



# The Litigation Reporter

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## Arbitration

### Complex Horizontal Price-Fixing Claims Under The Sherman Act Are Arbitrable

Plaintiffs, shippers of bulk chemicals, commenced a putative class action against defendants, who allegedly control two-thirds of the international parcel tanker service industry, asserting a claim of horizontal price-fixing and several state law claims. Defendants moved to compel arbitration based on arbitration clauses contained in the charter contracts. The district court denied defendants' motions concluding that plaintiffs' price-fixing allegations were outside the scope of the arbitration clause. The Second Circuit reversed, holding that plaintiffs' price-fixing allegations fell within the scope of the arbitration clause because it was a dispute that arose out of or was related to the contracts. In addition, the Second Circuit rejected plaintiffs' argument that an arbitration panel would be incapable of resolving plaintiffs' price-fixing claims, stating that complexity was not a reason to deny arbitrability. (*JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004))

## Business Law

### Implied Covenant In Sale Governs

The New York Supreme Court granted a preliminary injunction to plaintiff, the purchaser of a computer software business, preventing the business' former owners from soliciting plaintiff's customers and using its trade secrets. The Court found that, where a sale includes an express transfer of the business' goodwill, New York law implies a duty, infinite in duration, on the part of the sellers to refrain from soliciting the business' customers. The Court rejected the sellers' arguments that express two-year non-competition



agreements in the employment agreements they entered into with the buyer trumped the implied duty arising from the sale. (*Mysis International Banking System Inc. v. TwoFour Systems, LLC*, N.Y.L.J. December 3, 2004 (p. 22, col. 1))

## **Civil Rights**

### **Attorneys' Fees Awarded Where Civil Rights Plaintiffs Awarded Only Nominal Damages**

The New York Court of Appeals awarded attorneys fees to plaintiffs who won a civil rights lawsuit even though plaintiffs were awarded only nominal damages. The plaintiffs, preoperative transsexuals, alleged that they were harassed by the defendant's employees, whose conduct violated the public accommodations provisions of New York City's Human Rights Law ("NYCHRL"). Plaintiffs prevailed but received only \$1 each in damages. The court explained that an award of attorneys fees rarely is appropriate where only nominal damages are awarded unless the plaintiff accomplishes an important public goal. Awarding fees was appropriate here because plaintiffs' suit was the first public accommodations claim tried to verdict under the NYCHRL, and the first to vindicate the rights of transsexuals. (*McGrath v. Toys R Us*, 2004 WL 2720092 (N.Y. Nov. 23, 2004))

## **Consumer Lending**

### **Consumer Lenders May Pay Yield Spread Premium To Brokers Without Running Afoul Of California Predatory Lending Law**

Defendant bank ("Bank") made a residential mortgage loan to plaintiff borrower ("Borrower"). Co-defendants acted as mortgage brokers ("Brokers"). After Borrower learned that he could have obtained a lower interest rate, he sued alleging, among other things, violation of California's predatory lending law ("PLL"). The PLL provides in part that a borrower may not be charged points and fees in excess of 6% of the loan at or before the time of closing. To reach 6%, Borrower's calculation included the amount of a yield spread premium ("YSP"). A YSP is a bonus paid by Bank to Broker for originating a loan at a higher rate than the minimum approved by the Bank. The YSP is paid by Bank to Broker at the time of closing, then paid for by Borrower over the life of the loan in the form of increased mortgage payments. Defendant argued that the YSP is not a payment made by Borrower at or before the closing. The trial court agreed, sustaining the demurrer without leave to amend. The Court of Appeal affirmed, holding that a YSP is not a payment made by a "consumer at or before closing." Accordingly, the loan was not a "covered loan" and the PLL did not apply. (*Wolski v. Fremont Investment & Loan*, --- Cal.Rptr.3d ----, 2004 WL 2750358, 2004 Daily Journal D.A.R. 15,056, (Cal.App. 4 Dist., Dec 02, 2004))



## **Contracts**

### **Liquidated Damages Clause In Equipment Lease Not Enforceable Where No Consideration For Early Recapture of Equipment**

The plaintiff lessor sued, claiming that defendants breached a Lease agreement under which they had leased an aircraft. The defendants moved in limine that the liquidated damages clause in the Lease be declared unenforceable. The federal district court granted the motion, because the Lease also provided for actual damages, and liquidated damages cannot be awarded in addition to actual damages, but only in place of them. In addition, the liquidated damages provision was held to be unenforceable because it failed to account for the benefit to the plaintiff from the breach, namely, the early return of the leased aircraft, a fact that would have had to be taken into account in determining damages. (*AAR Int'l v. Vacances, et al.*, No. 99 C 8090 (N.D. Ill. 2004))

## **Copyright Law**

### **Digital Millennium Copyright Act § 1202(b) Not Violated By Copying Unmarked Pictures**

The United States District Court for the Eastern District of Pennsylvania has held that § 1202(b) of the Digital Millennium Copyright Act (“DMCA”) was not violated by the defendant’s unauthorized reproduction of photographs taken from plaintiff’s copyrighted book. DMCA § 1202(b) prohibits persons from intentionally removing or altering copyright management information (“CMI”), which is defined to include the title, author and copyright owner for the work. Here, the only CMI associated with the photographs was a copyright notice appearing on the cover of plaintiffs’ book. As no CMI appeared in or immediately around any photograph, the defendant did not “remove” the CMI from any work by reproducing the images without attribution. (*Schiffer Publishing Ltd. v. Chronicle Books LLC*, 2004 WL 2583817 (E.D. Pa. Nov. 12, 2004))

