

MANAGING LITIGATION BY USING ARBITRATION

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Moore & Van Allen

A NEW DECADE OF CHALLENGES FOR IN-HOUSE COUNSEL
PROTECT AND DEFEND IN 2010 AND BEYOND

Managing Litigation by Using Arbitration

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NON-CONSUMER ARBITRATION CLAUSE

The following clause adds to the AAA standard clause certain provisions, which may be viewed as “safeguards” or “impediments”, depending on which side you are on, the nature of the contract, the client you represent, the issues involved and the dollars that might be at stake in an arbitration proceeding:

Governing Law; Dispute Resolution. This Agreement shall be governed by the laws of North Carolina without regard to its conflicts of law principles except that the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, shall apply. The Parties agree that any controversy or claim arising out of or relating to this Agreement, or the breach hereof, which cannot be amicably settled, shall be determined solely and exclusively by arbitration administered by the Parties in accordance with the version of the AAA Commercial Arbitration Rules in effect as of the date of this Agreement. The arbitration shall take place at the AAA office located in Mecklenburg County, North Carolina.

Any final award or resolution reached through arbitration in accordance with the requirements of this paragraph shall, at the request of any Party, be entered as a judgment (including provisional remedies) in any state or federal court having competent jurisdiction; PROVIDED, however, that notwithstanding any AAA Commercial Arbitration Rule to the contrary, the Parties agree that: (1) no claim may be pursued by any Party in arbitration which is barred by the applicable statute of limitations and the resolution of any statute of limitations defense to any claim asserted shall be decided by a court having jurisdiction thereof and not by the arbitrator(s); (2) if the arbitration involves claims or counterclaims, either of which exceed \$100,000, the dispute shall be heard by three arbitrators, one selected by each side with those two selecting a third arbitrator; (3) in an arbitration where any claim or counterclaim exceeds \$50,000, the Parties shall have the right to take the deposition of any Party or their representative(s) who have knowledge of any facts relating to the claims or counterclaims asserted or the defenses related thereto; (4) the arbitrator(s) shall award the costs of the arbitration and any related litigation to the prevailing party, including reasonable attorney’s fees; (5) testimony by affidavit shall not be permitted in the arbitration; (6) hearsay evidence shall not be presented by the Parties or considered by the arbitrator(s), except that which would be permissible under the North Carolina Rules

of Evidence in effect at the time of the arbitration; (7) the Parties shall have the right to inspect originals and receive copies of all documents to be relied upon by the other Party at the arbitration at least sixty days in advance of the arbitration hearing and shall also have the right, upon thirty days notice in writing to the other Party, to request and then inspect and copy all relevant documents; (8) the arbitrator shall resolve any disputes concerning the relevance of documents to be produced; (9) the arbitration shall be private and all documents produced or relied upon by any Party and any award rendered by the arbitrator(s) shall be kept confidential by the Parties, it being agreed that any claims arising out of or relating to this obligation, or the breach thereof by any party, shall be settled by arbitration in accordance with the terms of this Agreement; (10) where one Party intends to rely upon the testimony of an expert or experts, the expert(s) must be disclosed at least ninety days in advance of the arbitration hearing and the other Party shall have the right within thirty days thereafter to take the deposition of the expert upon payment of the expert's reasonable fees for the in-deposition time of the expert; (11) any Party may disclose a rebuttal expert within thirty days of the deposition of the other Party's expert and the other Party shall be entitled to a deposition of the expert upon payment of the expert's reasonable fee for the in-deposition time of the expert; (12) the arbitrator(s) shall be required to consider the law presented by any Party which that Party considers to be applicable to any claim presented and shall issue a reasoned award with respect to that issue upon the request of any Party; and (13) the Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration provision. Any question with respect to the enforceability of this arbitration provision or the arbitrability of any dispute shall be decided by the arbitrator(s).

