NATIONAL ARBITRATION FORUM®

AUTOMOTIVE
ADR MONITOR

YOUR AUTHORITATIVE SOURCE FOR AUTOMOTIVE ADR NEWS AND INFORMATION

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WELCOME

Welcome to the first issue of the *NAF Automotive ADR Monitor.* The *Monitor* is designed to keep you up to date with reliable information on the latest legal and practical developments in the rapidly growing fields of motor vehicle and automotive finance dispute resolution. Each issue will contain important statutory law, case law, and regulatory updates, as well as practical tips on how to maximize the benefits of mediation, arbitration, and other out-of-court automotive dispute resolution processes.

Getting the Vehicle Back

Arbitral Powers for Replevin and Recovery

Money damages are the most commonly sought remedy in arbitration. In fact, arbitration agreements in secured finance contracts often exclude arbitration of remedies directly relating to collateral, such as replevin.

Where authorized by the arbitration agreement and rules, however, arbitrators have the same powers as do courts, and can award all contractual remedies and all remedies available under the applicable law. Several recent cases have readily upheld arbitration awards granting equitable relief.

Two cases presented below are examples of arbitration panels awarding foreclosure and temporary injunctive relief, respectively. The third illustrates that, if required, arbitrators may retain jurisdiction over a case in order to monitor the disposition of property.

These cases illustrate that parties who anticipate seeking repossession, replevin, injunctions, or any form of equitable relief should consider using an arbitral forum that can apply the law to grant that relief.

Foreclosure

In ***Creekside Construction Co. v. Dowler,*** 616 S.E.2d 609 (N.C. App. 2005), the Court of Appeals of North Carolina confirmed an arbitration award that included a provision calling for the foreclosure of Dowler's condominium unit in order to satisfy Creekside's lien.

Creekside agreed to remodel Dowler's unit on a "cost plus 15%" basis and ongoing design changes caused the $35,000 initial estimate to turn into a $93,000 final bill. Dowler made partial payment and Creekside sought arbitration.

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The panel found for Creekside, awarding not only the requested monetary damages, but also ordering foreclosure of the condominium unit: "the judgment and award as confirmed by the Court should order the sale of the property owned by the Defendants under the provisions of Chapter 44A of the North Carolina General Statutes in order to satisfy Plaintiff's lien and this award."

The Court of Appeals remanded the case to the trial court so that the order of foreclosure could be issued.

Injunctive Relief

In ***Telegration, Inc. v. Tackett,*** 2005 WL 1652205 (Mich. App. Jul. 14, 2005), Telegration went to court seeking to enjoin former employee Tackett from accepting employment with a competitor and sharing confidential information. Tackett moved to compel arbitration pursuant to the employment agreement.

Telegration argued that the arbitration agreement did not explicitly provide the arbitrator the power to issue injunctive relief and, therefore, the issue should be reserved for the court to decide. The court disagreed.

The court explained that Michigan's Arbitration Act grants parties, subject to a few exceptions, the ability to arbitrate "any controversy…which might be the subject of a civil action." MCL 600.5001. Because the parties drafted a broad arbitration clause that did not exclude injunctive relief, the court concluded it was an available remedy in arbitration.

Most jurisdictions, in fact, hold that courts have concurrent power to issue injunctive relief even where the parties have agreed to arbitrate all disputes. See, e.g., ***Teradyne, Inc. v. Mostek Corp.,*** 797 F.2d 43, 51 (1st Cir. 1986). In these situations, however, courts can only issue injunctions to "preserve the status quo pending arbitration," and court exercise of this option does not limit the ability of the arbitration panel to issue interim injunctive relief.

Retaining Jurisdiction

Statutes may require multiple hearings or prescribed waiting periods for certain property-oriented remedies such as replevin or foreclosure. Arbitrators may retain jurisdiction over a case in order to meet these procedural requirements, or the award can be immediately confirmed in court for court supervision.

For example, in ***J&F Investments, LLC v. Deutsch,*** 2005 WL 3163783 (Cal.App. Nov. 29, 2005), an arbitrator ordered the "commercially reasonable sale" of the healthcare facility owned by a partnership. The arbitrator also ordered Deutsch to buy out the other partners at a given price should the sale not be completed, and retained jurisdiction to monitor the parties' cooperation with the sale process.

Ten months later, no sale had occurred and the arbitrator triggered Deutsch's buy out. Deutsch argued the subsequent buy out order was an impermissible modification of the original award. The court held that the arbitrator had validly retained jurisdiction and that the buy out trigger was not a modification but rather the legitimate invocation of "alternate relief."

