



The Litigation Reporter

August 2004
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Alternative Dispute Resolution

Parent Not Subject To Arbitration With Subsidiary's Employee

The Southern District of New York has awarded summary judgment to plaintiff declaring that a parent company is not subject to arbitration under an employment contract between its subsidiary and defendant to which it was not a party. Applying New Jersey law, the court found no basis to pierce the corporate veil and hold plaintiff to its subsidiary's contract, noting that plaintiff's influence over its subsidiary did not rise to the level of dominance and plaintiff's loans to its subsidiary did not amount to an intermingling of funds. (*Horizon Plastics v. Constance*, 00-CV-6458 (RCC), 2004 WL 1234049 (S.D.N.Y. June 2, 2004))

Protection For Writings Prepared For Mediation Is Absolute

An action for construction defects by the owner of an apartment complex against the contractors who built the complex was settled following a mediation. Prior to the settlement, a comprehensive case management order ("CCM") had been issued providing, among other things, that documents prepared in connection with any "mediation proceeding" would be confidential. Following the settlement, tenants of the complex sued the contractors and the owner for construction defects and conspiracy to conceal the defects and, in discovery, sought documents prepared for the mediation in the first action. The California Supreme Court reversing an intermediate appellate court, held that the confidentiality protection of Section 1119 of the California Evidence Code is absolute, and that discovery of documents prepared for a mediation could not be compelled under any circumstances. (*Rojas v. Superior Court*, 33 Cal.4th 407 (2004))



Antitrust

Claim For Vertical Restraint of Trade Fails Absent Proof Of Concerted Action

Plaintiff, a men's clothing retailer, alleged that Clubman, a competitor, and Zanella, their joint supplier, conspired to maintain an artificially high retail price for Zanella's products by having Zanella terminate its distribution relationship with plaintiff. On appeal from an award of summary judgment in favor of defendants, the First Circuit agreed that plaintiff failed to prove that Zanella's decision to terminate plaintiff was the result of concerted action by defendants to fix prices. It noted that Zanella's actions in terminating its less profitable relationship with plaintiff to avoid losing Clubman's business did not raise an inference of a vertical restraint of trade sufficient to support a violation of the Sherman Act. (*Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11 (1st Cir. 2004))

Supreme Court Limits Reach Of U.S. Antitrust Laws

In an 8-0 decision, the Supreme Court has held that, absent independent harm to the U.S. economy, U.S. antitrust laws do not apply to anticompetitive conduct by foreign defendants resulting in higher consumer prices to foreign consumers. The Court reasoned that allowing such claims would create "a serious risk of interference with a foreign nation's ability to independently regulate its own commercial affairs." While plaintiffs may sue foreign defendants for antitrust violations that injure the U.S. economy, the circumstances under which foreign parties can bring claims premised on harm to a foreign market linked to harm in the U.S. market remain unclear. (*F. Hoffman-La Roche Ltd. v. Empagran SA*, No. 03-724 (U.S. June 14, 2004))

Civil Procedure

Prevailing Party Cannot Seek Attorneys' Fees In Subsequent Action

Following issuance of a pre-trial scheduling order in an action against the Port of Stockton, the Port moved to amend its answer to add a counterclaim for attorneys' fees and costs. The court denied the Port's motion, holding that it had not shown "good cause" to amend its pleadings. Two years after an award of summary judgment in favor of the Port on all counts, the Port brought a separate action to obtain fees and costs incurred in the first action. The Ninth Circuit, affirming a lower court, held that such fees may only be sought in the action in which incurred either by motion or, if required governing substantive law as an element of damages to be proven at trial. (*The Port of Stockton v. Western Bulk Carriers KS*, 371 F.3d 1119 (9th Cir. 2004))



Closely-Held Corporations

Mandatory Buy-Sell Provision In Stock Purchase Agreement Enforceable

A closely-held corporation's stock purchase agreement provided that upon the death of a shareholder, his estate must sell his stock back to the corporation, unless the shareholder had "specifically bequeathed or otherwise given" the stock to his or her descendants. The Illinois Supreme Court held that where a shareholder died without a will, and his estate passed through intestate succession, he did not "give" his descendants his stock within the meaning of the stock purchase agreement. As a result, his estate was required to sell the stock back to the corporation. (*Martin Roth v. Opiela*, No. 96862 (Ill. S. Ct. June 17, 2004))