Remedies. Notwithstanding the Dispute Resolution clause in this Agreement and any AAA Commercial Arbitration Rule to the contrary, the Parties further agree: (1) that the breach or non-performance of any term of this Agreement by any Party will cause irreparable damage to the other Party; (2) that the non-breaching Party shall be entitled to seek injunctive relief in any court of competent jurisdiction to specifically enforce any provision of this Agreement; (3) there is no adequate remedy at law for the breach or non-performance of any term of this Agreement; (4) to waive any security or the posting of a bond as a requirement for obtaining injunctive relief; and (5) that injunctive relief is in addition to any other remedies either Party may have at law or in equity.

Class Waiver.

BY AGREEING TO THIS BINDING ARBITRATION PROVISION, THE PARTIES WAIVE ANY RIGHT THEY MAY HAVE TO BRING OR PARTICIPATE IN A CLASS ACTION LAWSUIT REGARDING ANY CLAIM.

Reasoned Award.

Any decision by the arbitrator(s), including the final award, shall state the reasoning for such decision

CONSUMER ARBITRATION CLAUSE

1. "LOWE'S" DEFINED. Within this Contract (as defined on page 1), the term "Lowe's" shall refer to Lowe's Home Centers, Inc., a North Carolina corporation.

2. GENERAL DESCRIPTION. By this Contract, Customer and Lowe's agree that 1) Customer shall purchase and Lowe's shall sell the goods and/or materials (the "Goods") and 2) Lowe's shall procure on Customer's behalf, and Customer shall pay for, the services to install same (the "Installation Services") in or on the premises identified on the face of this Contract (the "Premises") for the Order Total stated on the face of this Contract (the "Price") and according to the provisions of the Contract documents. The Contract documents shall consist of (1) the face of this Contract, titled "Installed Sales Contract," (2) these Terms and Conditions, and (3) any attached sketches, materials lists, floor plans, and/or specification sheets and other addenda or attachments hereto. The Contract documents do not include any correspondence, advertisements, estimates or other documents that are not attached.

3. INSTALLATION SERVICES. Customer authorizes Lowe's on Customer's behalf to (a) arrange for the Installation Services to be performed by an independent contractor (the "Installer") (licensed when legally required), (b) issue a work order to the Installer to perform the Installation Services, (c) have the Installer's work inspected, should Lowe's in its discretion choose to do so (it being agreed that Lowe's has no obligation to do so), and (d) pay the Installer after completion of the work and after receipt of a certificate, signed and dated by Customer, that the work has been satisfactorily completed (the "Certificate of Completion"). Customer understands that Lowe's will rely upon the Certificate of Completion in paying the Installer for the Installation Services. CUSTOMER AGREES THAT THE INSTALLER WILL PERFORM THE INSTALLATION SERVICES ACTING AS AN INDEPENDENT CONTRACTOR FOR CUSTOMER AND NOT UNDER THE SUPERVISION OR CONTROL OF LOWE'S. Customer agrees that the Installation Services do not include architectural/engineering services or structural changes to the Premises or any other services beyond the ordinary and routine installation of the Goods as specifically provided in this Contract. Customer is responsible, at Customer's cost, for providing any necessary architectural/engineering services or structural changes to the Premises or any other services not specifically identified in this Contract.

4. GOODS. Lowe's will arrange for delivery of the Goods to the Premises. Any surplus materials upon completion of the Installation Services shall be the property of Customer.

5. PRICE. The Price covers the Goods, Installation Services, and applicable taxes. The Price assumes sound existing substructures, superstructure and points of attachment. The Price shall be increased by the cost and reasonable profit to Lowe's of having to provide additional Goods and/or Installation Services as a result of defective substructures, superstructures, or points of attachment or the existence of any other Undisclosed Condition (as defined in Section 9 of these Terms and Conditions). In the event of an Undisclosed Condition, upon Lowe's request Customer will execute a change order or a new replacement contract.

6. PAYMENT. Payment of the Price by Customer to Lowe's is due in full upon execution of this Contract. Payment for any change order or new replacement contract is due at the time of that change order or replacement contract.

