

# DISPUTE RESOLUTION

The Newsletter for Conflict Resolution Neutrals and Attorneys

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*NOTE: A good portion of the material in this issue comes from the Willamette Dispute Resolution Newsletter. If you would like to subscribe, go to: <http://www.willamette.edu/wucl/wlo/dis-res/>*

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### **Mediation Confidentiality**

Yacht Club Southeastern, Inc. v. Sunset Harbour North Condominium Association, Inc.; 2003 WL 728957 (Fla. App. 3rd Dist 2003). Full text: <http://www.3dca.flcourts.org/>. In this case Yacht Club, developer, was sued by Sunset for alleged construction defects. The parties engaged in mediation, unsuccessfully, and then Yacht Club communicated directly with all the individual condominium owners represented by Sunset about the mediation, including its settlement offer. This appellate court held that the individual unit owners were the real parties in interest, whether named or not, and that Florida's confidentiality in mediation statute did not apply to them.

### **Arbitrators have jurisdiction of violations of Federal anti-trust statutes**

Paul Lurie of Chicago's Schiff, Hardin firm reports as follows on Baxter Intl, Inc. v. Abbott Laboratories, Inc., 315 F.3d 829 C.A.7 (Ill.),2003. Decided Jan. 16, 2003. Full text:

<http://www.ca7.uscourts.gov/op3.fwx?submit1=showop&caseno=02-2039A.PDF>

“Arbitration panel has jurisdiction to decide violations of Federal anti-trust statutes and to craft remedies. Award will not be set aside due to alleged errors of law. Cudahy, J. dissent says that effect of the award is itself a violation of anti-trust law and should be set aside.” The Court said that the decision, which related to a three party arrangement between international companies, “does not condemn the public to tolerate a monopoly.” If it does “offend the Sherman Act, then the U. S., the FTC, or any purchases of the anesthetic gas in question, is free to sue and obtain relief.” The dissent points out that the arbitrators' award creates a horizontal allocation of markets, a clear violation of the Sherman Act.

### **Arbitrating Arbitrability**

In Shaw Group, Inc. v. Triplefine Int'l, CA 2d, No. 01-9038, decided March 4, 2003 (Full text: <http://www.tourolaw.edu/2ndCircuit/>), Second Circuit vacates the District Court's decision that held that arbitrability of Triplefine's claim for attorneys' fees and costs was a matter for the court, rather than the International Chamber of Commerce arbitrators, to decide.

The arbitration agreement provided that all disputes would be referred to the ICC, and that its rules provided that the International Court of Arbitration would resolve in the first instance any disputes about its own jurisdiction.

### **Contract formed before arbitration clause added means no arbitration**

Senco, Inc. v. Fox-Rich Textiles, Inc.; 2003 WL 734239 (Conn. App. 2003). Full text:

<http://www.jud.state.ct.us/external/supapp/Cases/AROp/AP75/75ap207.pdf>

. After telephone order for 60-inch fabric was placed with Fox-Rich, Senco received a Sales Contract that included an arbitration clause. However, the terms of the order had been memorialized in a letter that predated the Sales Contract, and the contract was already formed. The opinion does not state whether or not Senco had signed the Sales Contract. The fabric shipped was 57-inch, and, when the parties could not settle their dispute, sued in court. Appellate court affirmed lower court decision that contract had already been formed, and that the arbitration clause was not effective.

### **Arbitration Award Upheld in Absence of Statement Regarding Breach**

Superpumper, Inc. v. Nerland Oil, Inc.; 2003 WL 732829 (N.D. S. Ct. 2003). Full text:

<http://www.court.state.nd.us/COURT/OPINIONS/20020214.htm>

The Court stated that where it was clear that the arbitrators contemplated the issue of fault (as evidenced by the holding and award), the fact that they did not explicitly state which party breached the agreement was not a reason to overturn the award.

### **Automobile insurer not compelled to arbitrate issue of whether or not claimant fails to meet statutory filing requirements**

Scruggs v. State Farm Mutual Automobile Insurance Company, 2003 WL 352482 (Ariz. App. Div. 1). Full text:

<http://www.cofad1.state.az.us/opinionfiles/CV/CV020166.pdf>

Scruggs provided statutorily-required corroborating evidence in connection with an unidentified, uninsured motorist that forced him to hit another vehicle and did not stop. However, Scruggs could not compel State Farm to arbitrate the question of whether or not he had met his statutory obligation. Appellate court finds Scruggs met his obligation as a matter of law, and that lower court erred in referring the question to arbitration.

**Alabama Supreme Court holds arbitration may be compelled when contract is fraudulent, but arbitration clause is not**

Johnson Mobile Homes of Alabama Inc. v. Hathcock; 2003 WL 380498 (Ala. S. Ct. 2003). Full text:

<http://www.wallacejordan.com/decisions/Opinions2003/1992310.htm>

Trial court denied JMH's motion to compel arbitration on the grounds that the cause in action was fraud and that Mrs. Hancock, unlike Mr. Hancock, had not signed the contract which contained the arbitration clause. One arbitration agreement was freestanding, another was in a document called "Installment Note, Security Agreement, and Disclosure Statement." The Alabama Supreme Court noted that both Mr. and Mrs. Hancock were plaintiffs in this case, and found that to the extent she had any separate claims under the sales contract, she was not required to arbitrate. However, the lower court erred in denying the motion to compel since there was no fraud in connection with the free-standing agreement.

**Alabama Supreme Court split on interstate commerce precondition for arbitrability**

Ex Parte Webb; 2003 WL 378356 (Ala S.Ct.2003). Full text:

<http://www.wallacejordan.com/decisions/Opinions2003/1000651.htm>

Webb was an employee of Penney Motor Company, performing "menial chores," and was allegedly struck by the President of the company when he refused to clean his personal automobile. Webb had signed an employment arbitration agreement. However, an Alabama statute prohibits specific enforcement of a pre-dispute agreement to submit a controversy to arbitration. The Supreme Court held that Penney had not carried the burden of showing that the transaction substantially affected interstate commerce – although Penney's business was engaged in interstate commerce – and, therefore, the dispute would not be arbitrable. Writ issued to vacate trial court order compelling arbitration.

**Failure to explain arbitration agreement to person known to be illiterate may have been fraud in the inducement**

American Heritage Life Insurance Company v. Lang, 2003 WL 289444 (5th Cir. Miss.). Full text:

<http://www.ca5.uscourts.gov/opinions/OpinHome.cfm>. Case remanded to District Court for adjudication of issue of fraud in the inducement.

**Clause requiring appellate arbitration where award greater than \$50,000 is unconscionable, says California Supreme Court**

Alexander M. Little v. Auto Stiegler, Inc., 2003 WL 548926 (Cal. Supp. Ct.). Full text:

<http://caselaw.lp.findlaw.com/data2/californiastatecases/s101435.pdf>. This was a case involving the termination of an employee allegedly for whistleblowing about warranty fraud at an automobile dealership.

**Mediated agreement not enforced where party informed that a referendum of Indian tribe might be required for approval**

Except for the comity the court shows to the sovereign tribe, this case is similar to those where approval of a governmental unit to a mediated settlement agreement may be required.

Mills v Vilas County Board of Adjustments (Wis. App. Dist.).

<http://www.courts.state.wi.us/html/ca/02/02-2546.htm>

**Paul Lurie alerts us to case that's a primer on motion to compel arbitration, UAA vs. FAA, waiver of right to arbitrate.**

Housh v. Dinovo Investments, Inc., 2003 WL 1119526 (D.Kan., Mar 07, 2003) (NO. CIV.A. 02-2562-KHV).