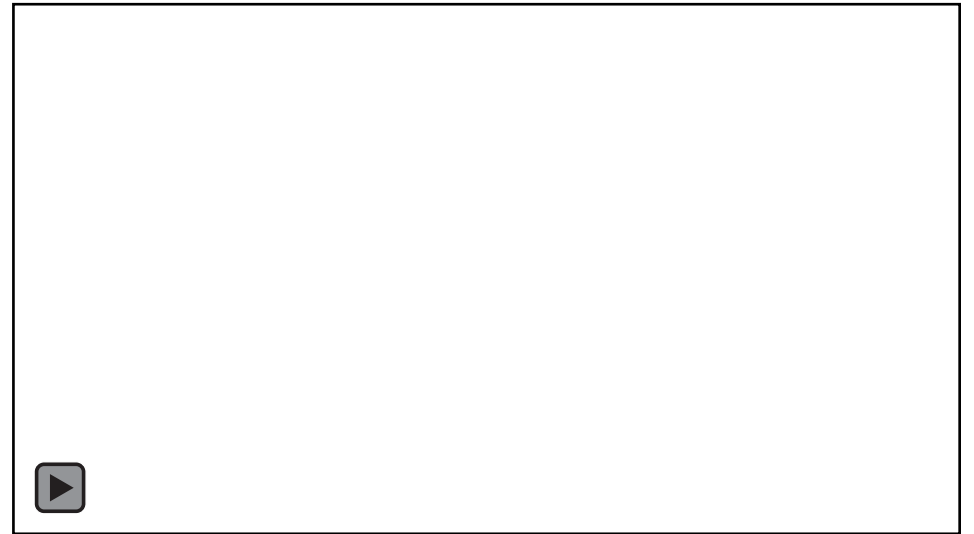


ARBITRATION PROJECT

An Update and Recommended
Arbitration Clause Language



KNOW YOUR ENEMY (2019-2022)

141 – Lawsuits

84 – Lawsuits from Feferman Warren Mattison

\$4,200,000 – Estimated Settlements and Verdicts

100% - Opposed to Arbitration

WHAT IS ARBITRATION?

- Arbitration is a private means of resolving disputes without going to court.
- Nearly every buyer's order has an arbitration clause.
- Arbitration agreements must be enforced so long as (1) they are agreed to by the consumer and (2) they are not **unconscionable**.

WHY ARE CONSUMER ADVOCATES OPPOSED TO ARBITRATION?

- Consumer advocates believe that most consumers do not understand the tradeoffs between arbitration and trial.
- Consumer Advocates believe that mandatory arbitration discourages consumers from pursuing claims.
- Consumer advocates believe the business has control over the selection of arbitrator.
- Private arbitration protects the wrongdoer from public scrutiny.
- Center for American Progress, THE CASE AGAINST MANDATORY CONSUMER ARBITRATION CLAUSES, 08/02/2016, [HTTPS://WWW.AMERICANPROGRESS.ORG/ARTICLE/THE-CASE-AGAINST-MANDATORY-CONSUMER-ARBITRATION-CLAUSES/](https://www.americanprogress.org/article/the-case-against-mandatory-consumer-arbitration-clauses/)

ARBITRATION IS GOOD FOR BUSINESS AND GOOD FOR CONSUMERS

- **P**redictable
- **P**rice
- **P**rivate

ARBITRATION IS PROTECTED BY STATUTE

- Arbitration is protected by Congress and the state legislature as a fair, expeditious, and private mechanism for dispute resolution without going to court. NMSA, 44-7A-16; 9 U.S.C. Ch. 1 § 2.

FREEDOM OF CONTRACT IS PROTECTED BY THE U.S. CONSTITUTION

U.S. Constitution - Article I, Section 10, Clause 1:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

ARBITRATION CLEARS THE WAY FOR COURTS TO ADDRESS OTHER CASES

- Bernalillo County must call in retired judges to facilitate pleas in criminal cases. ABQ Journal “DISTRICT COURTS CALL ON RETIRED JUDGES FOR CRIMINAL CASE BACKLOGS” 04/25/2022.
- Bernalillo County had 26,376 active civil cases in 2019 with an average of 420 days to resolution. New Mexico Legislative Finance Committee “LEGISLATING FOR RESULTS: APPROPRIATION RECOMMENDATIONS” Fifty-Fourth Legislature, Second Session
- Bernalillo County was forced to expand its “Court Annexed Arbitration Program” to all civil cases when \$50,000 or less at stake.

PATTERN OF JUDICIAL HOSTILITY

UNTIL RECENTLY LOCAL JUDGES ***ROUTINELY*** REFUSE TO ENFORCE
ARBITRATION AGREEMENTS

- Unfair Advantage
- Misunderstanding of the Law
- Politics

WE CAN TURN THE TIDE: *ROJAS V. RELIABLE CHEVROLET, ET. AL.* (CASE STUDY)

- In this case, arbitration pursuant to the purchase agreement was compelled by the district court over the consumer's objections.
- The consumer appealed and the appellate court recently issued a proposed decision upholding the lower court's ruling.
- Update – The New Mexico Court of Appeals recently assigned the case to a panel of three judges: Hon. Miles Hanisee; Hon. Jacqueline Medina; and Hon. Katherine Wray.

THE NMADA *AMICUS CURIAE*

- Concern over exceptions in contract law that “swallow the general rule that contracts freely entered into, including arbitration agreements, are enforceable.”

ARBITRATION AGREEMENT

Any dispute between Buyer and Dealer arising out of this transaction **will be decided by arbitration** in the City of Albuquerque, New Mexico **under the New Mexico Uniform Arbitration Act** and the applicable rules of the American Arbitration Association. Any arbitration award may be enforced as provided by law.