7. LICENSES, PERMITS, SAFETY RULES, BUILDING CODES, ZONING ORDINANCES, AND OTHER LAWS.

The Installer shall be solely responsible to Customer for obtaining any and all licenses and building permits which are legally required to perform the Installation Services. The Installer shall also be solely responsible to Customer for the Installation Services being performed in compliance with all applicable safety rules and all existing building codes, zoning ordinances and other laws. Neither the Installer nor Lowe's shall be responsible for any pre-existing violations of safety rules, building codes, zoning ordinances or other laws and shall not be required to address or correct same. If prior to the completion of work a change occurs to any applicable safety rule, building code, zoning ordinance or other law which requires additional Goods and/or Installation Services to perform this Contract, Customer agrees to pay Lowe's the cost and reasonable profit for such additional Goods and Installation Services and to execute a resulting change order or new replacement contract as requested by Lowe's. No additional work will be performed under this Contract due to any change to any applicable safety rule, building code, zoning ordinance or other law that occurs after the completion of work.

8. CUSTOMER'S WARRANTY AGAINST VIOLATIONS OF EASEMENTS, COVENANTS, AND THIRD PARTY RIGHTS. Customer warrants that performance of the Installation Services will not violate any existing real property easements, covenants, homeowners' association rules or rights of third parties holding an interest in the real property being improved.

9. UNDISCLOSED CONDITIONS IN PREMISES. If the Installer discovers any defect, weakness or dangerous condition including, but in no way limited to, mold, mildew, rot, asbestos or infestation ("Undisclosed Condition") in the Premises' structure, substructure, super-structure or points of attachment, Customer must remedy the Undisclosed Condition at Customer's sole cost and expense and to Lowe's sole satisfaction. If Customer refuses to permit inspection of the Premises as set forth below, Lowe's may terminate or rescind this Contract without remedy or recourse by, or further obligation to, Customer, except as expressly provided below. If Customer and Lowe's disagree as to whether an Undisclosed Condition exists, Lowe's may in its sole discretion obtain the services of an inspector to inspect the Premises at Lowe's sole cost and expense, and if Lowe's chooses to do so, such inspector's report shall be final and conclusive as to whether an Undisclosed Condition exists. In the event of any Undisclosed Condition that Customer does not remedy to Lowe's sole satisfaction, or any failure by Customer to perform any other obligation of Customer under this Contract, then at Lowe's option (1) if Lowe's notifies Customer of its election to rescind this Contract prior to the earlier of delivery of the Goods and the Installer beginning performance of the Installation Services, Lowe's may rescind this Contract and return the Price to Customer without further cost or obligation by either Customer or Lowe's, or (2) if Lowe's notifies Customer of its election to terminate this Contract after the earlier of delivery of the Goods and the Installer beginning performance of the Installation Services, Lowe's may terminate this Contract without remedy or recourse by, or further obligation to, Customer, except as expressly provided below. In the event that Lowe's terminates this Contract as provided in this Section, then Customer may return the Goods (other than Goods that have been "custom-made") in their

original, unopened condition, to Lowe's for a refund or credit. Any such return must be made within 30 days after Lowe's terminates this Contract. Customer will be charged a 15% restocking fee on any such returns. Goods not in their original, unopened condition, and custom-made goods, may not be returned. "Custom-made" goods include goods that have been uniquely altered, color-matched, shaped, sized, cut or otherwise designed or fitted to accommodate the requirements of a particular space or environment. Examples of custom-made goods include, but are not limited to, cabinets, countertops, floor and wall coverings, and window treatments. If Lowe's terminates this Contract as provided herein, Lowe's shall have no obligation to refund any portion of the Price (except as expressly provided herein) and shall have no obligation to restore the Premises to their original condition.

