

## DISPUTE RESOLUTION

The Newsletter for Conflict Resolution Neutrals and Attorneys

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There are a number of cases to report on this month.

- Lyles v. Pioneer Housing Systems, INC.; 2003 WL 1145466 (S. Ct. Ala., March 17, 2003) No link available at this time. A summary is available at <http://www.sirote.com/sirote.asp?section=publications>

The lower court ordered all disputes to be resolved by arbitration. The Supreme Court noted that only the plaintiff's warranty claim was covered by a pre-dispute arbitration agreement, and that a similar clause in the Owner's Handbook was not agreed to by plaintiff.

- Wachter v. UDV North American, Inc., 2003 WL734243 (Conn. App. Ct. Mar. 11, 2003). Full text:  
<http://www.jud.state.ct.us/external/supapp/Cases/AROp/AP75/75ap221.pdf>

Wachter moved to vacate an arbitration award made in connection with the termination of his employment agreement. He had refused to sign a release based upon a total severance settlement of \$580,000. The Arbitrator ruled that the refusal constituted a waiver of his rights to the severance package. This was an unrestricted submission, and the Supreme Court said that this meant that they would not review the Arbitrator's legal conclusions. [An "unrestricted submission" is one in

which there is “no express language restricting the breadth of issues, reserving explicit rights or conditioning the award on court review.]

- Franck v. P’ng, M.D., et al, 2003 WL 1203898 (N.C. Ct. App. Mar. 18, 2003). Full text:  
<http://www.aoc.state.nc.us/www/public/coa/opinions/2003/020405-1.htm>

Franck sued for wrongful death of her husband. Pursuant to a consent order, parties initiated arbitration. Parties were informed by arbitration provider, American Health Lawyers Association (AHLA), that each party would have to deposit \$24,500 to cover arbitration fees and expenses. Plaintiff filed a Motion to Set Aside Consent Order on the grounds that the amount was so excessive as to deny her due process, that she did not have the funds to put in escrow, and that she would be denied her day in court. The trial court set aside the consent order, and gave defendants the option to arbitrate with one arbitrator or to exercise its right to a jury trial, with plaintiff to be bound by defendants’ election. The North Carolina Court of Appeals said that the trial court order did not affect any substantial right of defendant, and dismissed the appeal as interlocutory.

- In Re: Anonymous, Respondents. Office of the Circuit Mediator for the United States Court of Appeals for the Fourth Circuit, Amicus Curiae. United States Court of Appeals, 4th Circuit, No. 01-9543, March 20,2003. Full text:  
<http://pacer.ca4.uscourts.gov/opinion.pdf/019543.P.pdf>

Paul Lurie (Schiff, Hardin & Waite, Chicago) reported on this case in which a client sued her former employer for retaliatory discharge. Her attorney hired another lawyer to aid in the case, but a second fee and expense agreement was not executed. Client and employer both appealed trial court’s original verdict, and attended a mediation conference. After that, but before Court dismissed appeals, the client discovered the expense dispute. They were directed to arbitrate that dispute. Client and her previous and current lawyers submitted a lot of information from the mediation to the arbitration panel without the court’s permission. They were then ordered to appear before a disciplinary panel.

The Court concluded, first, that confidentiality was a bright-line rule, and matters only collaterally related to the mediation are not exempt. Second, it is also a violation to make disclosures to a confidential forum. Third,

anyone in attendance at a mediation session are subject to the confidentiality rule. Fourth, confidentiality does not deny due process rights. Fifth, it does not restrict persons from seeking permission to disclose. Sixth, confidentiality is not restricted solely to the mediation conference. Seventh, the Court should weigh confidentiality against the public interest in serving justice. Finally, the mediator's release from his or her obligation of confidentiality is subject to a different standard; it can be ordered by the court only in cases of manifest injustice.

- Spinetti v. Service Corp. International, U. S. Court of Appeals, Third Circuit, No. 01-4415, March 31, 2003. Full text:  
<http://www.ca3.uscourts.gov/recentop/week/014415p.pdf>

Louis Coffey of Wolf, Block, Schorr and Solis-Cohen (Philadelphia) reports on this case in which the Third Circuit ruled that an arbitration agreement which requires workers lodging discrimination claims to pay for their own attorney's fees regardless of the outcome (contrary to statute) and to pay for their share of the arbitration costs is enforceable, since Federal judges have the power to sever the offensive provisions before sending the case to arbitration.