Conclusion

Parties anticipating the need to resort to remedies beyond compensatory money damages should consider seeking equitable relief in arbitration instead of in court. Appropriately worded arbitration awards can be readily converted into the necessary writs or orders when the award is judicially confirmed.

It is critical to examine the selected arbitration rules carefully to ensure that arbitrators are empowered to grant the desired remedy. On the other hand, parties should ensure that arbitrator's equitable powers are not open-ended, which can lead to results not originally contemplated under the agreement.

All parties to secured lending agreements need certainty that terms will be enforced as written and as provided under law. For example, the National Arbitration Forum Code of Procedure explicitly authorizes its arbitrators to "grant any legal, equitable or other remedy or relief provided by law," and limits arbitral powers to those contained in the Code, "the agreement of the parties and the applicable substantive law." Rules 20(D) and (A).

Arbitration for Automotive-Related Transactions

Arbitration can be specified as the procedure for resolving disputes in all agreements related to motor vehicle purchase, lease, finance and warranty, including:

- Financing Agreements
- Buyers Orders and Lease Agreements
- Manufacturer and Extended Warranties
- Repair Tickets, Service Orders and Parts sales

Many independent studies, including those conducted by the Litigation Section of the American Bar Association, have confirmed the comparative benefits of arbitration (versus lawsuits) for both businesses and consumers. Individuals fare at least as well in arbitration as in the lawsuit system, if not better, according to all of the reliable evidence on the use of predispute agreements to arbitrate. Survey results reveal that consumers and attorneys favor arbitration over the lawsuit system by wide margins in terms of timeliness and cost. For more information visit www.arbitration-forum.com/focus/automotive.

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Arbitration Agreements Outside of a Written Manufacturer's Warranty Are Valid

The Alabama Supreme Court determined that an arbitration agreement does not need to be included within the written warranty document in order to be valid under the Magnuson-Moss Warranty Act (MMWA).

In ***Patriot Manufacturing, Inc. v. Jackson,*** No. 1040915 (Ala. Nov. 18, 2005), Jackson purchased a manufactured home from Patriot. Although the limited warranty document provided by Patriot did not mention arbitration, the sales documents signed by Jackson included a stand-alone arbitration agreement.

The MMWA requires that warrantors "fully and conspicuously disclose…the terms and conditions" of any provided written warranty. 15 U.S.C. § 2302(a). Often this includes an informal dispute settlement mechanism plus a separate agreement to arbitrate instead of litigate if such informal procedures do not resolve the dispute. If there is no arbitration agreement, claims following or separate from the informal procedure can go to court litigation. See e.g., ***Burns v. DaimlerChrysler Corp.,*** 2005 WL 2439228 (Fla. 4th DCA 2005).

The Supreme Court of Alabama previously interpreted the MMWA to require that arbitration terms be contained within the written warranty document in order to be valid for a MMWA claim. ***Ex parte Thicklin,*** 824 So.2d 723, 730 (Ala. 2002). The Court revisited that holding here, and explicitly overruled ***Thicklin.***

The Court looked to the 11th Circuit's decision in ***Davis v. Southern Energy Homes, Inc.,*** which held that the MMWA does not conflict with binding arbitration because the Act's requirement that "informal dispute settlement procedures" be disclosed refers to non-binding dispute resolution and not to the election of an arbitral forum for binding resolution of MMWA claims. 305 F.3d 1268, 1275 (11th Cir. 2002). Alabama's rejection of a "single document" rule—requiring that warranties include any existing arbitration provisions—accords with both the text of the MMWA and the federal policy in favor of contractual arbitration expressed in the Federal Arbitration Act (FAA). 9 U.S.C. §§ 1-16.

To this end, the Court acknowledged that arbitration terms do not "make a product or its warranty less 'suitable,'" and that "arbitration agreements do not affect the substantive rights of a party."

Finally, it is important to point out that the Federal Arbitration Act accounts for notice concerns by imposing its own "writing" and "disclosure" requirements. Section 2 of the FAA mandates that arbitration terms be in a written agreement that meets state law standards for contract enforceability.

E-mail and Web Arbitration Agreements Can Be Enforceable

With the increased reliance on the Internet for advertising, financing applications, and even sales, there is a need for disputes that arise there to be resolved by more amicable means than litigation. Recent cases illustrate that properly drafted and formatted e-mails and Web documents can create binding dispute resolution agreements.