10. CUSTOMER'S RESPONSIBILITIES: Customer agrees to pay Lowe's according to these Terms and Conditions. Customer agrees to facilitate the location of utility lines. Customer is responsible for identifying property lines. Customer agrees to ensure that work areas are free of vermin and pre-existing physical or environmental hazards, and building/zoning code violations. Customer agrees to provide the Installer with access to work areas during working hours and to provide access to sanitary facilities or to pay the rental costs for such facilities. Customer agrees to ensure that any security system at the Premises will not interfere with performance of the Installation Services. Customer agrees to provide power to, and, as applicable, climate control in, the work areas. Customer agrees not to allow unattended minors at the Premises while the Installer is present. Customer agrees to control and keep pets away from work areas. Customer agrees to keep posted permits on display at all times. Customer agrees that if Customer or anyone Customer controls interferes with or delays performance of the Installation Services, Customer may be subject to transportation/storage charges or other resulting charges. Customer agrees not to assign or transfer this Contract. Customer agrees that any claims against Lowe's or the Installer under this Contract should be made to Lowe's within thirty (30) calendar days of the date Customer first becomes aware of a problem. (Lowe's will attempt resolution of any claim(s) within sixty (60) calendar days of receiving Customer's notice.) CUSTOMER ASSUMES THE RISK AND THE FULL LIABILITY OF PHYSICALLY ASSISTING WITH DELIVERY OF THE GOODS OR WITH PERFORMANCE OF THE INSTALLATION SERVICES.

11. MANUFACTURER WARRANTY FOR GOODS / LOWE'S WARRANTY FOR INSTALLATION SERVICES / LIMITATIONS OF LIABILITY. Customer is entitled to any warranty provided by a manufacturer of the Goods sold under this Contract. The Installer will provide Customer with any manufacturer consumer warranty information accompanying the Goods, and Customer may also obtain such information by contacting Lowe's. Lowe's does not warrant the Goods AND EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

Lowe's does warrant that the Installation Services will be performed by the Installer in a good and workmanlike manner. Lowe's warranty for Installation Services shall extend for a period of one year from the earlier of (1) the date the Certificate of Completion is signed by Customer or (2) the date that Lowe's determines that the Installation Services have been completed, or for such greater period as may be required by applicable law governing consumer warranties for workmanship (the "Warranty Period"). LOWE'S WARRANTY THAT THE INSTALLATION SERVICES WILL BE PERFORMED BY THE INSTALLER IN A

GOOD AND WORKMANLIKE MANNER DOES NOT COVER, AND LOWE'S WILL NOT BE RESPONSIBLE FOR, ANY DEFECT IN SUCH INSTALLATION SERVICES DUE TO (1) ANY DEFECT, WEAKNESS OR DANGEROUS CONDITION, INCLUDING BUT NOT LIMITED TO, MOLD, ROT, ASBESTOS OR INFESTATION IN THE PREMISES' STRUCTURE, SUBSTRUCTURE, SUPERSTRUCTURE OR POINTS OF ATTACHMENT, OR OTHER PRE-EXISTING PHYSICAL OR ENVIRONMENTAL HAZARD, OR (2) ABUSE, MISUSE, NEGLECT, OR IMPROPER CLEANING. LOWE'S WARRANTY FOR INSTALLATION SERVICES SHALL BE IN LIEU OF ANY OTHER WARRANTY, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Customer acknowledges and agrees that Customer shall be limited to seeking recourse or remedy exclusively from Lowe's or the Installer (as applicable) and that no affiliate of Lowe's shall have any liability under this Contract. Customer must give Lowe's written notice within the Warranty Period of any warranty claim relating to Installation Services. Customer agrees that its sole and exclusive remedy against Lowe's for a warranty claim is reinstallation in a good and workmanlike manner, including the repair or replacement of any Goods if and to the extent reasonably necessary to correct the defective Installation Services. CUSTOMER SHALL HAVE NO OTHER REMEDY FOR A WARRANTY CLAIM, INCLUDING WITHOUT LIMITATION REMEDY FOR LOSS OR DAMAGE CAUSED BY NORMAL WEAR AND TEAR, LOSS OR DAMAGE WHICH HAS NOT BEEN REASONABLY MITIGATED, OR LOSS OR DAMAGE CAUSED BY ACTS OF GOD. IN NO EVENT SHALL LOWE'S BE LIABLE FOR INDIRECT, PUNITIVE, CONSEQUENTIAL OR INCIDENTAL DAMAGES (SUCH AS, WITHOUT LIMITATION, LOST PROFITS, LOST SALES, AND INJURIES TO PERSONS OR PROPERTY), EVEN WHERE LOWE'S HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. WHERE, DUE TO OPERATION OF LAW, SUCH DAMAGES CANNOT BE EXCLUDED, THEY ARE EXPRESSLY LIMITED IN AMOUNT TO THE PURCHASE PRICE. In connection with any warranty claim, Customer agrees, at no cost to Lowe's or the Installer, to prepare the Premises and the reinstallation area in the manner described in Section 10 of these Terms and Conditions.

