 (S. D. Miss. May 5, 2009). In *Hicks v. Citigroup, Inc.*, 2012 WL 254254 (W.D. Wa. Jan. 26, 2012) that court discussed the viability of arbitration related discovery in the context of the Federal Arbitration Act ("FAA") as follows:

> While cognizant that under the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable," the Court does not view limited discovery as to arbitrability in this instance as a threat to the goals of the FAA. See 9 U.S.C. § 2. The FAA states that arbitration agreements may be contested "upon such grounds that exist at law or in equity for the revocation of any contract." *Id.* The Supreme Court in *Concepcion* cited the saving clause in § 2 in noting that the FAA "preserves generally applicable contract defenses." 131 S.Ct. at 1748. Thus, discovery may be granted in connection with a motion to compel arbitration if "the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue." 9 U.S.C. § 4; *see also Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir.1999). Courts have permitted limited discovery as to arbitrability where parties have placed the validity of the arbitration agreement in issue. *See, e.g., Alvarez v. T–Mobile USA, Inc.*, —— F. Supp. 2d ——, 2011 WL 4566440 (E.D.Cal.2011); *Dun Shipping Ltd. v. Amerada Hess Shipping Corp.*, 234 F.Supp.2d 291, 297 (S.D.N.Y.2002)

Hicks v. Citigroup, Inc., 2012 WL 254254 at *1 (W.D. Wa. Jan. 26, 2012).

Other jurisdictions also permit arbitration related discovery, at least on a limited basis. *See Garcia v. Wachovia Corp., et al.*, 699 F. 3d 1273 (11th Cir. 2012) (acknowledging that parties conducted arbitration related discovery at Florida district court level); *Hodson v. Directv, LLC,* 2012 WL 5464615 (N.D. Ca. Nov. 8. 2012) (discussing California Civil Code section 1670.5(b) which allows arbitration related discovery); *Perras v. H&R Block, Inc., et al.*, 2012 WL 4328196 (W.D. Mo. Sept. 14, 2012) (acknowledging that arbitration related discovery is permitted under both Missouri and California law); *Wallace v. The Ganley Auto Group, et al.*, 2011 WL 2434093 (Ohio Ct. App. June 16, 2011) (addressing scope of arbitration related discovery permitted by trial court and affirming trial court's limitation of discovery to the enforceability of the arbitration agreement against the named parties); *Georgia Cash America, Inc. v. Strong*, 649 S.E. 2d 548 (Ga. Ct. App. 2007) (ruling on work product objections and other objections made to arbitration related discovery permitted by the trial court). Such discovery is generally not permitted as a mere fishing expedition in hopes that some evidence of authority will be found, nor is it generally unlimited in nature. Defendants are best served by identifying a specific need for such discovery, what the defendant hopes to uncover through such discovery, and by suggesting a reasonable limitation on discovery (i.e., limited interrogatories, requests for production and requests admissions, and specific depositions, such as that of the signatory). Trial courts in Mississippi have wide discretion in permitting discovery as they deem appropriate. *Dunn v. Yager,* 58 So. 3d

1171 (Miss. 2011); *Bank v. Hill,* 978 So. 2d 663 (Miss. 2008); *Blake v. Wilson,* 962 So. 2d 705 (Miss. Ct. App. 2007). Permitting limited arbitration-related discovery is therefore well within the discretion of trial court judges, and should be allowed upon a proper showing of need by a defendant.

II. Ratification and Estoppel

In addition to the third-party beneficiary arguments, defendants seeking to enforce an arbitration agreement where the signatory lacked a power of attorney may, in the proper circumstances, utilize ratification and estoppel arguments to enforce the agreement. The doctrine of promissory estoppel provides that "an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetuation of fraud or would result in other injustice. 28 Am. Jur. 2d, *Estoppel and Waiver*, § 48 (1996)". *C. E. Frazier Construction Co. v. Campbell Roofing and Metal Works, Inc.,* 373 So. 2d 1036, 1038 (Miss. 1979).