E-mailed terms satisfy the Federal Arbitration Act's (FAA) writing requirement, but may require a reply e-mail or other means to indicate assent. See ***Campbell v. General Dynamics Government Systems Corp.,*** 407 F.3d 546 (1st Cir. 2005).

Valid assent to arbitration terms in Web-based agreements requires that the terms appear during the ordering process and that viewing the terms is "similar to turning the pages of a written contract." See ***Hubbert v. Dell Corp.,*** 835 N.E.2d 113, 121-22 (Ill. App. 2005). However, parties must actually complete the ordering process (for example, by clicking an "I agree" button) in order to be bound to arbitrate. ***Martin v. Snapple Beverage Corp.,*** No. B174847 (Ca. Super. Ct. July 27, 2005).

BEST PRACTICES

E-mail:

- Clearly communicate that the e-mail is a contract, arbitration is mandatory, and parties waive the right to sue in court.
- State that any hyperlinked terms are binding.
- Require an affirmative act to confirm acceptance (a reply e-mail or signed form).
- Terms should be visible without scrolling.
- Backing up an e-mail notice with a paper signature aids court review.
- State law requirements may differ, so consultation with local counsel is advised.

Web:

"Browse-Wrap" Agreements

To ensure that users validly and reliably assent to "browse-wrap" website terms (no button click required), focus on four general elements:

- Adequate notice of the proposed terms
- A meaningful opportunity to review the terms
- Adequate notice that taking a specified action manifests assent to the terms
- The user takes the action specified in the latter notice

See Christina L. Kunz, et. al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements,* 59 Bus. Law. 279 (2003).

"Click-Through" Agreements

To avoid disputes on the validity of mutual assent in "click-through" agreements (button click required), focus on six general elements:

- Opportunity to review terms
- Display of terms
- Rejection of terms and its consequences
- Assent to terms
- Opportunity to correct errors
- Keeping records to prove assent

See Christina L. Kunz, et. al., *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent,* 57 Bus. Law. 401 (2001).

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Financing Agreement Disputes Are Arbitrable

Claims brought by consumer parties to financing agreements are often statutory, relying on the Truth in Lending Act (TILA), state consumer protection statutes, or other federal or state statutes. Statutory claims are arbitrable under a contractual arbitration clause.

By agreeing to arbitrate, a party does not forgo the substantive rights afforded by statute. The party merely elects to resolve the dispute and assert their substantive statutory rights in an arbitral rather than judicial forum.

In ***Green Tree Financial Corp. v. Randolph,*** 531 U.S. 79, 89-90 (2000), the United States Supreme Court specifically held that TILA claims are arbitrable as long as the prospective litigant "effectively may vindicate" their statutory claim in arbitration (quoting ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,*** 473 U.S. 614, 637 (U.S. 1985)).

Courts also readily compel the arbitration of claims based upon state consumer protection statutes. As long as the transaction is governed by the Federal Arbitration Act (FAA) or falls within the FAA's very broad "involving commerce" coverage, the FAA preempts state attempts to preclude arbitration of statutory claims. See, e.g., ***Provencher v. Dell, Inc.,*** No. SA CV 05-878 CJC (C.D.Cal. Jan. 3, 2006) (FAA preempts California Legal Remedies Act); ***Abela v. General Motors Corp.,*** 677 N.W.2d 325, 327 (Mich. 2004) (FAA preempts Michigan's "lemon law" and Consumer Protection Act).

Unless Congress explicitly provides that claims brought under a specific statute cannot be arbitrated, an arbitral forum is permitted for those claims. Other statutory claims held arbitrable include those brought under RICO, ERISA, Title VII, ERISA, ADA, ADEA, FDCPA, the Sherman Act, and many others.

NATIONAL ARBITRATION FORUM

The National Arbitration Forum (NAF) is a leading provider of dispute resolution services, with over 1,500 legally-trained mediators and arbitrators located in all 50 states and 29 countries. NAF offers a full range of motor vehicle and automotive finance dispute resolution services.

To receive the complimentary White Paper on *Arbitration of Motor Vehicle Sales, Lease, Service and Warranty Disputes,* including drafting tips and model ADR language, or for expert information on how to implement a motor vehicle or automotive finance ADR program, return the enclosed reply card, e-mail auto@arb-forum.com, or call NAF at 877-655-7755 x6425.

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