12. ARBITRATION AGREEMENT AND WAIVER OF JURY TRIAL. Most questions or complaints are resolved informally. If Customer has a question or complaint, Customer agrees to contact the Installer, the Lowe's salesperson whose name appears on this Contract and the manager of the Lowe's store where Customer entered into this Contract. All claims by Customer or Lowe's concerning this Contract which cannot be resolved informally (and which are not subject to the jurisdiction of a small claims court) shall be resolved by binding arbitration conducted by a single arbitrator under the current applicable rules, procedures and protocols of the American Arbitration Association (as amended). If the dispute falls within the jurisdiction of a small claims court the claimant may, at its option, choose to arbitrate or file a small claims action. Any appeal of a judgment from a small claims court shall be resolved by arbitration as provided herein. Claims to be resolved by binding arbitration include, but are not limited to (1) all claims directly or indirectly related to the signing of this arbitration agreement, the validity or scope of this arbitration agreement, or any attempt to set aside this arbitration agreement, (2) all federal or state law claims relating directly or indirectly to this Contract (including this arbitration agreement), the information Customer gave Lowe's before entering into this Contract and/or any past agreement or agreements between Customer and Lowe's, (3) all counterclaims, cross-claims and third-party claims, (4) all common law claims of any kind including common law claims based upon contract,

tort, fraud, or other intentional torts, (5) all claims based upon a violation of any state or federal constitution, statute or regulation, (6) all claims asserted by Lowe's against Customer, including claims for money damages to collect any sum Lowe's claims Customer owes Lowe's, (7) all claims asserted by Customer individually against Lowe's and/or any of Lowe's' employees, agents, directors, officers, shareholders, managers, members, parent company or affiliated entities (hereinafter collectively referred to as "related third parties") or the Installer, including claims for money damages and/or equitable or injunctive relief, (8) all claims asserted on Customer's behalf by another person, (9) all claims asserted by Customer as a private attorney general against Lowe's, related third parties and/or the Installer, (10) all claims arising from or relating directly or indirectly to the disclosure by Lowe's, related third parties or the Installer of any non-public personal information about Customer, and/or (11) all other claims arising under or related to this Contract whether or not set forth above.

Binding arbitration means that Customer waives: (1) any right to a jury trial; (2) any right to bring a lawsuit in a court (other than a small claims court as described above); and (3) any right to seek relief in any other forum or from any other agency. Any claim not decided by a small claims court will be decided by an arbitrator selected by the American Arbitration Association.

Lowe's and Customer agree that binding arbitration provides a simple, cost efficient method to resolve disputes quickly. Lowe's and Customer therefore agree that no class action arbitration of any type may be ordered by a Court or arbitrator(s) under this Contract and, in addition, that there shall be no joinder of parties, except for joinder of parties to the transaction covered by this Contract. If a court or arbitrator determines the waiver of the right to class action arbitration or the prohibition of joinder of parties (other than parties to the transaction covered by this Contract) to be unenforceable, then this entire arbitration agreement shall be rendered null and void, and the party bringing such action will be required to bring such action in a court of law.

By agreeing to binding arbitration Customer and Lowe's waive any right to bring or participate in a Class Action lawsuit regarding any claim.

How Arbitration Works:

Lowe's may demand arbitration by sending written notice to Customer at the address listed in this Contract. Customer may demand arbitration by sending written notice to Lowe's at the following address: Mail Code 2ELG, P.O. Box 1000, Mooresville, NC 28115.

The arbitration shall be held in the city or county where the Premises are located or in such other convenient location as the Customer and Lowe's may mutually agree.

