

## ARBITRATING INSURANCE DISPUTES IN MISSISSIPPI: INSURANCE COMMISSIONER'S AUTHORITY

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### *Introduction*

Jury verdicts in Mississippi are among the highest in the nation.<sup>1</sup> Two of the nation's twenty highest verdicts for the year 2001 were rendered by Mississippi juries.<sup>2</sup> The numbers are impressive. From Jefferson County, the highly publicized "Propulsid" verdict weighed in at 100 million dollars, while a lesser-known asbestos case from Holmes County culminated in a whopping 150 million dollar verdict.<sup>3</sup> Already in 2002, one insurance company has been hit with a 30 million dollar punitive damages award for allegedly forcing plaintiffs to purchase high-risk insurance policies.<sup>4</sup> Spurred on in part by these verdicts and others on the horizon, insurance companies have naturally sought to develop arbitration features in conjunction with their policies issued within the state.

In October 2001, Mississippi Commissioner of Insurance George Dale approved a policy filing which provided for binding arbitration for the first time in the state's history.<sup>5</sup> The filing by Primerica Life Insurance Company included a binding arbitration provision, but the policy allowed consumers to choose the same policy without the arbitration agreement for a higher premium.<sup>6</sup> Since that initial approval by the Commissioner, certain members of the Mississippi Bar have disputed his authority to approve such arbitration clauses.

Meanwhile, the federal Fifth Circuit Court of Appeals recently held that the Commissioner has "no regulatory authority to disapprove mandatory arbitration clauses relating to insurance."<sup>7</sup> The June 14, 2002 decision in *American Heritage Life Insurance Co. v. Orr* came immediately before the Mississippi Supreme Court voiced its general adherence to "the federal policy favoring arbitration."<sup>8</sup> When viewed together, as well as with other cases, these decisions might be interpreted to herald the dawning of a new age within the Mississippi insurance regulatory context – an age in which the Commissioner of Insurance possesses very little, if any, authority with respect to arbitration clauses.

### *Background of the Case*

The dispute involved in *American Heritage Life Insurance Co. v. Orr* began when a number of borrowers obtained consumer loans from Republic Finance, Inc.<sup>9</sup> In conjunction with the loans, Republic Finance sold to the borrowers both credit life and disability insurance. Insurers American Heritage Life Insurance Company and First Colonial Insurance Company of Florida wrote and issued the policies sold to the borrowers.<sup>10</sup> At the loan closings, the borrowers signed a separate "Arbitration Agreement" with Republic Finance, which provided that:

[A]ny claim, dispute or controversy . . . arising from [among other things] insurance written in connection herewith . . . shall be resolved by binding arbitration before one arbitrator in accordance with the Federal Arbitration Act, the expedited procedures of the commercial arbitration rules of the American Arbitration Association, and this agreement. . . . The parties agree that Lender is engaged in interstate commerce, and the transaction is governed by the Federal Arbitration Act, 9 U.S.C. Section 1-16.<sup>11</sup>

In addition, the agreement contained the following language in bold, capital letters above the signature lines:

**THE PARTIES UNDERSTAND THAT BY SIGNING THIS ARBITRATION AGREEMENT, THEY ARE LIMITING ANY RIGHT TO PUNITIVE DAMAGES AND GIVING UP THE RIGHT TO A TRIAL IN COURT, BOTH WITH AND WITHOUT A JURY.**<sup>12</sup>

Subsequent to signing the agreement, the borrowers sued Republic Finance, American Heritage, and First Colonial in Mississippi state court, alleging among other things conspiracy to sell credit life and credit disability insurance “that was unnecessary and at an exorbitant premium far in excess of the market rate.”<sup>13</sup>

The companies brought actions in the U.S. District Court for the Northern District of Mississippi, seeking to compel arbitration under the authority of the Federal Arbitration Act.<sup>14</sup> The district court concluded that the FAA controlled and entered an order compelling arbitration and staying all related court proceedings.<sup>15</sup>