- Prestige Ford v. Ford Dealer Computer Services Inc. (FDCS), 2003 WL 940629 (5th Cir. (Tex.) Mar. 25, 2003). Text:  
<http://www.ca5.uscourts.gov/opinions/OpinHome.cfm> (find by date)

FDCS was to provide computer products and services to Prestige. Prestige announced its intention to terminate the agreement due to faulty equipment and failure to timely maintain. FDCS filed arbitration claim. Arbitrators found that Prestige's letter was a breach of contract and awarded FDCS \$102,000. Prestige appealed on grounds that the panel had denied its motion to obtain certain FDCS documents that affected its rights. District Court and Fifth Circuit denied Prestige's appeal, because Prestige did not meet any of the 9 U. S. C. § 10 (a) grounds for *vacature*.

- Musnick v. King Motor Company of Fort Lauderdale; 2003 WL 1591270 (11th Cir. (Florida) 2003). Full text:  
<http://www.ca11.uscourts.gov/ops/200212648.pdf>

King appealed district court order denying its motion to compel arbitration in religious discrimination case. The arbitration agreement

required the awarding of costs and fees to the prevailing party. The 11<sup>th</sup> Circuit reviews the cases in various circuits in which a consensus is formed that the party seeking to avoid arbitration has the burden of showing that the fee-shifting provision would preclude him from vindicating his federal statutory rights. If Musnick does not prevail, he can seek judicial review if the liability is excessive. Here, it is speculative and Musnick did not provide evidence of fees, etc.

- Casper v. Preston 2003 WL 1563985 (Tex. App. 1st Dist 2003). Westlaw: 2003 WL 1563985. No known link unless you are a member of the Texas Bar Association.

The divorcing parents reached a settlement agreement in mediation that included visitation. The trial court's decision also included visitation provisions. Casper appealed on grounds that the terms of the court's decision were materially different from the agreement. In Texas, a mediated settlement agreement is binding if the agreement provides in a separate paragraph an underlined, capitalized, or boldfaced type statement that it is not subject to revocation, is signed by each party, and is signed by each party's attorney. The settlement agreement in this case met that statutory standard. Casper also had some issues with the conflict between the settlement agreement and the court order with respect to child support and medical support. He was not successful on those appeals.

- Earl Anthony Bowling, Inc. v. Corrie Development Corp, Dublin Land Co. 2003 WL 1605803 (Cal. App. 1st Dist 2003). 2003 WL 1605803 Source: Willamette Law Review Online – Dispute Resolution.

Bowling leased property from Dublin Land Co., with a right of first refusal, but Dublin sold to Corrie. Bowling settled with Dublin in mediation agreement that provided that Corrie would pay certain expenses. Corrie refused to pay, claiming that Calif. Code of Civil Procedure required “pending litigation” as a condition for enforcement of the agreement. The court held that the statutory language was to be literally construed, and thus the enforcement provision in the mediated settlement agreement was ineffective.

- PacifiCare Health Systems, Inc., et al., V. Jeffrey Book, et al., U. S. Sup. Ct., No. 02-215, April 7, 2003, reversing and remanding 285 F.

3d 971. Full text available at:

<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol=000&invol=02-215>

Physicians filed suit against managed health care organizations, including RICO cause of action. Two of the four arbitration agreements at issue preclude punitive damages. PacifiCare and United moved to compel arbitration. District Court denied motion to compel as to RICO claims. 11<sup>th</sup> Circuit affirmed. The Supreme Court, in Justice Scalia's opinion, reviewed the various decisions on treble damages provisions, ranging from strictly punitive to purely compensatory. "We have repeatedly acknowledged" that the RICO provision is remedial. Here there is ambiguity in the contractual terms, and the Court would not base its decision on mere speculation as to what the arbitrator might find as to the intent of the provisions, but said that the proper course was to compel arbitration.

- U.S. District Court (Maine)) Gregory W. JOHNSON, v. POLARIS SALES, INC., No. 02-CV-185-B-S. April 4, 2003. Full text available at:  
[http://www.med.uscourts.gov/site/opinions/singal/2003/gzs\\_04042003\\_1-02cv185\\_johnson\\_v\\_polaris.pdf](http://www.med.uscourts.gov/site/opinions/singal/2003/gzs_04042003_1-02cv185_johnson_v_polaris.pdf)

Plaintiff sued ATV manufacturer and distributor, who moved to compel arbitration. The FAA does not require that every party sign the written arbitration agreement. Here Polaris Sales is affiliated with Polaris Industries, the manufacturer, and so may seek arbitration, even if it is not a signatory. Similarly, Johnson Marine's corporate predecessor is Johnson Power, Inc., and the Johnson's exploited the benefits of the agreement prior to litigation.

