RECENT DEVELOPMENTS

LANDLORD TENANT

APARTMENT OWNER CAN BE SUED UNDER FAIR HOUSING ACT AMENDMENTS FOR NOT WAIVING NO-COSIGNER POLICY

Giebeler v. M&B Associates, 343 F.3d 1143 (9th Cir. 2003)

FACTS: John Giebeler, disabled and unemployed due to the AIDS virus, sought to move from an expensive apartment to a less expensive unit closer to his mother at the Park Branham Apartments ("Branham"). M&B Associates ("M&B") owned Branham. Branham informed Giebeler, who was unable to work due to his disability, that he did not meet the minimum gross income requirements. Giebeler then asked his mother to help him rent the apartment. Branham rejected the application because M&B had a policy against cosigners and considered Giebeler's mother a cosigner. Giebeler informed Branham of his disability and of the Fair Housing Amendments Act ("FHAA") requirement that reasonable accommodations in rules, policies, practices or services be used when such accommodations may be necessary to afford disabled persons' use and enjoyment of the unit. 42 U.S.C. § 3604(f)(3)(B). Giebeler then filed suit under the FHAA for failure to reasonably accommodate his disability through Branham's refusal to waive the no-cosigner policy. The district court granted summary judgment for M&B on the reasonable accommodation claim because an accommodation, which remedies the economic status of a disabled person, is not an "accommodation" as contemplated by the FHAA.

HOLDING: Reversed and Remanded.

REASONING: The FHAA imposes an affirmative duty upon landlords to reasonably accommodate disabled persons' physical and administrative needs. *United States v. California Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994), 42 U.S.C. § 3604(f)(3)(A), (C). Branham did not dispute that Giebeler suffered from AIDS nor that Branham was aware of the disability and refused to accommodate Giebeler. The Supreme Court has held that accommodation requirements: 1) occasionally require preferring disabled individuals over others who are otherwise similarly situated but are not disabled; and 2) are not limited only to lowering barriers created by the disability itself. *U.S. Airways v. Barnett*, 535 U.S. 391 (2002). Under the FHAA only *reasonable* accommodations that do not cause undue hardship or mandate fundamental changes in a program are required. But a discriminatory rule, policy, practice, or service is not defensible simply because that is the manner in which such rule or practice has traditionally been constituted. The FHAA would require that changes be made to such traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling. Giebeler's request that he be permitted to live in an unit rented by his financially qualified mother was a request for accommodation that he was entitled to receive *if* the adjustment both "may be necessary to afford [him] equal opportunity to use and enjoy a dwelling" and was "reasonable" within the meaning of the statute. 42 U.S.C. § 3604 (f)(3)(B). An accommodation is reasonable under the FHAA "when it imposes no 'fundamental alteration in the nature of the program' or 'undue financial or administrative burdens.'"

To prove that the accommodation was necessary, Giebeler had to demonstrate that but for the accommodation, he was denied an equal opportunity to enjoy the unit. Financial policies can interfere with disabled persons' right to use the facilities thus necessitating accommodation. Due to his disability related poverty, Giebeler was denied an equal opportunity to enjoy the unit. M&B's relaxation of their no-cosigner policy was necessary to afford Giebeler equal opportunity to use and enjoy the unit at Branham. Giebeler met his burden of demonstrating and producing evidence that a reasonable accommodation was possible. The burden then shifted to Branham to produce evidence that the requested accommodation was not reasonable. Branham failed to meet its burden. This court held Giebeler's request that his financially qualified mother be allowed to rent an apartment for him, affording him the opportunity to live in a suitable unit despite his disability, was a request for a reasonable accommodation within the intent of the FHAA and should have been honored

MISCELLANEOUS

ARBITRATION PROVISION IN A CONTRACT A HUSBAND SIGNED WHEN HIS WIFE WAS ADMITTED TO A NURSING HOME IS UNCONSCIONABLE

Romano v. Manor Care, Inc., ____ So. 2d ____ (Fla. App. 4th Dist. 2003).

FACTS: Lawrence and Josephine Romano agreed for Josephine to enter a nursing home for rehabilitation after she suffered a fall in their home. The day after she was admitted Lawrence was given several documents to sign, including one that was an arbitration agreement. This arbitration agreement provided for arbitration of all disputes, including those brought pursuant to statute. It stated that neither party was entitled to attorney's fees and contained a limitation of liability provision which excluded punitive damages and limited non-economic damages. The administrator who supervised the signing of the "admissions packet" did not attempt to explain any of the terms of the documents. Lawrence was told only that the papers he signed were his wife's admission papers.