> The agent's authority as to those with whom he deals is what it reasonably appears to be. So far as third persons are concerned, the apparent powers of an agent are his real powers. This rule is based upon the doctrine of estoppel. A principal, having clothed his agent with the semblance of authority, will not be permitted, after others have been led to act in reliance of the appearance thus produced, to deny, to the prejudice of such others, what he has theretofore tacitly affirmed as to the agent's powers.

Steen v. Andrews, 223 Miss. 694, 883 (Miss. 1955). Further, "one may be held an agent by estoppel only when from all of the circumstances he realizes or should realize the substantial likelihood that the party suffering the loss will justifiably rely on the tacit representation of agency arising from his conduct". *Alabama G. S. R. Co. v. McVay,* 381 So. 2d 607, 612 (Miss. 1980); *see also Kinwood Capital Group, LLC v. BankPlus,* 60 So. 3d 792, 797 (Miss. 2011) (citing *McVay* and affirming agency may be created by estoppel); *Gurley v. Carpenter,* 673 F. Supp. 805, 809 (N.D. Miss. 1987) (quoting *McVay* on agency by estoppel).

Further, the doctrine of equitable estoppel is similarly applicable. This doctrine is applied when "equity clearly requires it to prevent unreasonable results." *Long Meadow Homeowner's Ass'n v. Harland,* 89 So. 3d 573, 577 (Miss. 2012). The doctrine is based on "public policy, fair dealing, good faith and reasonableness", and ensures a "wrongdoer is not entitled to enjoy the fruits of his fraud." *Id.* The application of estoppel is within a court's discretion. *Sapic v. Court of Turkmenistan,* 345 F. 3d 347, 360 (5th Cir. 2003). Equitable arguments seem especially appropriate where a defendant obviously relied upon the representations of authority of a signatory, and detrimentally changed its position based on such representations. For example, often arbitration agreements are mutual in nature, whereby both parties agree to arbitrate rather than litigate any claims. By relying on the signatory's representations of authority, a defendant may have therefore agreed to waive its own right to a jury trial on certain issues. This argument would appear to be especially applicable where the signatory subsequently files suit, and seeks to have the arbitration agreement found void, as the very person who initially agreed to arbitrate subsequently opposes arbitration.

Similarly, Mississippi law "allows a principal to ratify the agent's unauthorized acts and, upon doing so, become[] bound." *Insurasource, Inc. v. Phoenix Ins. Co.,* 912 F. Supp. 2d at 433, 441 (S.D. Miss. 2012). "[R]atification may be established through affirmative acts or inaction." *Barnes, Broom, Dallas & McLeod, PLLC,* 991 So. 2d at 1212. Thus, ratification may be shown by demonstrating that the principal either "(a) "manifest[ed] assent" to the error or (b) engaged in "conduct that justifies a reasonable assumption" that he consented to the error," *Myatt v. Sun Life Assur. Co.,* 2012 U.S. Dist. LEXIS 157648 at *7 (S.D. Miss. 2012). A principal's failure to act, therefore, will result in ratification where the principal has knowledge "that others will infer from his silence that he intends to manifest his assent to act". *Kinwood Capital Group, LLC v. BankPlus,* 60 So. 3d 792, 797 (Miss. 2011). Ratification, therefore, is dependent upon the principal, at some point after the arbitration agreement is executed, affirming the agent's authority to act on his or her behalf. While this may often be difficult, it may be demonstrated for instance where the principal was present while the arbitration agreement was executed, and made no objection to the signatory executing the agreement.

III. *AT&T Mobility v. Concepcion* Prohibits Courts from Treating Arbitration Agreements Differently than any other Contract

Despite the FAA's dictate that all questions concerning arbitration be resolved in favor of enforcement of such agreements, many courts around the country have applied judicially created rules to defeat enforcement of arbitration agreements. This problem was recently addressed by the United States Supreme Court in *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, (2011).

The Supremacy Clause of the United States Constitution provides in part that "the Laws of the United States ... shall be the supreme Law of the Land." U.S. Const. art VI, cl. 2. Any state law "that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted by the Supremacy Clause. *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). As federal substantive law, the FAA preempts contrary state law. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 400, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).