In response to Plaintiff's assertion that a certain dispute was not within the purview of the arbitration clause, the court found that the agreement also included plain language that arbitrability issues "shall be" arbitrated. Next plaintiff argued that the contract had expired. The dealer agreement, however, provided that the parties would remain obligated by terms that explicitly or implicitly survive termination.

- Jackson v. Rubicon, Inc. 2003 WL 1733724 (La. App. 3 Cir April 2, 2003). Full text: [www.la3circuit.org/opinions%5C0402%5C02-1156opi.pdf](http://www.la3circuit.org/opinions%5C0402%5C02-1156opi.pdf)

Rubicon appealed trial court judgment imposing in solido liability among defendants. The settlement agreement involved four defendants, who all agreed to pay the sum to the Jacksons. The fact that this is a joint obligation is supported by the fact that there was no statement in the settlement agreement listing individual amounts that each defendant would pay. The court found that the obligation was indivisible, and must be paid by all or any one of the defendants (or some, I would add).

- Local 391, Council 4, ASCME, AFL-CIO v. Dept. of Corrections et al.; 2003 WL 1564192 (Conn. App. 2003). Full text: <http://www.jud.state.ct.us/external/supapp/Cases/AROap/AP76/76ap264.pdf>

Arbitrator may look outside a collective bargaining agreement to a statute, some of whose provisions were not superseded by the agreement.

- Saturn Distribution Corp. v. Paramount Saturn, LTD.; 2003 WL 1561908 (5th Cir. (Texas) 2003). Full text: <http://caselaw.lp.findlaw.com/data2/circs/5th/0220431p.pdf>

District Court closed the case without dismissing it when it granted Saturn's motion to compel arbitration; labeled it a final judgment; and did not stay federal court proceedings. Next, there is a broad arbitration agreement in the parties' contract. Finally, Texas Motor Vehicle Board did not have exclusive jurisdiction over dispute as Paramount alleged, and, in any event, the FAA preempts state laws that limit arbitrability.

- Little v. Auto Stiegler, Inc., Cal. Sup. Ct. No. S101435, decided February 27, 2003. Full text: <http://www.courtinfo.ca.gov/opinions/documents/S101435.PDF> and Leamon v. Herrera, Cal. App. 4<sup>th</sup>-Div. , decided February 24, 2003. Full text: <http://www.courtinfo.ca.gov/opinions/documents/F038025.DOC>

California Supreme Court decided that employers can require arbitration of statutory employment claims under certain conditions: In *Armendariz v. Foundation Health Psychcare Services, Inc.*, No. S075492 (8/24/00) these were: bilateral agreement, employer pays for unique costs of arbitration, adequate discovery is allowed, and award is in writing. Little claimed that he was terminated for investigating and reporting warranty fraud. The

agreement contained a provision that an arbitration appeal could be triggered by an award greater than \$50,000. The Supreme Court held that it was unconscionably one-sided and may not be enforced, but that it was severable. Employees may not be terminated for reasons contrary to public policy. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 178 (1980). The Court held that non-statutory *Tameny* claims are subject to the minimum requirements of *Armendariz*.

*Leamon* involved issues concerning the enforceability of a contract for the sale of real estate. In relevant portion, Seller refused a request to mediate, a condition precedent to recovery of attorney's fees under an agreement that the lower court found invalid. *Leamon* should have sought mediation, stated her position that the contract was invalid, and that mediation was sought to preserve the attorney's fee claim.

- *Fehrbach, Chapter 7 Trustee of Taurus Foods, Inc., v. Ernst & Young, LLP*, 2003 WL 1906136, January 6, 2003. Full text available at: [http://www.insd.uscourts.gov/search\\_opinions.htm](http://www.insd.uscourts.gov/search_opinions.htm). Look for date under recent decisions by Judge Tinder.

From Paul Lurie, EY's motion to stay pending arbitration was denied. A term in an arbitration clause covering claims "relating to EY's engagement letter" was not broad enough to cover claims made for services rendered prior to the letter. The question in this bankruptcy case was for the court, not the arbitrators, notwithstanding an explicit clause that said that any issue concerning arbitration was for the arbitrators to decide.