Josephine resided in the home for one month. During that time, her condition deteriorated rapidly. After leaving the home, the Romanos filed suit alleging that the nursing home deprived Josephine of her rights pursuant to sections 400.022 and 400.023 of the Nursing Home residents Rights Act. The trial court determined that the parties had entered into a valid arbitration agreement and compelled arbitration.

The Romanos appealed.
HOLDING: Reversed.
REASONING: To decline to enforce a contract as unconscionable, the contract must be both procedurally unconscionable and substantively unconscionable. *Powertel, Inc. v. Bexley*, 743 So.2d 570 (Fla. 1st DCA 1999). Both procedural and substantive unconscionability must be present, but they need not be present in the same degree. The court espoused a balancing approach such that, for the contract to be deemed unconscionable, the greater the substantive unconscionability, the less procedural unconscionability must be found and vice versa.

Procedural unconscionability refers to the individualized circumstances under which the contract was entered. Lawrence did not understand the rights he was signing away for his wife. He was asked to sign the documents after his wife was already admitted to the nursing home without being told that his failure to sign them would not affect her care or her ability to stay in the home. Given the ages of the Romanos and the circumstances surrounding the signing of the agreement, the court found that there was some degree of procedural unconscionability.

Substantive unconscionability refers to the unreasonableness and unfairness of the contractual terms themselves. Although parties may agree to arbitrate statutory claims, arbitration must provide the prospective litigant with an effective way to vindicate his or her statutory cause of action in the arbitral forum. *Green Tree Fin. Corp-Ala. V. Randolph*, 531 U.S. 79, 90 (2000). Sections 400.022 and 400.023 of the Nursing Home Resident's Rights Act were remedial statutes passed to protect nursing home residents. The statute provided for the award of attorney's fees, punitive damages, and placed no cap on pain and suffering damages. The Romanos' agreement specifically deprived the resident of remedies that the legislature felt were important to the reduction of elder abuse in nursing homes. The arbitration agreement's limitations took away any effective enforcement of the statutory rights of the resident; thus, the court found a large degree of substantive unconscionability present in the agreement.

Due to the presence of both procedural and substantive unconscionability in the arbitration agreement, the court reversed the order compelling arbitration and held that the agreement was unenforceable.

ARBITRATORS ARE IMMUNE FROM CIVIL SUITS

Blue Cross Blue Shield of Texas v. Juneau, 114 S.W.3d 126 (3rd Cir. 2003).

FACTS: James J. Juneau ("Juneau") and two other arbitrators associated with the American Arbitration Association arbitrated a dispute between Blue Cross Blue Shield of Texas ("Blue Cross") and HealthCor Liquidation Trust ("HealthCor"), as provided for by contract. The arbitration panel conducted a full evidentiary hearing and unanimously awarded HealthCor damages against Blue Cross. Blue Cross brought suit to vacate the award, naming HealthCor and the individual arbitrators, including Juneau, as defendants. HealthCor removed the action to federal district court, which severed the cause of action against HealthCor and remanded the suit against the arbitrators to the state district court.

Blue Cross nonsuited the other two arbitrators and supplemented its original petition, alleging that Juneau failed to disclose a previous relationship with a HealthCor attorney, which Blue Cross said affected the arbitration process. Juneau, the only remaining defendant, filed a plea to the jurisdiction. The district court granted Juneau's plea and dismissed the case. Blue Cross appealed the decision to this court.

Blue Cross contends on appeal that the district court erred when they sustained the plea to jurisdiction and dismissed the case. They argued that if arbitral immunity existed, a functional approach should have been adopted instead of granting arbitrators absolute immunity. Under this approach, Juneau would not have been immune from the cause of action. Juneau contended that the district court lacked subject-matter jurisdiction because the doctrine of arbitral immunity barred the claim.
HOLDING: Affirmed.
REASONING: Arbitral immunity is derived from judicial immunity, which establishes that judges are absolutely immune from personal liability, regardless of how erroneous the act, or how evil the motive. *Stump v. Sparkman*, 435 U.S. 349 (1978). Persons whose responsibilities are "functionally comparable" to those of a judge are likewise immune from liability. *Butz v. Economou*, 438 U.S. 478 (1978). The extension of immunity to arbitrators, acting within the scope of their duties, is necessary because independence of judgment and freedom from threat of lawsuits by dissatisfied parties is essential to the success of arbitration.

Arbitral immunity is derived from judicial immunity.