In *Concepcion,* the United States Supreme Court reaffirmed the long-standing "liberal federal policy favoring arbitration" under the FAA, and specifically held that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion,* 131 S.Ct. 1747, 1749. The *Concepcion* Court specifically assessed whether the FAA preempted California's judge-made rule against class-action waivers in consumer arbitration agreements under *Discover Bank v. Superior Court,* 36 Cal. 4th 148, 162-63 (2005), and concluded that "California's *Discover Bank* rule is preempted by the FAA" because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" under the FAA. *Concepcion,* 131 S.Ct. at 1753.

The FAA preempts "state law that prohibits outright the arbitration of a particular type of claim". *Concepcion,* 131 S.Ct. at 1747; *see also Marmet Health Care Ctr., Inc. v Brown,* 132 S.Ct. 1201, 1203

(2012) (applying *Concepcion* in nursing home context). "[A]ny general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA." *Mortensen v. Bresnan Communs., LLC,* 722 F. 3d 1151, 1159 (9th Cir. 2013); *see also Muriithi v. Shuttle Express, Inc.*, 712 F. 3d 173, 180 (4th Cir. 2013) (stating "*Concepcion* sweeps . . . broadly" and preempts otherwise valid contract defenses which "target[] the existence of an agreement to arbitrate as the basis for invalidating that agreement"); *Hawkins v. Region's*, 944 F. Supp. 2d 528, 531 (N.D. Miss. 2013) (holding "The U.S. Supreme Court has, in recent years, adopted an approach which highly favors arbitration, including overturning the decisions of state supreme courts when it finds that they have established laws which are contrary to the pro-arbitration policies behind the FAA").[3]

To the extent the Mississippi trial or appellate courts treat arbitration agreements any differently than other contracts, such a heightened standard is preempted by the FAA. In the opinion of the author, the *Johnson* opinion (discussed *supra*) runs afoul of the rule against "prohibit[ing] outright the arbitration of a particular type of claim" by analyzing the enforcement of arbitration agreements in the nursing home context differently than arbitration agreements in other cases to implicitly prohibit arbitration of claims against nursing homes.

In *Johnson*, before reaching the third-party beneficiary analysis the Court imposed a requirement of actual or apparent authority. Historically, Mississippi courts have not imposed an actual or apparent authority requirement to find third-party beneficiary.

> A person or entity may be deemed a third-party beneficiary if: (1) the contract between the original parties was entered for that person's or entity's benefit, or the original parties at least contemplated such benefit as a direct result of performance; (2) the promisee owed a legal obligation or duty to that person or entity; and (3) the legal obligation or duty connects that person or entity with the contract. *Burns*, 171 So. 2d at 325 (citing 17A C.J.S. Contracts § 519(4) (1963)). In *Yazoo & M.V.R. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669 (1931), this Court offered the following analysis for determining third-party-beneficiary status:
>
> (1) When the terms of the contract are expressly broad enough to include the third party either by name as one of a specified class, and (2) the said third party was evidently within the intent of the terms so used, the said third party will be within its benefits, if (3) the promisee had, in fact, a substantial and articulate interest in the welfare of the said third party in respect to the subject of the contract. *Sideboard,* 161 Miss. at 15.

Simmons House., Inc. v. Shelton, 36 So. 3d 1283, 1286-87 (Miss. 2010). Other Mississippi appellate court opinions have enforced arbitration agreements against non-signatories, absent any showing of authority to act by the actual signatory. *See, e.g., Smith Barney v Henry,* 775 So. 2d 722 (Miss. 2001) (enforcing arbitration agreement against successors under will); *Terminix, Int'l, Inc. Ltd. Part. v. Rice,* 904 So. 2d 1051 (Miss. 2004) (binding wife to arbitration agreement where only husband signed).