Lowe's shall pay the filing, administrative, hearing and arbitrator's fees associated with the arbitration. Customer shall not be required to reimburse Lowe's for these expenses even if Lowe's wins the arbitration. Unless the arbitrator's award specifically provides otherwise, Lowe's and Customer will each be responsible for its own attorneys' fees and other expenses, such as witness and expert witness fees. At the timely request of Customer or Lowe's, the arbitrator will provide a written explanation of

the award so long as such requirement is consistent with the rules, procedures and protocols of the American Arbitration Association then in effect.

The arbitrator's award may be filed with and enforced by any court having jurisdiction.

If allowed by statute or applicable law, the arbitrator may award statutory damages and/or reasonable attorneys' fees and expenses. If Customer fails to pay Lowe's in accordance with this Contract, Lowe's shall be entitled to recover its reasonable attorneys' fees as provided by N.C. Gen. Stat. §6-21.2 or other applicable law.

The parties agree that this arbitration agreement is made in connection with a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, but if for any reason the Federal Arbitration Act does not apply, then this arbitration agreement shall be governed by the laws of the State of North Carolina.

13. GOVERNING LAW AND SEVERABILITY. This Contract shall be interpreted under and governed by the law of North Carolina except that the Arbitration Agreement and Waiver of Jury Trial is governed by the Federal Arbitration Act, 9 U.S.C. §§1-16. If any provision of this Contract is contrary to any law to which it is subject, such unlawful provision shall be ineffective without invalidating the other provisions, which shall remain in full force and effect; except that, as stated in Section 12, if the waiver of class action arbitration, or the prohibition of consolidation or joinder, is determined unenforceable, then the entire arbitration agreement in Section 12 will be rendered null and void.

14. CREDIT CARD/FINANCED TRANSACTIONS. If Customer uses a credit card or obtains financing to pay some or all of the Price, then Customer acknowledges that the terms of his or her cardholder agreement or financing documents may change the total amount of money Customer must pay to the credit card provider or lender, including any interest charges and fees. Customer acknowledges that his or her cardholder agreement or financing documents may have other terms and conditions to which Customer will be subject. Customer also acknowledges that Lowe's is not a party to any such cardholder or financing agreement.

15. WAIVER OF LIENS. Because responsibility for paying the Installer on Customer's behalf belongs to Lowe's, Lowe's will require the Installer, on behalf of itself and any of the Installer's subcontractors, materialmen or suppliers, as a condition precedent to payment by Lowe's on Customer's behalf, to fully and unconditionally relinquish, waive and release any and all mechanic's liens, materialman's liens and other liens in the Premises which the Installer or its subcontractors, materialmen or suppliers might have or acquire in the future, by operation of law or otherwise, as a result of this Contract.

16. UNAVOIDABLE DELAY OR FAILURE IN PERFORMANCE EXCUSED. Any delay or failure by Lowe's or the Installer in performing this Contract because of strike, fire, flood, epidemic, acts of terrorism, acts of God, inability to obtain Goods in a timely or commercially feasible manner, or any other causes beyond the reasonable control of Lowe's or the Installer shall be excused and shall not be breaches of this Contract.

17. ENTIRE AGREEMENT / CHANGES IN WRITING. Customer and Lowe's agree that this Contract accurately states the entire agreement between Customer and Lowe's concerning the Goods and Installation Services and replaces and supersedes all prior agreements and understandings relating thereto, both oral and written, and all oral agreements and understandings entered into at the same time as this Contract. Any additions or changes to this Contract, or any waiver of rights under this Contract, must be in writing signed by Customer and Lowe's.

18. CAPTIONS. Titles or captions of sections contained in this Contract have been inserted only as a matter of convenience and in no way define, limit, extend, describe or otherwise affect the scope or meaning of this Contract or the intent of any provisions hereof.

QUESTIONS OR CONCERNS. Customer should speak with the Installer, the Lowe's salesperson whose name appears on this Contract and the manager of the Lowe's store where Customer entered this Contract regarding routine matters such as scheduling, any requested changes to Customer's order, or any concerns Customer may have about this Contract, the Goods or the Installation Services. If the Installer and/or the Lowe's store are unable to answer your questions, or if you still have concerns, Lowe's is ready to assist you at the following telephone number and address:

Telephone: _____

Address: _____

HOME REPAIR: KNOW YOUR CONSUMER RIGHTS

As you plan for your home repair/improvement project, it is important to ask the right questions in order to protect your investment. The following tips should allow you to protect yourself and minimize the possibility that a misunderstanding may occur.