Arbitral immunity is especially compelling in this case because arbitration is the means the parties selected for disposing of controversies. *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1211 (6th Cir. 1982). This immunity maintains respect for the parties' contractual choice for arbitration and protects the arbitrators from suits against disgruntled parties. The court further reasoned that aggrieved parties could still pursue further remedies against the "real" adversary through the appeal process.

Finally, the court recognized that failure to disclose possible conflict of interests creates at the least an impression of bias which contaminates the decision making process and would not be condoned by the court. The court declined, however, to permit a civil suit against the arbitrator because of its policy of encouraging arbitration and protecting the independence of the decision made.

TELEPHONE CONSUMER PROTECTION ACT AUTHORIZES SUIT IN STATE COURT

Condon v. Office Depot, Inc., 855 So.2d 644 (Fl. Dist. Ct. App. 2003).

FACTS: Condon sued Office Depot, Inc. for sending him thirteen unsolicited facsimile advertisements in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C.

§ 277(C)(1). The trial court dismissed Condon's suit with prejudice, ruling the language in the TCPA allowing a private cause of action "if otherwise permitted by the rule of court of a State" required the state legislature to enact substantive legislation before the claim was cognizable in a state court of law. 47 U.S.C. § 277(b)(3).

HOLDING: Reversed and remanded.

REASONING: The court followed the majority view among other state and federal courts. The language "if otherwise permitted" within the TCPA merely acknowledged the principle that states have the right to structure their own court systems, and state courts are not obligated to change their procedural rules or accommodate TCPA claims. Federal law is enforceable in state court because such law is as much law in the states as law passed by the state's legislature.

The Supremacy Clause of the United States Constitution creates a presumption of state court jurisdiction over claims arising under federal law. An explicit statutory directive can rebut a state court presumption of jurisdiction over federal claims, by unmistakable implication from legislative history, or by clear incompatibility between state court jurisdiction and federal interests. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981).

Federal principles of statutory construction dictate that when a statute's plain language is ambiguous, legislative history may be used as evidence of congressional intent. *Omnibus International, Inc. v. AT&T*, 111 S.W.3d 818 (Tex. App.—Dallas 2003). The ambiguous language "if otherwise permitted" failed to explicitly direct an enactment requiring enabling state legislation, nor did the legislative history support a requirement of state legislation. In addition, state court jurisdiction was not incompatible with federal interests, as the federal legislation resulted from states' interests. Therefore, according to the court, "given a presumption of state court jurisdiction and the absence of any factors that would rebut its existence, we would require an explicit mandate from Congress that the private cause of action it created was conditioned on prior state approval."

EDITOR'S NOTE: The Texas Business and Commercial Code, section 35.47, is the analogous Texas statute to the TCPA. It proscribes intrastate facsimiles sent without consent and for which the recipient is charged, applies to all intrastate facsimiles whether sent with or without consent, and grants a private right of action against violators. *See,* Omnibus International v. AT&T, 111 S.W.3d 818 (Tex. App.—Dallas 2003).

ARBITRATION AGREEMENT FOUND UNENFORCEABLE

DIRECTV, Inc. v. Mattingly, Sr., 829 A.2d 629 (Md. 2003).

FACTS: John A. Mattingly, Sr. ("Mattingly") entered into an oral agreement with DIRECTV in February 1997 to receive satellite television service subject to the terms and conditions of a written customer agreement, which stated that the customer's receipt of services constitutes acceptance of all the terms and conditions in the agreement. DIRECTV reserved the right to modify the agreement, but received a written notice describing any changes and their effective date. The initial agreement was silent on the issue of arbitration.

In March 1998, DIRECTV mailed another customer agreement, which appeared nearly identical to the initial customer agreement, but added an arbitration provision, without additional highlighting or description. DIRECTV did not send a separate description, explanation, or comparison of the changes, and Mattingly continued his service after receiving the new agreement.

In August of 1999, Mattingly filed a class action suit for illegal or excessive late fee charges, and the Circuit Court found that Mattingly was required to arbitrate his claims in compliance with the most recent customer agreement. The court then granted a motion to dismiss without prejudice, and Mattingly appealed to the Court of Special Appeals. The appellate court reversed the trial court, and DIRECTV appealed.

HOLDING: Affirmed.