As noted by the Fifth Circuit, "It does not follow that under the [Federal Arbitration Act] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." *Washington Mut. Fin. Group, LLC v Baily,* 364 F.3d 260, 267 (5th Cir. 2004) (abrogated on other grounds) (*quoting Thompson-CSF, S.A. v. American Arb. Ass'n,* 64 F. 3 d 773, 776 (2nd Cir. 1995)). Accordingly, in any situation where a court appears to scrutinize an arbitration agreement more closely than any other contract, a defendant should advise the court of the *Concepcion* line of cases, and the absolute prohibition against treating arbitration agreements differently than any other contract.

IV. Unavailability of Forum

In *GGNSC Tylertown, LLC v. Dillon, et al.*, 87 So. 3d 1063 (Miss. Ct. App. 2011), the appellate court declined to enforce an arbitration agreement where it designated the National Arbitration Forum ("NAF") Code of Procedure for use, however, the NAF now refuses to administer pre-dispute consumer arbitration agreements.

The language of the *Dillon* arbitration agreement itself, however, overwhelmingly supported severance of the NAF provision and enforcement of the remainder of the contract. The arbitration agreement only required use of the NAF Code of Procedure, and not administration of the arbitration by the NAF. Mere selection of a forum's code of procedure, but not the forum itself, does not make that forum's involvement integral to the agreement. *Green v. U.S. Cash Advance, Illinois, LLC,* 724 F. 3d 787, 789 (7th Cir. 2013) ("The [arbitration] agreement calls for the use of [NAF's] Code of Procedure, not for the [NAF] to conduct the proceedings"). The NAF Code itself recognizes that other arbitrators may apply the NAF Code by providing that arbitrators may be selected on "mutually agreeable terms" by the parties and that the parties may "agree to other procedures" beyond the Code.

Other courts across the country considering the same NAF language as the *Dillon* court have found that designation of the NAF Code of Procedure was not fatal to enforcement of an arbitration agreement.[4] As an example, the court in *Meskill v. GGNSC Stillwater Greeley LLC,* 862 F. Supp. 2d 966 (D. Minn. 2012) held:

> The agreement here provides that disputes will be submitted to arbitration "in accordance with the National Arbitration Forum Code of Procedure." On its face, this provision does not mandate that the NAF actually conduct the arbitration – it requires

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[3] In "enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating,* 465 U.S. 1, 10 (1984). Thus, "even if a rule of state law would otherwise exclude such claims from arbitration," the FAA compels that the parties' arbitration agreement will be enforced (*Mastrobuono,* 514 U.S. at 58), pursuant to the FAA's "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 24 (1983).

[4] In *Ranzy v. Tijerina,* 393 Fed.Appx. 174 (5th. Cir. 2010), the Fifth Circuit declined to appoint a substitute arbitrator where the NAF was designated with mandatory, rather than permissive, language. The Fifth Circuit did not establish a hard and fast rule, however, that the unavailability of NAF prohibited such substitution in all cases. *Cf. CompuCredit Corp. v. Greenwood,* 132 S.Ct. 665 (2012) (compelling arbitration even where the NAF Code was specified in the arbitration agreement).

only that the NAF Code be applied by the arbitrator.

Indeed, Meskill acknowledges that the agreement "does not expressly state that the case must be arbitrated before the NAF." And several courts have recognized that when an arbitration clause selects an arbitral forum's rules but does not expressly designate that forum to hear the matter, arbitration may be compelled notwithstanding the forum's unavailability. *See, e.g., Reddam v. KPMG LLP.,* 457 F. 3d 1054, 1059-61 (9th Cir. 2006), abrogated on other grounds by *Atl. Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F. 3d 931 (9th Cir. 2010); *Jones v. GGNSC Pierre LLC,* 684 F. Supp. 2d 1161, 1167 (D.S.D. 2010) (compelling arbitration under the same agreement as in this case, and noting that the arbitration clause "does not mandate the NAF per se").