AVOIDING HOME REPAIR FRAUD

Please use extreme caution when confronted with the following warning signs of a potential scam:

- (1) Door-to-door salespersons with no local connections who offer to do home repair work for substantially less than the market price.
- (2) Solicitations for repair work from a company that lists only a telephone number or a post-office box number to contact, particularly if it is an out-of-state company.
- (3) Contractors who fail to provide customers references when requested.
- (4) Persons offering to inspect your home for free. Do not admit anyone into your home unless he or she can present authentic identification establishing his or her business status. When in doubt, do not hesitate to call the worker's employer to verify his or her identity.

(5) Contractors demanding cash payment for a job or who ask you to make a check payable to a person other than the owner or company name.

(6) Offers from a contractor to drive you to the bank to withdraw funds to pay for the work.

CONTRACTS

(1) Get all estimates in writing.

(2) Do not be induced into signing a contract by high-pressure sales tactics.

(3) Never sign a contract with blank spaces or one you do not fully understand. If you are taking out a loan to finance the work, do not sign the contract before your lender approves the loan.

(4) Remember, you have 3 business days from the time you sign your contract to cancel any contract if the sale is made at your home. The contractor cannot deprive you of this right by initiating work, selling your contract to a lender, or any other tactic.

(5) If the contractor does business under a name other than the contractor's real name, the business must either be incorporated or registered under the Assumed Business Name Act. Check with the Secretary of State to see if the business is incorporated or with the county clerk to see if the business has registered under the Assumed Business Name Act.

(6) Homeowners should check with local and county units of government to determine if permits or inspections are required.

(7) Determine whether the contractor will guarantee his or her work and products.

(8) Determine whether the contractor has the proper insurance.

(9) Do not sign a certificate of completion or make final payment until the work is done to your satisfaction.

(10) Remember, homeowners should know who provides supplies and labor for any work performed on your home. Suppliers and subcontractors have a right to file a lien against your property if the general contractor fails to pay them. To protect your property, request lien waivers from the general contractor.

BASIC TERMS TO BE INCLUDED IN A CONTRACT

(1) Contractor's full name, address, and telephone number. Illinois law requires that persons selling home repair and improvement services provide their customers with notice of any change to their

business name or address that comes about prior to the agreed dates for beginning or completing the work.

(2) A description of the work to be performed.

(3) Starting and estimated completion dates.

(4) Total cost of work to be performed.

(5) Schedule and method of payment, including down payment, subsequent payments, and final payment.

(6) A provision stating the grounds for termination of the contract by either party. However, the homeowner must pay the contractor for work completed. If the contractor fails to commence or complete work within the contracted time period, the homeowner may cancel and may be entitled to a refund of any down payment or other payments made towards the work, upon written demand by certified mail.

Homeowners should obtain a copy of the signed contract and keep it in a safe place for reference as needed.

IF YOU THINK YOU HAVE BEEN DEFRAUDED OR YOU HAVE QUESTIONS

If you think you have been defrauded by a contractor or have any questions, please bring it to the attention of your State's Attorney or the Illinois Attorney General's Office.

Attorney General Toll-Free Numbers

Carbondale (800) 243-0607

Springfield (800) 243-0618

CHI:1848069.1

CHI:1848069.1

CHI:1848069.1

CHI:1848069.1

Chicago (800) 386-5438**CHI:1876137.2**

CHI:1876137.2

FILED

NOT FOR PUBLICATION

JUN 26 2009

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**

BALAR EQUIPMENT CORPORATION,
an Arizona corporation,

Plaintiff - Appellee,

v.

VT LEEBOY, INC., a North Carolina
corporation formerly known as B.R. Lee
Industries, Inc.,

Defendant - Appellant,

and

JOHN DOES, I-X, inclusive; JANE
DOES, I-X, inclusive; BLACK AND
WHITE CORPORATION, I-X, inclusive;
XYZ PARTNERSHIPS, I-X, inclusive,

Defendants.

