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ARBITRATION CLAUSES
BEWARE THE INJUNCTIVE RELIEF EXCEPTION

MEDICIS PHARMACEUTICAL CORPORATION V. ANACOR PHARMACEUTICALS, INC.
DELAWARE CHANCERY COURT
C.A. NO. 8095-VCP
DECIDED: AUGUST 12, 2013

On August 12, 2013 the Delaware Chancery Court issued its ruling in Medicis Pharmaceutical Corporation v. Anacor Pharmaceuticals, Inc., C.A. No. 8095-VCP, a case involving interpretation of an arbitration clause that included an exception allowing access to courts for injunctive relief. The court held that under the terms of the exception a party was permitted to seek specific performance in court in lieu of arbitration of the dispute, pointing out that arbitration was consensual and under the clear language of this clause the court had no choice but to allow the suit to continue in court.

On February 9, 2011 Medicis and Anacor entered into a license agreement. The agreement contained an arbitration clause providing for arbitration in Wilmington, Delaware by JAMS before three arbitrators, and also contained the following disputed clause:

> The arbitrators also shall be authorized to grant any temporary, preliminary or permanent equitable remedy or relief the arbitrators deem just and equitable and within the scope of this Agreement, including an injunction or order for specific performance. The award of the arbitrators shall be the sole and exclusive remedy of the Parties (except for those remedies set forth in this Agreement). Judgment on the award rendered by the arbitrators may be enforced in any court having competent jurisdiction thereof, subject only to revocation on the grounds of fraud or clear bias on the part of the arbitrators. *Notwithstanding anything contained in this Section 13.2 to the contrary each Party shall have the right to institute judicial proceedings against the other Party or anyone acting by, through or under such other Party, in order to enforce the instituting Party's rights hereunder through specific performance, injunction, or similar equitable relief* [emphasis added].

A dispute developed, and Anacor initiated the dispute resolution process under the agreement, which required an initial referral of the dispute to "Executive Officers" of the parties and could result in eventual arbitration of the dispute. Two weeks after Anacor's initiation of the dispute resolution process, Medicis brought suit in Delaware Chancery Court seeking to enjoin Anacor from pursuing the arbitration and seeking specific performance of the agreement and a declaratory judgment. Anacor moved to dismiss, and in ruling on that motion the court stated:

> "For the reasons that follow, I conclude that the plaintiff's claims are not subject to mandatory arbitration under the parties' license agreement. Hence, I deny the defendant's motion to dismiss. In reaching this conclusion, I recognize that, in the abstract, this result may not be optimal. To conclude otherwise, however, would require the Court to ignore the plain and unambiguous language of the agreement negotiated by two sophisticated business entities. I decline to do that because arbitration is consensual and these parties failed to provide a clear expression of an intent to require that this dispute be arbitrated."

From the author's perspective, it appears that the result is what Anacor negotiated and it is difficult to see how the court could have come to a different result under the language of the agreement. However, if the parties desire that their disputes be arbitrated, including an exception for actions for specific performance would seem to make little sense.