Contracts

Maritime Broker Not Entitled to Commissions After Agreement Terminated

The Southern District of New York has awarded summary judgment to defendants dismissing claims for unpaid commissions under an agreement plaintiff brokered between the agent of the owner of a vessel and the charterer of the vessel. When the charterer went into bankruptcy, the parties agreed to terminate the agreement and plaintiff was paid the commission due at that point. Thereafter, the agent, on behalf of the owner, entered into a new charter agreement with another charterer and paid a commission to a different broker. Plaintiff sued the owner and its agent, claiming it was entitled to continuing commissions because the new agreement was an assignment of the old. Dismissing the claims against the agent, the court held that an agent for a disclosed principal was not primarily liable for damages caused by a breach of contract. In addition, in dismissing the claims against the owner, it held that under maritime law, when contract payments are interrupted by termination of the contract, the broker is not entitled to a commission. (*John F. Dillon & Co. LLC v. Foremost Maritime Corp.*, 2004 WL 1396180 (S.D.N.Y. Jun 21, 2004))

Employment

Terminated At-Will Employee May Sue For Fraudulent Inducement To Enter Employment

A radio station owner gave a written offer of employment to plaintiff for a sales manager position. After plaintiff accepted the offer and began work, the owner reneged on the compensation terms and, shortly thereafter, fired plaintiff. A lower court held that since the manager was an at-will employee, he could not have relied upon the owner's representations regarding his employment, an essential element of both the misrepresentation and fraudulent inducement claims, and, therefore, granted summary judgment for the owner. The Court of



Appeal held that while an at-will employee may not recover damages arising from termination, fraudulent inducement as to the compensation terms is an actionable tort regardless of the employee's at-will status. (*Agosta v. Astor*, 120 Cal.App.4th 596 (2004))

Living Wage Ordinance Constitutional

In 2000, the City of Berkeley enacted a living wage ordinance requiring compliance by employers of a certain size operating on land leased from it. A restaurant sued, claiming that the ordinance violated the U.S. and California Constitutions. The Ninth Circuit held that since the lease with the City did not contain any wage requirements, the ordinance did not interfere with a contract and therefore did not violate the Contract Clause of the U.S. Constitution. Applying a "rational basis" test because the ordinance was economic in nature, it also found that the City's stated reasons for enacting the ordinance were "plausible" and, as a result, the ordinance did not violate the state or federal Equal Protection Clauses. Lastly, the Court found that a provision allowing employers with a collective bargaining agreement to opt out of the ordinance's requirements was not a delegation of legislative power to unions and, consequently, did not violate the state and federal Due Process Clauses. Thus, it held that the ordinance was constitutional. (*RUI One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004))

Affirmative Defense Allowed In Constructive Discharge Case

An employee filed a Title VII action alleging that she was subject to a sexually hostile work environment, discriminated against on the basis of her age and political affiliation, and was constructively discharged. In an affirmative defense, the employer claimed that it took reasonable care in preventing and correcting the harassment and that the employee failed to take advantage of procedures available to correct the harassment. The Supreme Court, noting that the employer's defense would not be available if the employee had actually been terminated, held that constructive discharge does not constitute a tangible employment action within the meaning of Title VII, and allowed the employer's affirmative defense. (*Pennsylvania State Police v. Suders*, No. 03-95 (U.S. June 14, 2004))



Editors	Contributors
Matthew J. Cannon Diane da Cunha Jonathan J. Faust Jay W. Freiberg Marlyn M. Gates Kristin L. Holland	Geoffrey Cahen Alexis L. Cirel* Julia Chung Todd M. Foreman Andrew D. Hoeg Megan P. McKnight Jowita Walkup

* Awaiting admission to the New York Bar.

The Litigation Reporter summarizes noteworthy decisions selected by the Contributors. Its contents do not constitute legal advice. For more information on any of the decisions discussed, contact Joel W. Sternman at j.sternman@kmzr.com, Bruce M. Sabados at bruce.sabados@kmzr.com, or Gil M. Soffer at gil.soffer@kmzr.com

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Katten Muchin Zavis Rosenman

www.kmzr.com

525 West Monroe Street
Suite 1600
Chicago, IL 60661-3693
p_312.902.5200
f_312.902.1061

575 Madison Avenue
New York, NY 10022-2585
p_212.940.8800
f_212.940.8776

2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
p_310.788.4400
f_310.788.4471

1025 Thomas Jefferson St., N.W.
East Lobby, Suite 700
Washington, DC 20007-5201
p_202.625.3500
f_202.298.7570

401 South Tryon Street
Suite 2600
Charlotte, NC 28202-1935
p_704.444.2000
f_704.444.2050

260 Sheridan Avenue
Suite 450
Palo Alto, CA 94306-2047
p_650.330.3652
f_650.321.4746

One Gateway Center
Suite 2600
Newark, NJ 07102-5397
p_973.645.0572
f_973.645.0573

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