## **Discovery**

### **A Responding Party Has No Duty To Supplement Interrogatories When New Information Comes To Light Even If The Party Has Reserved The Right To Supplement And Amend The Earlier Responses**

Plaintiff alleged that he contracted asbestosis from exposure related to his employment. Defendant employer served an interrogatory requesting identification of all persons with



knowledge of the circumstances surrounding plaintiff's alleged exposure. Plaintiff responded that, after good faith inquiry, he currently lacked information. Plaintiff reserved the right to supplement his response upon discovering responsive information. Defendant moved for summary judgment, and plaintiff opposed with a declaration of a witness co-worker who described specific circumstances by which defendant would use air hoses to blow asbestos dust in plaintiff's direction. Defendant objected to the declaration on the ground that the co-worker had not been identified in the earlier interrogatory response. The trial court sustained the objection, excluded the declaration, and granted summary judgment. The Court of Appeal reversed the trial court, holding that a party has no affirmative duty to supplement interrogatory responses even if new information comes into that party's possession. (*Biles v. Exxon Mobil Corporation*, 124 Cal.App.4th 1315, 22 Cal.Rptr.3d 282 (Cal.App. 1 Dist., Dec 14, 2004))

## **Insurance**

### **Insurer Does Not Have To Prove Prejudice To Deny Coverage To Insured Who Failed To Provide Timely Notice Of Lawsuit**

Plaintiff, an insurance company, filed a declaratory action alleging that an insured's claim for coverage was precluded by failure to give timely notice of the underlying lawsuits. Even though the insurance company was unable to show any prejudice resulting from the untimely notice, the court held that the timely notice provision was a condition precedent to coverage under the contract, and thus a lack of timely notice was a valid reason to deny coverage. While the existence of prejudice may be relevant to a determination of whether notice was "timely," it is not required for a denial of coverage under such a provision if the notice is otherwise found to be untimely. (*Country Mutual Ins. Co. v. Livorsi Marine, Inc., et al.*, Nos. 1-03-2832 and 1-03-2912 (Ill. App. Ct. Nov. 30, 2004))

## **Labor and Employment**

### **Employer May Implement Overall Grooming And Appearance Policy If Burdens On Men And Women Are "Substantially Equal"**

Defendant Harrah's implemented a new policy in 20 of its casinos governing the grooming and appearance of its staff. The new policy imposed burdens on both men and women. Among other things, women were obliged to wear makeup and curl or tease their hair. Men were required to have their hair neat and were prohibited from wearing nail polish. Plaintiff was a cocktail waitress at Harrah's casino in Reno for 20 years, with an exemplary record. In derogation of the new policy, she refused to wear makeup because it offended her personal dignity. She sued under Title VII alleging sex discrimination. The Ninth Circuit held that an



employer's policy requiring that certain female employees wear makeup did not discriminate on the basis of sex where it was part of an overall grooming and appearance policy that imposed no greater burden on women than it did on men. (*Jespersen v. Harrah's Operating Company, Inc.*, 2004 WL 2984306 (U.S.D.C. Nev., Dec. 28, 2004))

### **Employer Does Not Violate Family Medical Leave Act Where It Restores Employee To Changed Position If Changes Are Insignificant**

Plaintiff filed claim against her former employer under the Family Medical Leave Act ("FMLA"), alleging that the employer had constructively discharged her while she was on leave by consolidating positions on the assembly line on which she worked. After her leave the plaintiff was required to use hand tools, which she had not used before. Plaintiff was injured using the tools and chose not to return to work. The court affirmed the grant of summary judgment for employer, holding that no violation could be found where the plaintiff retained the same pay and benefits, her duties were substantially similar, and she could not show that the same changes would not have been made in the absence of her taking leave. (*Mitchell v. Dutchmen Manuf., Inc.*, No. 04-1365 (7th Cir. Nov. 23, 2004))

## **Tax**

### **Financial Hardship Did Not Constitute Reasonable Cause For Abatement Of Penalties For Nonpayment Of Taxes**

The IRS assessed penalties against Plaintiff for failure to timely file returns, failure to timely deposit taxes, and late payment of taxes. Plaintiff argued that its financial difficulties constituted "reasonable cause" for its failure to comply with the tax laws, and filed suit when IRS denied its request. The Seventh Circuit agreed with the majority of circuit courts that have considered the issue and held that financial hardships could in some cases constitute "reasonable cause." However, it found that such circumstances were not present, as: (1) plaintiff had paid taxes when its revenue was at its low point but then failed to pay them when it had substantially restored its revenue level; (2) during the relevant period plaintiff's officers had raised their own salaries; (3) all creditors had been paid; and (4) other evidence had indicated that plaintiff had an available source of credit. (*Diamond Plating Co. v. United States*, No. 04-2199 (7th Cir. Dec. 6, 2004))



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