BOOTSTRAPPING OTHER PORTIONS OF THE CONTRACT

Dealer is not liable for incidental, consequential or punitive damages arising out of this sale or the use of this vehicle, including but not limited to *loss of use, loss of time, inconvenience, transportation, rental, loss of earnings or profits, or any commercial loss.*

Any legal claim arising from this transaction *must be brought within one year* after the date a cause of action accrues, or it will be forever barred.

CONSUMER ARGUMENTS

For all intents and purposes, consumers make the same argument in every case

- The Arbitration Agreement is Unconscionable because it strips the consumer of punitive damages, statutory damages, and attorneys' fees
- The Court should not strike the unconscionable provisions and enforce the arbitration agreement because it incentivizes dealers to act unconscionably knowing they most likely will not be challenged
- A judge's prior ruling in a prior case involving the same dealership with the same arbitration clause where the judge holds the clause unconscionable merits doing the same in the instant case. *Lewis et. al. v. Reliable Chevrolet et. al.* (09/15/2020)

DEALER ARGUMENT (KEY TO VICTORY)

- The Consumer misunderstands the law surrounding punitive damages
 - Contrary to the popular belief of the Plaintiffs and Defense Bars, common law punitive damages and treble damages under the UPA are not the same thing
 - Both are designed to punish wrongful conduct
 - Punitive damages are **uncapped**
 - Treble damages are **capped** at three times actual damages

DEALER ARGUMENT

- The consumer reads new language into the agreement to avoid arbitration altogether
 - There is nothing in the contract that says consumers can't get attorney's fees.
 - There is nothing in the contract that limits the consumers right to UPA damages including treble damages.

DEALER ARGUMENT

- Limitations on remedies *are permissible* so long as they are non-exculpatory and reasonable.
 - The Uniform Commercial Code (UCC) allows for limitations on damages
 - The Arbitration Agreement does nothing to limit the consumer's ability to obtain treble damages, statutory damages, or attorneys fees.

ARBITRATION STRATEGY (SUMMARY)

1. Always move the court to force arbitration.
2. Never admit that any portion of the contract is unconscionable.
3. Don't let the consumer read new language into the contract.
4. Make sure your lawyers cite to *Rojas v. Reliable Chevrolet et. al.*
5. Appeal, Appeal, Appeal.

AVOIDING PROBLEMS WITH BETTER ARBITRATION CLAUSE LANGUAGE

A victorious leader wins first and battles second. Sun Tzu

- Capitalize on an *easy victory* with an arbitration clause that is more difficult to challenge.
- An arbitration clause is difficult to challenge when:
 - It is 100% bilateral
 - It does not force the consumer to waive any remedies
 - It is conspicuously disclosed with an adjacent consumer signature

ARBITRATION CLAUSE (RECOMMENDED)

PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS

1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
2. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Provision, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors, or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle or service, this contract, or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract), shall, at your or our election, be resolved by neutral, binding arbitration and not in a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Provision shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis. Any arbitration shall be pursuant to the New Mexico Uniform Arbitration Act.

Arbitrators shall be attorneys or retired judges practicing and/or residing in New Mexico and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law and the applicable statute of limitations. The arbitration hearing shall be conducted in New Mexico. We will pay your filing, administrative, service or case management fee and your arbitrator or hearing fee up to a maximum of \$_____, unless the law or arbitrator requires us to pay more. Each party shall be responsible for its own attorney, expert, and other fees, unless awarded by the arbitrator under applicable law. Any award by the Arbitrator shall be in writing and will be final and binding on all parties, subject to any limited right of appeal under the New Mexico Uniform Arbitration Act.

You and we retain the right to seek remedies in small claims court for disputes or claims within the court's jurisdiction, unless such action is transferred, removed, or appealed to a different court. Neither you, nor we, waive the right to arbitration by using self-help remedies such as repossession, or by filing an action to recover the vehicle, to recover a deficiency balance, or for individual injunctive relief. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Provision shall survive any termination, payoff, or transfer of this contract. If any part of this Arbitration Provision is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable.

ELEMENTS OF THE RECOMMENDED ARBITRATION CLAUSE

- **Explicit and conspicuous**
- **Everything is bilaterally applicable**
- **Reserved right to pursue remedies in small claims court**
- **No limitations on remedies**
- **Has been enforced by at least one New Mexico District Judge
(Hon. Beatrice Brickhouse)**

ISSUES TO CONSIDER

- The consumer can insist on arbitration in small collections and repossession cases thereby potentially raising the cost of litigation.
- The arbitration clause requires the dealer to pay the arbitrator, at least up to a certain amount.

TIPS FOR USING THE ARBITRATION CLAUSE

- Avoid contradicting the arbitration clause in other contracts and documents.
- Make sure the consumer's signature is physically adjacent to the arbitration clause.
- Make sure the arbitration clause is published **CONSPICUOUSLY**.

TIPS FOR DEPLOYING A NEW ARBITRATION CLAUSE

- Prevent employees from using outdated paper and electronic forms
- Train employees on why using current forms is important
- Meet with your form publisher to develop a strategy to deploy the new arbitration clause quickly
- Consider putting the date the form language was updated in the footer of the document
- Update the arbitration clause to accommodate changes in law

THANKS TO THE NMADA

The progress we have made on arbitration would not be possible without the support of the NMADA. Every member benefits when arbitration clauses are routinely enforced by New Mexico courts. Every member benefits from access to arbitration language that is developed in New Mexico, by New Mexico lawyers, with New Mexico car dealers in mind.