### *Issue and Holding*

On appeal to the Fifth Circuit, an important issue was whether the Federal Arbitration Act (“FAA”) was reverse-preempted by application of the McCarran-Ferguson Act.<sup>16</sup> The borrowers claimed that a Mississippi Attorney General’s Opinion, coupled with the general past policy of the Mississippi Department of Insurance constituted *state law* regarding arbitration provisions, and therefore concluded that the FAA was reverse-preempted by state law.<sup>17</sup>

In short, the Fifth Circuit rejected that contention. The court noted instead that the McCarran-Ferguson Act “bars application of the FAA to insurance contracts only in the context of a *state statute* evincing the same, not mere policy statements of state officials or administrative rule interpretations of governmental entities.”<sup>18</sup> It discussed the fact that “no Mississippi statute addresses, much less prohibits or restricts, arbitration of credit insurance-related claims, disputes, or controversies . . .”<sup>19</sup> As such, the court concluded, “the Commissioner of Insurance for the State of Mississippi (the “Commissioner”) is without regulatory authority to prohibit arbitration clauses relating to insurance.”<sup>20</sup>

### *Analysis*

**Obvious Principles.** A couple of items have been made very clear by the decision. First, the provisions of the Federal Arbitration Act are clearly applicable to arbitration provisions signed in conjunction with most insurance policies in Mississippi.<sup>21</sup> In contrast to certain other states, Mississippi has only one statute specifically prohibiting arbitration clauses in *uninsured motorist* insurance policies.<sup>22</sup> No Mississippi statutes prohibit such clauses in *other types* of policies. Thus, the McCarran-Ferguson Act would not require reverse-preemption of the FAA in regard to most types of insurance policies issued within the state, so that any arbitration provisions relating to insurance disputes validly executed will be “valid, irrevocable, and enforceable” under the terms of the FAA, absent a finding of unconscionability by a court.<sup>23</sup>

Two Mississippi Supreme Court decisions handed down during the Summer of 2002 serve as something of a microcosm of Mississippi’s “unconscionability” law. *East Ford, Inc. v. Taylor* addressed the issue in July, finding an arbitration agreement in a vehicle purchase contract procedurally unconscionable where the print of the agreement was “less than one-third the size of many other terms in the document,” and where the salesperson did not discuss the arbitration provision with the purchaser.<sup>24</sup> The Court went out of its way, however, to emphasize the point that it adheres to “the federal policy favoring arbitration and that arbitration agreements are not per se inherently unconscionable.”<sup>25</sup>

More recently, the Court has upheld an arbitration provision over unconscionability allegations in *Russell v. Performance Toyota, Inc.*<sup>26</sup> The Court held that there was no substantive or procedural unconscionability involved with the automobile dealership’s arbitration agreement, despite the claims of the purchaser that “he had a lack of knowledge of the contract . . . and . . . there was a lack of voluntariness.”<sup>27</sup> The court reiterated once again its support of the FAA’s “strong presumption in favor of arbitration,” and found no substantive or procedural unconscionability in the agreement where the print was bold faced and capitalized, and there was no coercion to sign it.<sup>28</sup> Both the *East Ford* and *Performance Toyota* decisions were 6-3 decisions, with one justice concurring in result only in each of the cases.

A second point made clear by the *American Heritage* decision is that the Commissioner of Insurance does, in fact, have the authority to approve arbitration provisions contained in policies. The decision, while not necessarily

mandating approval of all arbitration clauses, certainly upholds the Commissioner's authority to approve arbitration provisions "as he deems fit."<sup>29</sup>

**Less Obvious Possibilities.** What is less clear is the extent to which the Commissioner *must* allow arbitration of insurance disputes in the wake of *American Heritage*. The decision is not necessarily a clear-cut mandate for the Commissioner to approve all arbitration provisions relating to all insurance policies. The main source for this uncertainty is found in two seemingly contradictory statements.

