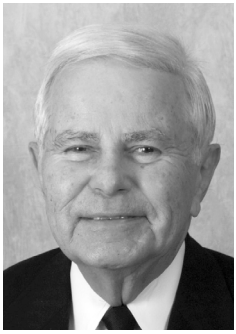

Analysis of the *Matter of Talbot* Decision

BY ROBERT G. KURZMAN, ESQ. *

The magnitude of the decision in the *Matter of Talbot* reported in the *New York Law Journal* page 1 on May 17, 2011[1] requires an analysis which this article will attempt to do.

Fundamental to American jurisprudence is the right of the parties to seek enforcement of contracts fairly entered into with a high degree of transparency manifested by the lack of unconscionability or unfair overreaching. This rule is enshrined in Article 1, Section 10, Clause 1 of the U.S. Constitution which forbids States from "impairing the obligation of contracts." The test of this rule found its way to the U.S. Supreme Court in April 1933 in a case entitled *Blaisdell v. Home Building and Loan.*[2] Associate Justice Hughes writing for the majority of the Court struck down the inviability of contract theory predicated upon the States' right to override contracts for the pubic interest. The *Blaisdell* case, however, preserved the fundamental duty of the Court to preserve the rights of parties to enter into private contracts which were not overreaching and must be sustained by the Court for constitutional reasons. Absent in the *Talbot* case was an overriding public interest to justify voiding the contract. Indeed, the facts of the case underscore the lack of unconscionability.

The facts in *Talbot* revealed that Plaintiff Karen Cullin, the sole beneficiary of a five million dollar estate, was not a distributee of the decedent. Seven blood relatives contested the will. The decedent Jo D. Talbot, who died in 2005, was blind. There had been two previous wills prior to the final one, which was signed six days before she died. The final will named Ms. Cullin as sole beneficiary.

Given the facts that the decedent was blind, and the final will was executed six days before she died, it was evident that the blood relatives would oppose probate of the will.

Apparently, Ms. Cullin lacked sufficient funds to engage experienced legal counsel.

* Robert G. Kurzman is a senior partner in the White Plains firm of Kurzman Eisenberg Corbin & Lever, LLP and has been a practicing attorney for more than 54 years specializing in Trust and Estate Law. He is a former Adjunct Assistant Professor of Law at New York University Law School and has written and lectured extensively throughout the United States. He is a Fellow of the American College of Trust and Estates Counsel and a Fellow of the American Bar Foundation. He is listed in *Who's Who in American Law* and was recently selected as one of the 25 Top Lawyers in Westchester County. The writer wishes to thank his colleague, David Choi, for his invaluable assistance in both research and in reviewing this submission.

(I do not intend to imply that the counsel she selected was not of the highest caliber.) Ms. Cullin, of course, had the right to seek counsel with any number of attorneys, and she certainly had the right to contract a fee arrangement that would be disparate from the arrangement that she entered into with the lawyer she chose, James Spiess. There is absolutely no evidence in the decision that Ms. Cullin was coerced into signing the retainer contract, nor is there any evidence of overreaching on the part of Mr. Spiess.

Indeed, the Appellate Division has established a ruling that mandates retainer agreements as a condition precedent before recovering compensation in Surrogate's Court matters.[3] The Courts have consistently upheld contingency agreements as they apply to personal injury cases in order to ensure that indigent persons who are injured as a result of negligence can be afforded legal representation. Without the contingency arrangement most firms would routinely deny representing the injured party.

The *Talbot* decision asserts that a settlement between the parties was reached in March of 2007. The decision goes on to recite that the witnesses to the disputed testified (as had the attorney who drew it up) reported that during the month it took to reach a settlement agreement there had been several days of negotiations. This portion of the decision confirms the considerable time and effort as well as skill that Mr. Speiss expended on the part of Ms. Cullin in arriving at a settlement that Ms. Cullin accepted and articulated in open court. The settlement agreement provided that Ms. Cullin receive four million dollars in liquid assets and the objectants receive one hundred fifteen thousand dollars.

