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Compelling Arbitration in Consumer Class Actions: Best Practices for Creating 'Reasonable Notice'

To create binding arbitration agreements with consumers, businesses must ensure that the necessary elements for a contract are satisfied, attorneys Alexis Miller Buese and Rara Kang say. The authors review recent important rulings, and offer practical advice on drafting and placing arbitration provisions that ''can help businesses succeed in compelling arbitration in the face of consumer class actions.''

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During the first quarter of 2017, courts rendered a number of significant decisions demonstrating that when it comes to compelling arbitration in a consumer class action, placement of the arbitration clause is paramount. Practitioners and companies that sell products to consumers will benefit from staying abreast of the developments in recent judicial interpretation as to what provides reasonable notice to consumers of an arbitration clause. This article will examine three recent cases, *Norcia v. Samsung Telecommunications America, LLC*, 845 F.3d 1279 (9th Cir. 2017), *Noble v. Samsung Electronics America, Inc.*, No. 16-1903, 2017 BL 66251 (3d Cir. Mar. 3, 2017), and *Johnson v. Uber Technologies, Inc.*, No. 16 C 5468, 2017 BL 108404 (N.D. Ill. Mar. 3, 2017), and will provide practical advice on drafting and placing arbitration provisions that can help businesses succeed in compelling arbitration in the face of consumer class actions.

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A risk of selling services or goods to a large customer base is that retailers, even those of relatively inexpensive items, may be exposed to large damages awards when an alleged injury is asserted by a nationwide class of consumers. Arbitration agreements that include class action waivers are a powerful defense to consumer class actions. After businesses began adopting arbitration and class action waiver clauses in response to the class action boom in the 1990s, courts were initially split about whether these clauses were enforceable to avoid class actions in state or federal court. However, as the U.S. Supreme Court confirmed in recent years in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) and *DirecTV Inc. v. Imburgia*, 136 S. Ct. 463 (2015), arbitration agreements must be placed on ''equal footing'' with other contracts and enforced according to their terms. *AT&T Mobility LLC*, 563 U.S. at 339; *DirecTV Inc.*, 136 S. Ct. at 468. In accordance with these principles, companies have successfully enforced class action waivers included in their arbitration provisions.

However, the enforceability of arbitration clauses has nevertheless remained subject to attack. Notably, judges, not lawmakers, are largely shaping this issue. In recent years, courts across the country have arguably increased scrutiny respecting the enforcement of arbitration clauses, focusing on whether an enforceable arbitration agreement was formed in the first place. In the three cases discussed below, courts declined to compel arbitration because the defendants could not establish that the consumers had taken actions to demonstrate their consent to be bound by an arbitration agreement. These recent decisions make clear that the placement of

the arbitration provision is essential to form a binding arbitration agreement, leading to the following guidance for practitioners and providers of consumer products:

■ Clearly signal the existence of an arbitration provision on outside product packaging.

■ Don't bury or hide the arbitration provision in a lengthy manual or guide.

■ Minimize the potential to mislead, confuse, misdirect, or distract the consumer.

Clearly Signal Existence of Arbitration Provision on Outside Product Packaging

The Ninth Circuit decision in *Norcia v. Samsung Telecommunications America, LLC* demonstrates the importance of using product packaging to signal the existence of an arbitration provision in order to form an enforceable shrinkwrap arbitration agreement. Shrinkwrap arbitration clauses are terms and conditions contained on or inside product packaging. In *Norcia*, the plaintiff purchased a Samsung smart phone at a Verizon Wireless store. The phone was packaged in a box with ''Samsung Galaxy S4'' written on the front and ''Package Contains. . . Product Safety & Warranty Brochure'' on the back. 845 F.3d at 1282. Inside the box was a copy of Samsung's 101-page ''Product Safety & Warranty Information'' brochure which contained Samsung's Standard Limited Warranty, including an arbitration provision. *Id.* At the store, a Verizon Wireless employee opened the box and unpacked its materials for the plaintiff, offering the box and its contents to the plaintiff who declined to take them. *Id.*

The court held that including the arbitration provision in the Product Safety and Warranty Information brochure did not create a valid contract to arbitrate all claims related to the phone, even though the brochure was referenced on the back of the product box, because the plaintiff was not reasonably put on notice of the provision to provide valid assent to the terms. *Id.* While recognizing that the plaintiff's silence or inaction could constitute acceptance of contractual terms in certain scenarios, the court reasoned that the brochure was not an enforceable shrinkwrap agreement because ''the outside of the Galaxy S4 box did not notify the consumer that opening the box would be considered agreement to the terms set forth in the brochure.'' *Id.* at 1287.