REASONING: The very purpose of notice provisions is to provide the customer with enough information to make an informed decision regarding any amendments or new provisions found within the replacement document. If a customer was not given proper notice of the addition of an arbitration provision to his initial customer agreement, the customer could not have constructively assented to the arbitration provision, and thus the terms of the initial customer agreement, without an arbitration provision, would control. Under the plain language of the initial customer agreement's notice provision, DIRECTV was contractually obligated to inform Mattingly when a change to the agreement occurred and what that change entailed. Such a description was not provided, violating the customer agreement.

The very purpose of notice provisions is to provide the customer with enough information to make an informed decision regarding any amendments or new provisions found within the replacement document.

Though parties are able to waive written provisions of a contract by their conduct, this only applies in cases where the parties' conduct amounts to mutual assent to an unwritten practice or change after being fully cognizant of that change of circumstances or procedure. The Court stated in this case "petitioner agreed to let respondent know when a change occurred and what that change entailed, presumably before the change purportedly became effective." Mattingly could not have mutually assented to waive any provision without proper notice.

DIRECTV's failure to send Mattingly sufficient notification of changes to make an informed decision combined with DIRECTV's purported unilateral power to amend the customer agreement and the voluntary inclusion of the notice provision in the initial document led the court to hold that the initial customer agreement was not validly modified to

include the arbitration provision. Therefore, the Court of Special Appeals was correct in refusing to compel arbitration and reversing the trial court's dismissal of Mattingly's claims against DIRECTV.

CLASS MEMBERS WHO "OPT OUT" MUST PAY CLASS ATTORNEY'S FEES

In re Linerboard Antitrust Litig., ____F. Supp. 2d ____ (E.D. Pa. 2003).

FACTS: Buyers brought an antitrust action against twelve manufacturers of linerboard, alleging the manufacturers conspired to raise the price of corrugated containers and sheets throughout the U.S. by restricting production and/or curtailing inventories in violation of federal antitrust laws. The court consolidated five of the class action cases. After four years of discovery and various pretrial proceedings, Plaintiffs and Defendants Temple-Inland, Inc., and Gaylord Container Corporation reached an agreement to settle. Notices were sent to potential class members detailing the class certification, the right to request exclusion from the classes, preliminary settlement terms with Defendants, and the right to object to the settlement by June 9, 2003.

On May 6, 2003, class member Farmland Foods, Inc. filed an expedited motion for access to certain relevant materials in the possession of the designated class representatives and a motion to extend the opt out deadline or oppose the proposed settlement. Farmland sought access to discovery and deposition materials, arguing it needed these materials to reach a well-informed decision with regard to the opt-out and proposed settlement issues. The court granted Farmland access under a confidentiality agreement, limiting use of these materials to decisions regarding whether to opt out of the classes or to object to the proposed settlement. Additional groups sought and gained this same limited access to discovery and deposition materials. By June 9, 2003, 140 entities had opted out of the classes. Several of the opt-out entities subsequently filed tag-along actions against Defendants.

The designated class attorneys filed a Lead and Liaison Counsel's Motion for Establishment of an Escrow Fund on June 10, 2003, arguing that the court should enter an order sequestering a certain percentage of funds from settlements or judgments in the tag-along actions because the tag-along Plaintiffs have obtained substantial benefits from their work in managing the litigation. Counsel for Plaintiffs in one of the tag-along actions requested access to the discovery and deposition materials and also requested that the court to vacate its restrictions on the use of these materials. The court granted "use of the deposition transcripts and exhibits in all tag-along actions for any purpose covered by the applicable discovery rules" subject to a confidentiality order and any order related to the establishment of an escrow fund.

HOLDING: Sequestration ordered in part.

REASONING: In a complex, multi-district litigation, the district court has broad discretion in coordinating and administering the proceedings, including the designation of lead counsel and the management and consolidation of discovery issues. *In re Showa Denko K.K.L-Tryptophan Prods. Liab. Litig.*, 953 F.2d 162, 165 (4th Cir. 1992). A necessary corollary to court appointment of lead and liaison counsel and appropriate management committees is the power to assure that these attorneys receive reasonable compensation for their work. *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977).

The court concluded the case at bar warranted the establishment of a system to ensure that designated counsel are compensated for their efforts in managing the litigation. The court stated this was the rare antitrust case in which major entities and their counsel awaited the development of the case by designated counsel and only filed suit on the eve of the conclusion of discovery. The court ordered the establishment of an escrow fund to provide for equitable allocation of counsel fees and costs among the tag-along actions, owed for common benefit work performed by designated counsel.

COMPUTER SOFTWARE PROBLEMS ARE NOT PHYSICAL DAMAGE TO TANGIBLE PROPERTY

America Online, Inc. v. St. Paul Mercury Ins. Co., 347 F.3d 89 (4th Cir. 2003).