The Court appears to contradict itself when after making such a broad pronouncement regarding the Commissioner's lack of authority, it states that "The record indicates that the Commissioner can permit or disallow insurance disputes to be subject to arbitration as the Commissioner deems fit."<sup>30</sup> The issue boils down to this: How can the Commissioner have "no regulatory authority to prohibit arbitration clauses" at the same time that he can "permit or disallow" insurance disputes to be subject to arbitration as he "deems fit?" While these statements may seem on a surface level to create some uncertainty as to the Fifth Circuit's intentions, it is indeed possible to reconcile the statements. There are three possibilities.

**Option 1: Commissioner has no authority whatsoever over any arbitration agreements or provisions.** The first and perhaps least attractive alternative is to completely disregard the court's "permit or disallow" statement as dictum and conclude that the Commissioner is without any degree of authority with respect to any insurance arbitration agreement, whether contained in a policy or executed in a separate document. This option cannot be totally dismissed, but the argument assumes that the court had nothing in mind when it stated that the Commissioner can "permit or disallow insurance disputes to be subject to arbitration" as he "deems fit." This is a less-than-satisfying analysis, especially in light of the two other alternatives discussed below.

**Option 2: Commissioner has authority over arbitration provisions only in submitted policies.** The words "*relating to*" may hold the key to understanding the court's statement that the Commissioner has "no regulatory authority to prohibit arbitration clauses relating to insurance." A second option would interpret "relating to" to include only those arbitration agreements contained in a separate document independent of an insurance policy. This would lead to the simple but profound conclusion that the Commissioner has no authority whatsoever over *separate* arbitration agreements, while the court's other statement that the Commissioner can "permit or disallow" arbitration would theoretically place complete discretion with the Commissioner regarding arbitration provisions submitted to him within insurance policies.

**Option 3: Commissioner has limited authority over both separate arbitration agreements and arbitration provisions in submitted policies.** Under a third interpretation, the Commissioner would have no authority to absolutely *prohibit* arbitration agreements of any type, but he would, however, have authority to *regulate* certain aspects of such agreements. The court's statement that the Commissioner can "permit or disallow" arbitration would retain a degree of regulatory discretion with the Commissioner regarding arbitration clauses either contained in policies or in separate documents. In other words, while he clearly could not *disapprove* an arbitration clause of any type pursuant to the "no regulatory authority" statement, the Commissioner could "permit or disallow" disputes arising out of an insurance policy to be subject to arbitration as he "*deems fit*." Any arbitration provision relating to an insurance policy could be subject to something of a "fitness test" established by the Commissioner to determine whether the provision complies with applicable law, including whether or not the clause is unconscionable.

### *Conclusion*

The holding of *American Heritage* may well have an impact on the way insurance companies do business in Mississippi. Of the three alternatives discussed above, the third option seems to reconcile the court's two statements in the most logical way. It is the only interpretation that gives meaning to both statements by the court without over-diluting the importance of either. Under that interpretation, the Commissioner's authority would be limited to making a determination of the fitness of arbitration provisions relating to insurance policies.

While the Commissioner of Insurance has previously approved policies with arbitration provisions under certain limited circumstances, the Fifth Circuit's opinion is bound to have resounding implications for future arbitration agreements, both within policies and in separate agreements. At a minimum, the Commissioner is now apparently endowed with the opinion of the Fifth Circuit that he has no authority to prohibit arbitration agreements.

Perhaps the import of the *American Heritage* ruling can be seen more clearly when viewed in conjunction with a number of other Mississippi cases supporting arbitration agreements. Both federal and state courts in Mississippi have consistently upheld the validity of binding arbitration agreements, both in general terms and specifically in the insurance context. These cases could be seen as indications of Mississippi courts' willingness to support valid arbitration provisions.

A case with facts virtually identical to those in *American Heritage* was decided in late August, when the federal District Court for the Northern District of Mississippi granted an insurance company's motion to compel arbitration pursuant to an agreement executed in conjunction with credit-related insurance policies. In *North American Insurance Company v. Moore* (grounded in part on the *American Heritage* decision), the district court held among other things that, "In signing this [Arbitration] Agreement and agreeing to arbitration, the [policyholder] has necessarily waived her right to a jury trial."<sup>31</sup> This ruling by the district court came immediately on the heels of *American Heritage* and is a further indication that arbitration agreements relating to insurance policies might well be here to stay.