Meskill, 862 F. Supp. 2d at 972-73. That court considered the argument that ""agreeing to use the [NAF] Code is the same as agreeing to arbitrate before [the] NAF, because the Code provides, among other things, that it shall be administered only by the NAF" and reasoned:

> Yet, if the parties had contemplated the NAF would be their exclusive arbitral forum, they could have easily said so – there would be no need for them to do so obliquely by "specify[ing] that the arbitration must be conducted by [the NAF's] rules." *Brown v. Delfre,* 968 N.E. 2d 696, 2012 IL App (2d) 111086, 2012 WL 1066210, at *5 (Ill. App. Ct. 2012); *accord Reddam,* 457 F. 3d at 1059 (arbitration clause requiring application of NASD rules did "not state that the arbitration is to take place before the NASD itself" and "[h]ad [that] been intended, the parties could easily have said so"). Indeed, by invoking only the Code and not the NAF itself, the agreement suggests that the parties anticipated an entity other than the NAF might conduct the arbitration.

Meskill, 862 F. Supp. 2d at 972-73; *see also Wright v. GGNSC Holdings LLC,* 808 N.W. 2d 114 (S.D. 2011) ("We conclude that designation of the NAF Code of Procedure did not require an "NAF arbitrator;" a substitute arbitrator could apply common procedural rules like those found in the NAF Code of Procedure and public domain; and a substitute arbitrator would be required to apply the same substantive law. Therefore, the parties' contractual expectations regarding both the substantive and procedural aspects of arbitration would not be frustrated by the appointment of a substitute arbitrator"); *GGNSC Montgomery, LLC v. Norris,* U.S. Dist. LEXIS 22627, 2013 WL 627114, at *4 (M.D. Ala. 2013) (finding that the inclusion of the NAF in the GGNSC arbitration agreement is not integral).

As noted by the Supreme Court of South Dakota in *Wright,* the application of the NAF Code: (i) does not work to select a particular person to resolve the dispute; (ii) does not specify qualifications or experience; and (iii) does not require NAF as an actual "forum. " *Wright,* 808 N.W. 2d 119-20 and n.6. Mere "administration" of the NAF Code does not require the NAF to resolve any substantive dispute between the parties conducting arbitration under the Code. *Id.*

> Further, this is not a case in which the record suggests that the experience of the NAF in the nursing home filed was vital to the parties and no other arbitrator could perform the arbitration. . . . Our review of the Code reflects that any competent arbitrator could follow rules of procedure like those in the NAF Code - rules similar to rules of civil procedure that attorneys routinely follow. Even more importantly, a substitute arbitrator would be required to follow the same substantive law that would have been applied if the NAF Code were available. Under these circumstances, we conclude that designation of the NAF's Code of Procedure was an ancillary logistical concern that was not as important to the agreement as the agreement to arbitrate.

Wright, 808 N.W. 2d at 122-23 (internal citations omitted). Sparing reference to the NAF in an arbitration agreement suggests that the NAF Code was not a significant consideration. *See Diversicare Leasing Corp. v. Nowlin,* 2011 WL 5827208, at *6 (W.D. Ark. Nov. 18, 2011) ("lack of focus" on the NAF due to it being mentioned only once was not a primary concern of the parties").

If there were any doubt whether an NAF or similar provision may be severed, an express provision of an arbitration agreement permitting severance of any portion of the Agreement later found to be unenforceable resolves that doubt. As the district court in *Jones* recognized, a "severance provision indicates that the intention was not to make the NAF integral, but rather only to have a dispute resolution process through arbitration." *Jones,* 684 F.Supp. 2d at 1167; *see also Meskill,* 762 F.Supp. 2d at 976 (same); *Diversicare Leasing Corp.,* 2011 WL 5827208 at *6 (severance clause indicates an overriding intent by the parties to arbitrate disputes, rather than have NAF as the exclusive forum overseeing arbitration).

Further, pursuant to Section 5 of the Federal Arbitration Act, the Court may appoint a substitute arbitrator where a designated arbitrator is unavailable:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein.