Under the terms of the written retainer agreement, Ms. Cullin paid Mr. Spiess a legal fee of five hundred ninety thousand dollars. Moreover, before the retainer agreement was finalized, Ms. Cullin asked and Mr. Spiess agreed that he would cap his fee at six hundred thousand dollars. In 2009, with Mr. Haug as her new attorney, Ms. Cullin petitioned Suffolk County Surrogate John M. Czgier to review the reasonableness of the fees pursuant to his authority under Surrogate's Court Procedure Act Section 2110.

The Surrogate rejected the petition by Ms. Cullin citing that it was well-settled that courts will enforce contingency agreements unless: 1) an attorney forfeited his right by misconduct, 2) the agreement was induced by fraud, or 3) the attorney had taken some unconscionable advantage of his client.

On April l7, 2011, the Appellate Division Second Department reversed and directed the Surrogate to determine whether the fee was reasonable. The Appellate Division stated in its opinion, "the Surrogate bears the ultimate responsibility for deciding what constitutes a reasonable legal fee regardless of the existence of a retainer agreement or whether all of the interested parties had consented to the amount of fees requested."[4]

It is not disputed that Surrogate's Court Procedure Act Section 2110 provides the Surrogate with a measure of responsibility in determining what constitutes a reasonable legal fee, regardless of the existence of a retainer agreement or whether all of the interested parties have consented to the amount of fees requested. However, implicit in the reporting of the decision in *Matter of Talbot* was that the Surrogate had already taken into consideration the absence of misconduct, fraud or some uncon-

scionable advantage by the attorney of his client and, therefore, upheld the contract. The Appellate Division's reversal suggests: 1) that the contract is irrelevant despite its clear and unambiguous language and the absence of the above mentioned factors that might give grounds to vitiate the contract, and 2) that the Surrogate must, nevertheless, apply a subjective evaluation in total disregard of the contract's purpose.

Numerous decisions have found their way into the lexicon of the law concerning this issue. The Court of Appeals in *Lawrence v. Miller*, upheld a decision of the New York County Surrogate's Court (by Surrogate Roth) which confirmed a referee's report denying legal fees in connection with an estate matter.[5] The Court held that the motion to dismiss the petition in a proceeding to recover over forty million dollars in legal fees due pursuant to the parties' *revised* retainer agreement were properly denied. The Court went on to say that a fee arrangement can be deemed unconscionable when entered into or in retrospect following a long professional relationship where eighteen million dollars in fees had been paid over an extended period of time. The Court added that New York law "provides that circumstances arising after contract formation can render a contingent fee agreement—not unconscionable when entered into—unenforceable where the amount of the fee, combined with the large percentage of the recovery it represents, seems disproportionate to the value of the services rendered."[6] The Court also alluded to the fact of the existence of a pre-existing confidential relationship with the client suggesting a hint of overreaching which could be sufficient to nullify the enforceability of the contract.

The Appellate Division below in an order dated November 27, 2007, in a four-to-one decision, affirmed the disallowance with a majority noting that unconscionability determinations require a showing of procedural and/or substantive unconscionability. To quote from that decision, "while at first blush the revised retainer agreement might arguably seem excessive and invite skepticism before any determination regarding unconscionability can be made, the circumstances underlying the agreement must be fully developed including any discussions leading to the agreement, as well as the prospects at that time of successfully concluding the litigation in favor of the Plaintiff."[7]

The Court in *Lawrence v. Miller* concluded that it is well settled that an unconscionable contract is generally defined "as one which is so grossly unreasonable as to be unenforceable according to its literal terms because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[8] The Court went on to cite *Corbin on Contracts*, Sections 1.6 and 17–18, noting that an attempt to define unconscionability by its assertion that, in general, agreements entered into between competent adults where there is no deception or overreach in their making should be enforced as written.

Accordingly, the power to invalidate fee agreements with hindsight should be exercised only with great caution. It is not unconscionable for an attorney to recover much more than he or she could possibly have earned at an hourly rate. Indeed the contingency system cannot work if lawyers do not sometimes get very lucrative fees, for that is what makes them willing to take the risk—a risk that often becomes reality that they will do much more work and earn nothing. If state courts become too preoccupied

with a ratio of fees to hours contingency fee, lawyers may run up hours just to justify their fees or may lose interest in getting the largest possible recoveries for their clients.