In August, the Mississippi Supreme Court reinforced the point that "review of [an] arbitrator's award is extremely narrow." The Court held in *Margerum v. Bud's Mobile Homes* that, "The only grounds for setting an arbitration award aside, or of modifying it, are prescribed by statute."<sup>32</sup> The Mississippi statute referred to by the court provides that arbitration awards may be set aside only in situations involving corruption, fraud, undue means, partiality or misconduct of an arbitrator, or where an arbitrator exceeds his or her powers or fails to make a mutual, final, and definite award.<sup>33</sup> *Bud's Mobile Homes* involved an arbitration arising from a mandatory arbitration provision included in a financing agreement. The court upheld an award in favor of the finance company despite certain minor procedural defects made by the arbitrator.<sup>34</sup>

These cases and others such as the *East Ford* and *Performance Toyota* decisions discussed above are relatively good indicators of the receptiveness of Mississippi courts toward arbitration agreements. For the time being, the *American Heritage* decision appears to lay the groundwork for increased arbitration agreements within the insurance context, either through approvals by the Commissioner of Insurance or through execution in separate agreements. It remains to be seen how the Mississippi Supreme Court will view such agreements.

#### *Endnotes*


1. *The National Law Journal's Largest Verdicts of 2001*, [www.verdictsearch.com/news/specials/0204verdicts\\_index.jsp](http://www.verdictsearch.com/news/specials/0204verdicts_index.jsp) (visited October 1, 2002).
2. *Id.*
3. *Id.*
4. "\$30M awarded in insurance suit," *The Clarion-Ledger*, Jackson, Mississippi, May 31, 2002. [www.clarionledger.com](http://www.clarionledger.com) (visited May 31, 2002).
5. "Dale announces first policy filing allowing arbitration," (October 2, 2001) [www.doi.state.ms.us/pressrel/arbitration.html](http://www.doi.state.ms.us/pressrel/arbitration.html) (visited September 17, 2002).
6. *Id.*
7. *See American Heritage Life Insurance Co. v. Orr*, 294 F.3d 702, 709 (5<sup>th</sup> Cir. 2002).

8. *East Ford, Inc. v. Taylor*, 2002 WL 1584301 (Miss. 2002).
9. *See American Heritage*, 294 F.3d at 705.
10. *See Id.*
11. *Id.* at 705-06.
12. *Id.* at 706.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 708. The McCarran-Ferguson Act provides, in pertinent part, that “No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . .” 15 U.S.C. 1012(b).
17. *See American Heritage* at 708-09.
18. *Id.* at 708 (emphasis original).
19. *Id.* at 709.
20. *Id.* Contrast this holding with Mississippi Attorney General Opinion No. 2000-0100 (2000) which stated that the Commissioner is “vested with the statutory authority to control by regulation matters relevant to the content of policies, including whether a binding arbitration provision may be incorporated as a part of various types of insurance policies and whether it must be in a separate and distinct document.”
21. The Federal Arbitration Act provides, in pertinent part, that “A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C.A. § 2.
22. *See Miss. Code Ann.* § 83-11-109.
23. 9 U.S.C.A. § 2.
24. *East Ford, Inc. v. Taylor*, 2002 WL 1584301, \*2, \*6 (Miss. 2002).
25. *Id.* at \*1.
26. *Russell v. Performance Toyota, Inc.*, 2002 WL 31087644 (Miss. 2002).
27. *Id.* at \*5.
28. *Id.* at \*2, \*6.
29. *American Heritage* at 709.
30. *Id.* The court made this statement to refute the argument that the Commissioner had never approved insurance policies containing arbitration clauses. The October 2001 Primerica approval was evidence to the contrary.

31. *North American Insurance Company v. Moore*, 2002 WL 31050995 (N.D. Miss.) at \*4.

32. *Margerum v. Bud's Mobile Homes, Inc.*, 2002 WL 1874864 (Miss.) at \*2.

33. *See* Miss. Code Ann. 11-15-23 (1972).

34. *Margerum* at \*4. 

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