9 U.S.C. § 5; *see Khan v. Dell Inc.,* 669 F. 3d 350, 354 (3rd Cir. 2012) ("[S]ection 5 of the FAA provides a mechanism for substituting an arbitrator when the designated arbitrator is unavailable."); *Brown v. ITT Consumer Fin. Corp.,* 211 F. 3d 1217, 1222 (11th Cir. 2000) (same).[5] A court should decline to appoint a substitute arbitrator under the FAA only if the parties' choice of forum is

[5] In *Ranzy v. Tijerina,* 393 Fed. Appx. 174, 176 (5th Cir. 2010), the Fifth Circuit found that the unavailability of NAF to arbitrate was fatal to the arbitration agreement, however, in that case NAF was specifically designated as the arbitration forum, a significant distinction from the arbitration agreement at hand.

"so central to the arbitration agreement that the unavailability of that arbitrator [brings] the agreement to an end." *Khan*, 669 F. 3d at 354 (quoting *Reddam v. KPMG LLP*, 457 F. 3d 1054, 1061 (9th Cir. 2006), (overruled on other grounds, 621 F. 3d 931 (9th Cir. 2010)). Thus, in order for section 5 not to apply, "the parties must have unambiguously expressed their intent not to arbitrate in the event that the designated forum is unavailable." *Khan,* 669 F. 3d at 354; *see also GGNSC Lancaster v. Roberts,* 2014 WL 1281130, at *7 (E.D. Pa. March 31, 2014). In most cases, it can be successfully argued that the designated forum is not an essential part of the agreement, and that the parties' true intention was to merely arbitrate any dispute. Accordingly, where the designated forum is unavailable defendants should, in addition to seeking enforcement of an arbitration agreement, also move the trial court to appoint a substitute arbitrator if necessary.

V. Conclusion

Despite the position of the Mississippi courts that all questions concerning arbitration should be resolved in favor of arbitration, many issues still exist concerning enforceability of such agreements that remain to be developed by the Mississippi state and federal courts. Questions concerning third-party beneficiary, unavailability of forums, application of estoppel and ratification arguments, all in light of *Concepcion* and its progeny, remain to be fully addressed. Until that happens, defendants must continue to address these issues on a case by case basis at the trial courts. ■

The Role of Social Media in Litigation

By Shea S. Scott

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Social media has exploded in recent years, and has also transformed litigation. Social media includes mobile and web-based technologies that allow users to interact. Social media includes popular social networking sites such as Facebook, Twitter, Instagram, LinkedIn, and many others. Social networking sites typically allow a person to create a profile that is public, private, or semi-private. The user connects with other users of the platform and can then view and explore those connections within the platform. James Grimmelmann, *Saving Facebook*, 94 Iowa L. Rev. 1137, 1142 (2009). The profiles often utilize screen names that may be the user's real name or some other online identity. Aviva Orenstein, *Friends, Gangbangers, Custody Disputants, Lend Me Your Passwords*, 31 Miss. C. L. Rev. 185, 187 (2012). While some profiles are private, social media is often very open, and the openness of social media means that online profiles can be treasure troves of helpful or harmful information about parties, including your own clients, lawyers, witnesses, experts, jurors, and even judges. Many users share personal information, activities, and opinions on public social networking websites, and a personal injury plaintiff may reveal his emotional or mental state, injuries claimed, level of activity, employment, or physical condition.

Almost Everyone is Using Some Form of Social Media

As of January 2014, 74% of online adults in the United States used at least one social networking site. The most popular social networking site in the United States is Facebook with over 1.35 billion active monthly users. Hundreds of millions of users are active on other social networking sites as well. Twitter has more than 284 million users, while there are more than 200 million Instagram users. Snapchat is gaining in popularity and has more than 100 million active users. LinkedIn is a more professional-oriented social networking site, and there are more than 332 million LinkedIn users.

A Lawyer's Duty of Competence May Require Knowledge of Social Media

Rule 1.1 of the Mississippi Rules of Professional Conduct and the Model Rules of Professional Conduct both state, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] to Model Rule 1.1 specifically provides, "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with continuing legal education requirements** to which the lawyer is subject." (emphasis added).

The American Bar Association declined to specifically opine as to "whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process," but it noted that it is "mindful of the recent addition of Comment [8] to Model Rule 1.1." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 466 (2014). The New York City Bar Association