The key insight from *Norcia* is that to form a binding shrinkwrap arbitration agreement, product packaging should clearly note that opening the packaging constitutes the consumer's acceptance of the terms set forth in a document contained in the package. Better yet, the outside packaging would expressly reference the existence of the arbitration provision itself. This approach reflects the *Norcia* court's recognition that ''[w]here a notice on a package states that the user agrees to certain terms by opening the package,'' the consumer's silence or inaction may be deemed acceptance of the arbitration provision, thereby forming a binding arbitration agreement. *Id.* In contrast, merely referencing a brochure or manual whose title does not communicate that binding contractual terms are contained within it may be found to be insufficient to provide the consumer reasonable notice of such terms.

Don't Hide Arbitration Provision In Lengthy Manual or Guide

Norcia also underscores the significance of giving the consumer reasonable notice of the arbitration provision up front for purposes of creating an enforceable in-the-box arbitration agreement. The Ninth Circuit in *Norcia* refused to find that Samsung's Product Safety and Warranty Information brochure was a binding in-the-box contract with respect to the plaintiff's non-warranty claims because the plaintiff was not put on adequate notice of the arbitration provision's existence and therefore could not have assented to its terms. *Id.* at 1289. Samsung's arbitration clause was provided in Section 2 of the 101-page Product Safety and Warranty Information brochure respecting Samsung's Standard Limited Warranty. *Id.* at 1282. After explaining the scope of Samsung's express warranty, Samsung's obligations, the procedures for obtaining warranty service, and limits to Samsung's liability, the warranty section included an arbitration clause written in all-capitalized typeface, requiring all disputes with Samsung arising from the warranty or the sale, condition, or performance of the phone to be resolved through arbitration. *Id.* Procedures for opting out of the arbitration agreement were addressed later in the warranty section. *Id.*

The court held that a reasonable person would not have been on notice that Samsung's Product Safety and Warranty Information brochure contained a freestanding arbitration provision outside of the scope of warranty, or that by failing to opt out, the consumer was bound. *Id.* at 1289. By its title, Samsung's ''Product Safety & Warranty Information'' brochure merely indicated that it included safety information and Samsung's warranty relating to the phone. *Id.* Moreover, the arbitration provision was placed in a section of the brochure discussing Samsung's Standard Limited Warranty and only after an explanation of various other provisions relating to Samsung's warranty. *See id.* at 1282. The court explained that although a party cannot simply avoid the terms of a contract by failing to read them before signing, no contract formation can occur where, as here, ''the writing does not appear to be a contract and the terms are not called to the attention of the recipient.'' *Id.* at 1289 (internal citations and quotations omitted).

The Third Circuit in *Noble v. Samsung Electronics America, Inc.* likewise stressed the significance of conspicuously informing the consumer regarding the existence of an arbitration provision in order to create a binding arbitration agreement. There, the plaintiff purchased a series of Samsung smart watches which were packaged in a box containing a ''3.1-inch by 2.5-inch, 143-page document, titled 'Health and Safety and Warranty Guide.' '' *Noble*, 2017 BL 66251, at *1. The cover of the Guide instructed the consumer to ''read this manual before operating your device and keep it for future reference,'' but neither its table of contents nor its index contained any reference to an agreement to arbitrate. *Id.* at *1-2. The arbitration clause was placed on page ninety-seven of the Guide in all-capitalized typeface and presented as an answer to the question ''What is the procedure for resolving disputes?'' *Id.* at *2. The Guide further provided that the consumer could opt-out of the ''dispute resolution procedure'' by providing notice to Samsung within 30 days from the date of the purchase. *Id.*