FACTS: America Online, Inc. ("AOL") released Version 5.0 ("5.0") of its software to the public. Consumers ("Plaintiffs") then filed class action suits against AOL, alleging 5.0 altered their existing software, disrupted their network connections, caused the loss of stored data, and caused their operating systems to crash. After some of the cases were consolidated and settled, AOL tendered the remaining individual class action suits to its insurer, St. Paul Mercury Insurance ("St. Paul"). St. Paul denied coverage, claiming Plaintiffs' underlying claims did not allege damage to "tangible" property and were not property damage as defined by the St. Paul commercial general liability policy ("Policy"). AOL sued St. Paul, alleging breach of contract, demanding defense costs and compensatory damages, and seeking declaratory judgment that St. Paul was obligated to defend and indemnify AOL. The district court denied AOL's motions for summary judgment and granted St. Paul's cross-motion, distinguishing between computer software and hardware, and concluded that the underlying suits alleged damage to computer data and systems but did not allege "physical damage to tangible property." AOL appealed, claiming (1) the damages in the underlying complaints alleged "physical damage to tangible property;" and (2) the complaints alleged "loss of use of tangible property" covered by the Policy. St. Paul cross-appealed, challenging the district court's conclusion that the underlying complaints alleged "loss of use" of tangible property.

HOLDING: Affirmed.

REASONING: An insurer's obligation to defend depends on comparison of the policy language with the underlying complaint to determine whether any claims alleged are covered by the policy. *Superformance Int'l, Inc. v. Hartford Cas. Ins. Co.*, 332 F.3d 215, 220 (4th Cir. 2003). Ambiguous terms in insurance agreements are construed against the insurer. AOL claimed: (1) because Plaintiffs alleged "damage to computers," they alleged "physical damage to tangible property" covered by the Policy; (2) because software involves arrangement of

atoms on computer disks, software has a physical property and was covered under the Policy; and (3) "tangible" was ambiguous in the Policy and must be construed in favor of AOL.

AOL's first claim failed for lack of specificity because damage to the computer may refer to damage to the software or the hardware. The underlying claims ultimately claimed damage to Plaintiffs' software. AOL argued damage to software was physical damage to tangible property.

Taking the term to have its usual and ordinary meaning, "tangible" means "capable of being touched: able to be perceived as materially existent esp. by the sense of touch: palpable, tactile." *See* Webster's Third New Int'l Dictionary of the English Language Unabridged 2337 (1993). Specifically, "tangible property" means "having physical substance apparent to the senses." These common definitions equate "tangible and "physical" and defeated any ambiguity AOL attributed to the term "tangible." Thus, the physical magnetic material on the hard drive that retained data, information, and instruction was tangible property.

But concluding that physical magnetic material on the hard drive was tangible property was separate from the inquiry of whether the software, or the data, information, and instructions codified in a binary language for storage on the hard drive, were tangible property. The hard drive is a medium in which the data, information, and instructions are stored, but the data must be considered apart from the medium. If the arrangement of the data and information stored on the hard drive were to become disordered or the instructions were to come into conflict with each other, the physical capabilities and properties of the hard drive would not be affected.

Software programs, stored magnetically using physical hardware, are abstract ideas in the minds of the programmer and the user. Loss of or damage to software is not damage to the hardware, but to the idea, its logic, and consistency with other ideas and logic. Damage to the software is thus not damage to the hardware or the physical components of the computer—those which have "physical substance apparent to the senses."

The Policy covered liability for "physical damage to tangible property," and not damage data and software, i.e., the abstract ideas logic, instructions, and information. The Policy thus covered any damage caused to circuits, switches, drives, and any other physical components of the computer but not loss of instructions to configure the switches or the loss of instructions to configure the switches or the loss of data stored magnetically. The damages Plaintiffs alleged were all software problems that did not amount to physical damage to tangible property. Plaintiffs' underlying claims were not covered by the Policy.

Taking the term to have its usual and ordinary meaning, "tangible" means "capable of being touched: able to be perceived as materially existent esp. by the sense of touch: palpable, tactile."

AOL also claimed Plaintiffs' alleged loss of use of their computers, which amounted to property damage covered by the Policy. But the Policy's "impaired property" exclusion barred coverage for loss of tangible property of others that was not physically damaged by the insured's defective product. The faulty version of 5.0 caused damage to software. Because there was no demonstration or claim that 5.0 damaged the physical or tangible components to any computer, AOL's arguments for loss of use were rejected.