

ENFORCEMENT OF ARBITRATION AGREEMENTS

Many businesses are electing to include arbitration clauses as part of consumer contracts. As part of the underlying transaction, the parties are agreeing to forego the courtroom and bring any dispute to binding arbitration. However, when a dispute arises, the business will want to be in the position to enforce the contract and require arbitration. This may even include overcoming the consumer's "I didn't know what I was signing" defense. In any civil action to compel arbitration, the circumstances surrounding the drafting and execution of the contract will be at issue and thus should be considered prior to execution.

First, there should be no ambiguity as to the scope of the claims the parties agree to arbitrate. The clause

should even cover claims concerning the validity and enforceability of the agreement itself. Additionally, the arbitration clause should not be buried in small print in the middle of the contract. Instead, it should be clearly set out and in bold print or even put on a separate piece of paper, clearly labeled as part of the contract and an arbitration agreement. The consumer should be required to sign the contract immediately below the arbitration clause so as to indicate that he/she agreed to arbitrate the claim and forego the court/jury. There should be no pressure on the consumer that would prevent him/her from reviewing the contract in its entirety and freely entering into it. Finally, the cost of arbitration should not be so overwhelming that the consumer can argue that it is unfair and/or unconscionable.

CHANGES TO THE NEW HOME WARRANTY ACT

The New Home Warranty Act (NHWA), La. R.S. 3141, et seq., provides mandatory warranties for purchasers and occupants of new homes in Louisiana. It requires the builder to warrant to the owner that certain items will be free from defects for certain periods of time. If a building violates the NHWA, any owner shall have a cause of action against the builder for actual damages, including attorney's fees and costs. In this session, the Legislature passed Act 333 that amended the term "owner" to include heirs, invitees and assigns to the home. Additionally, the two year warranty coverage for plumbing, electrical, heating, cooling and ventilating systems was broadened to state that these systems will be free from "any

defect" due to noncompliance with building standards or defects in materials or workmanship, and not merely "major structural defect." Finally, the Act now states that unless the parties otherwise agree in writing, the builder's warranty excludes mold and mold damages.



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WEATHERING THE STORM: SEEKING SAFE HARBOR IN A SEA OF ON-LINE INFRINGEMENT

Contrary to common belief, on-line service providers are responsible for the textual, graphical, and musical information stored by their subscribers. If a subscriber uploads copyrighted content, then both the service provider and the subscriber may be liable to the owner of the copyright for damages and injunctive relief. The situation is analogous to holding a shopping mall liable for infringing sales made by one of its tenants.

Under U.S. copyright law, only the owner of a copyright may (1) reproduce the copyrighted work, (2) prepare derivative works, (3) distribute copies of the work, and (4) publicly display the work. Unless a license is obtained from the copyright owner or the use is deemed to be a "fair use" of the work, the subscriber clearly commits copyright infringement by reproducing the copyrighted work. The service provider may also be liable to the copyright owner for allowing the copyrighted work to be publicly displayed using the supplied browser, software, or other resources. Both the subscriber and the service provider are liable, regardless of whether such infringement was innocent or intentional. Prior to 1998, service providers were obligated to manually police the information stored by subscribers for infringing material, a practice that was time consuming and highly ineffective.

In 1998, Congress created a safe harbor for on-line service providers. The provision, referred to as the Digital Millennium Copyright Act ("DMCA"), allows "service providers"¹ to escape liability for copyright infringement if the service provider:

- (1) (i) does not have actual knowledge that the material is infringing, (ii) is not aware of facts from which infringing activity is apparent, or (ii) acts expeditiously to remove or disable access to the material upon obtaining knowledge;
- (2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

- (3) upon notification of claimed infringement, responds expeditiously to remove or disable access to the allegedly infringing material.

17 U.S.C. §512(c)(1). If the above criteria are satisfied, the service provider will not be liable to any person (including the copyright owner or the subscriber) for the good faith disabling of access to or removal of material claimed to be infringing, regardless of whether such material is ultimately determined to be infringing. However, in order to take advantage of the above safe harbor, the service provider must designate an agent to receive notifications of claimed infringement. The designation must be provided to the U.S. Copyright Office (*see* <http://www.copyright.gov/onlinesp/agent.pdf>) and included on the provider's website.

Victims of infringement can also take advantage of the situation created by this safe harbor. If copyright-protected material is infringed by a website, the infringer may ignore demands to remove the material. By bringing the complaint to the service provider, the copyright owner can stop the infringement without the expense of a lawsuit. The letter to the provider must meet the requirements of the DMCA, and the copyright owner must be careful not to overstate his or her case.

The recent rash of lawsuits filed by the music recording industry serves as a reminder of the importance of the DMCA to service providers. Given the ease with which infringing material can be distributed via the Internet, the extreme difficulty faced by service providers in identifying and excising such material, and the consequences for failing to do so, the DMCA is a relatively low-maintenance option for immunizing oneself from unwelcome copyright litigation.



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¹"Service provider" is defined as "a provider of online services or network access, or the operator of facilities therefore, and includes an entity . . . offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, or material of the user's choosing, without modification to the content of the material as sent or received." 17 U.S.C. §512(k).



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