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The court in *Noble* held that no binding arbitration contract was formed because the plaintiff did not receive reasonable notice of the arbitration provision to assent to its terms. *Id.* at *4. As in *Norcia*, the court reasoned that contractual terms will only be binding when they are ''reasonably conspicuous,'' and not ''proffered unfairly, or with a design to conceal or de-emphasize its provisions.'' *Id.* at *3 (internal citations and quotations omitted). Here, Samsung failed to give sufficient indication to the plaintiff that the Health and Safety and Warranty Guide constituted a bilateral contract because the cover of the Guide referred to itself as a ''manual'' and the outside of the Guide did not indicate that a bilateral contract, let alone an arbitration agreement, was inside the document. *Id.* at *3-4. The Guide also merely instructed the consumer to ''read this manual before operating your device and keep it for future reference,'' and neither its table of contents nor index suggested that the Guide included a bilateral contract. *Id.* at *4. Moreover, while an ''End User License Agreement for Software'' began on page 105, there was no language to suggest that the consumer should expect bilateral terms, such as a binding arbitration agreement, anywhere in the Guide. *Id.* Because reading ninety-seven pages into the Guide was the only way a consumer would receive notice of the arbitration provision, the court refused to presume that the plaintiff had read or received notice of the arbitration provision. *Id.*

Norcia and *Noble* offer clear takeaways for supporting the enforceability of in-the-box arbitration agreements. Avoid burying or hiding arbitration provisions in a brochure or manual that, without further cues, does not appear to contain such term terms. Instead, at a minimum, signal to the consumer that the document contains an arbitration provision by referencing it upfront on the brochure or manual's cover, table of contents, index, or ideally, a combination of these. Relying on differentiating typeface, such as bolding or all-capitalized text, may not be sufficient to establish that the consumer had reasonable notice of an arbitration provision contained in a lengthy document, especially where there is no indication elsewhere that the document contains a binding arbitration provision.

Minimize the Potential to Mislead, Confuse, Misdirect, or Distract Consumer

In accord with the principles set forth in *Norcia* and *Noble*, the enforceability of clickwrap agreements for products and services sold electronically does not necessarily depend on the consumer merely clicking on a box. For example, in *Johnson v. Uber Technologies, Inc.*, the court held that for a clickwrap arbitration agreement to be valid, a consumer must ''be provided reasonable notice of all the terms and conditions of an agreement as well as reasonable notice that, by clicking a button, the consumer is assenting to the agreement'' and refused to ''presume that a person who clicks on box that appears on a computer screen has notice of all contents not only of that page but of other content that requires further action (scrolling, following a link, etc.).'' 2017 BL 108404, at *1-2 (internal quotations and citations omitted). The court further concluded that whether the consumer received reasonable notice of the terms of an arbitration agreement and provided unambiguous assent to those terms is a fact-intensive inquiry that considers whether ''a reasonable person would be misled, confused, misdirected, or distracted by the manner in which the terms and conditions are presented.'' *Id.* at *2. Because Uber failed to present sufficient facts to demonstrate that the online registration process provided the plaintiff reasonable notice of the arbitration agreement, the court denied Uber's motion to compel arbitration. *Id.* at *3.

As *Johnson* illustrates, some courts will examine the content of pages that have references to contractual terms containing an arbitration provision and the specific process in which the consumer maneuvers through each page, analyzing whether the consumer was likely to be misled, confused, misdirected, or distracted through the process. Accordingly, practitioners and providers of online consumer goods or services should focus on giving the consumer notice of the contents on the pages that reference or link to contractual terms containing an arbitration provision. Suggestions that increase the likelihood that the clickwrap agreement will be enforced include:

- Include a check-box that users must click adjacent to an affirmation similar to ''By clicking on the box, you are indicating that you have read and agree to the Terms of Service.''
- Make it clear the ''Accept'' button relates to the agreement to the terms, rather than something else.
- Any hyperlink to the terms should be obvious (e.g., ''Terms of Use'' is underlined and has decent size lettering and visible coloring).
- Consider using a scrolling text box or a nearby hyperlink that requires you to scroll to completion and click ''Accept'' or ''Agree'' before moving to the next screen.
- Any hyperlink to the terms should have a central or obvious location on the webpage (e.g., the hyperlink is directly below the ''I Agree'' button).

Concluding Thoughts

To create binding arbitration agreements with consumers, businesses must ensure that the necessary elements for a contract are satisfied. In disputes with consumers, whether the consumer was provided reasonable notice of and gave mutual assent to an arbitration provision remains a significant issue. As the courts in *Norcia*, *Noble*, and *Johnson* have concluded, the necessary elements of notice and mutual assent can be satisfied by properly-drafted and properly-presented arbitration provisions. Enforcement of an arbitration clause may be as simple as opening a box or clicking an ''accept'' button on a mobile application, but providers of consumer products and services should focus on eliminating potential deficiencies in the presentation of the arbitration clauses, or face the possibility of class action litigation.

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