None of this is present in the *Talbot* decision. The Appellate Division did not allude to overreaching or unconscionability but merely remanded the case back to the same Surrogate who presumably had considered these factors in sustaining the terms of the retainer agreement. Had the Appellate Division made but one specific reference that would allow the contract to be revisited, let alone vitiated, then clearly Surrogate's Court Procedure Act 2110 would be the appropriate remedy to resolve the issue of the legal fee.

Another Court of Appeals decision worth noting is *King v. Fox*.[9] In the *King* case, the Court of Appeals held that ratification of an attorney's fee agreement that might otherwise be considered voidable as unconscionable can occur if the client is fully informed, has equal bargaining power and knowingly and voluntarily affirms such agreement with both a full understanding that made the agreement voidable and knowledge of his or her rights as a client.[10]

The essence of the *King* decision was that the attorney had been found guilty of misconduct during the course of the representation. Clearly, under those circumstances, justification for terminating the retainer contract leaves little doubt that the contract would be voided. The Court relied upon a factual determination that such misconduct had occurred and there was little distance for the Court to travel in reaching the unanimous result that the retainer contract should be vacated. On the issue of unconscionability, an earlier Appellate Division decision with respect to the same *Lawrence v. Miller* case mentioned above[11] is instructive.

The predicate rationale for the lengthy decision finding that the retainer contract was unconscionable is the Court's reliance on the long established rule that an unconscionable contract is one that is so grossly unreasonable in the light of the mores and business practices of the time and place that it should not be enforced. In this case, the relationship between the attorney and the client extended over a long number of years during which period of time substantial legal fees were paid to Plaintiff's counsel pursuant to the terms of their retainer agreement. However, near the conclusion of the case, after the Plaintiff herself had practically entered into an acceptable settlement with a specific dollar amount sitting on the table, the Plaintiff's law firm sought to modify the retainer agreement thereby substantially enhancing their prospective legal fee that far exceeded the anticipated amount of time that would be necessary to reach a final settlement of the matter. The Court emphasizes the fact that there was very little risk in bringing about a final successful resolution of the case.

Once again, in analogizing *Talbot* to the aforementioned seminal cases, the disparity is clearly evident and leaves little or no room to equivocate the justification of the retainer agreement in the *Talbot* case.

No confidential relationship existed between the attorney and his client. There was no misrepresentation regarding the likelihood of success, particularly given the fact that the decedent was unrelated to Ms. Cullin and was blind at the time of the execution of the document which occurred six days before her death. There is no

evidence that Karen Cullin was unsophisticated, naïve or illiterate and, of course, she had the right to consult with any number of attorneys before entering into the subject retainer contract.[12] Finally, the fee is not unconscionable despite the fact that if predicated upon an hourly rate it is not denied that the hourly rate would compute to be extravagant. However, and of the utmost importance, is the risk taken by the attorney given the facts surrounding the execution of the will that his time and effort might have been for naught and that was the reason that both parties acting in good faith agreed to a contingency fee arrangement which it turns out was for the mutual benefit of both parties.

Endnotes

1. *Matter of Talbot*, 84 A.D.3d 967, 922 N.Y.S.2d 552 (2d Dept. 2011).

2. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934).

3. 22 NYCRR Part 1215, also known as the Written Letter of Engagement Rule.

4. *Matter of Talbot*, 84 A.D. 3d at 967.

5. *Lawrence v. Graubard Miller,* 11 N.Y.3d 588, 873 N.Y.S.2d 517 (2008).

6. *Id*., at 596.

7. *Lawrence v. Graubard Miller,* 48 A.D.3d at 4 (1st Dept. 2007).

8. *Id*., at 17-18.

9. *King v. Fox*, 7 N.Y.3d 181, 818 N.Y.S.2d 833 (2006).

10. *Id*., at 190-191.

11. *See* 48 A.D.3d 1, 853 NYS2d 1 (1st Dept. 2007).

12. *See Aldrich v. Bailey,* 132 NY 85, 87-88 (1892) which establishes the standard rule that a party must wholly, absolutely and completely be unable to understand or comprehend the nature of the retainer agreement, which is the standard for establishing legal incompetency.