No. 08-15007

D.C. No. CV-07-00403-EHC

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted June 11, 2009

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

San Francisco, California

Before: TROTT, McKEOWN and IKUTA, Circuit Judges.

Plaintiff Balar Equipment (“Balar”) was the exclusive dealer in Arizona for certain LeeBoy, Inc. (“LeeBoy”) products when LeeBoy attempted to terminate Balar as a dealer. Balar resisted, claiming that the termination violated the Arizona Equipment Dealers Act, A.R.S. §§ 44-6701 to 44-6709 (“Act”). When LeeBoy refused to withdraw its termination notice, Balar sued for damages allegedly arising from the termination. LeeBoy countered with a motion to dismiss in favor of arbitration. The district court denied LeeBoy’s motion, holding that the contract between the parties incorporated the Act and thereby excluded the termination dispute from arbitration.

We reverse and remand with instructions.

The controlling contract contains in Section 11 an arbitration provision covering “any dispute, controversy, difference or claim arising out of, relating to or in connection with this Agreement” and requiring the same to be “finally settled by arbitration.”

Balar asserts, however, that Section 12 of the Agreement exempts this termination dispute from the contract’s arbitration provision. Section 12 states,

Some states have laws that give you certain rights that may vary from, or are in addition to, those found in this Agreement. If your principal place of business is located in one of those states, this Agreement is deemed amended to the fullest extent necessary to provide you those rights.

(emphasis added).

LeeBoy counters that Section 12, which does not mention the Act, is merely a generic choice-of-law clause that does not address arbitration. Moreover, LeeBoy asserts as an aside that its relationship with Balar simply is not covered by the Act.

Under the Federal Arbitration Act, 9 U.S.C. §§ 1-14, doubts as to whether the parties agreed to arbitrate a specific dispute should be resolved in favor of coverage. AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 650 (1986). Moreover,

where the contract contains an arbitration clause, there is a presumption of arbitrability . . . ‘unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.’

Id. (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-85 (1960)). “In the absence of any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a

purpose to exclude the claim from arbitration can prevail.” Id. (quoting Warrior & Gulf Navigation Co., 363 U.S. at 584-85).

We agree with LeeBoy’s construction of the Agreement. Nowhere does Section 12 reference by implication or otherwise the Act, nor does it exclude any dispute from arbitration. Certainly Section 12 does not contain an “express provision” excluding this dispute from arbitration by incorporating the Act. Moreover, the Agreement’s use of the term “amended” is insignificant in this context without more specifics to identify what it covers. As in Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995), and Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205 (9th Cir. 1998), Section 12 “may reasonably be read” as a general choice-of-law provision. Mastrobuono, 514 U.S. at 59. The language in Mastrobuono and Wolsey to which those courts looked -- “governed by” and “interpreted and construed under” -- is different but not distinguishable from the use of “amended” in this case.

REVERSED and REMANDED with instructions to stay pending the completion of arbitration proceedings in North Carolina.

ARBITRATION RULES

United States

www.ADR.org

www.JAMSADR.org

International

www.ICCWBO.org



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PRACTICE AREAS Litigation

Tom Myrick has been first chair trial counsel through verdict in dozens of civil jury trials, including trials that lasted up to four months. His practice has recently been focused on handling significant commercial cases involving sophisticated damage theories. He also counsels clients engaged in complex business combinations on methods to minimize their exposure to litigation.

Mr. Myrick has a wide range of civil trial experience, including frequent appearances in both state and federal trial and appellate courts, with particular experience in business related litigation.

EDUCATION

B.S.B.A., University
of North Carolina at
Chapel Hill, 1978

J.D., University of
North Carolina at
Chapel Hill, 1983

Mr. Myrick handles cases involving:

- Business torts
- Shareholder derivative claims
- Unfair business practices
- Securities fraud
- RICO claims
- Corporate governance issues
- Franchise class action claims
- Contract disputes
- Product Safety Claims

BAR & COURT ADMISSIONS

North Carolina, 1984

All Federal District
Courts in North
Carolina

U.S. Court of Appeals
for the Fourth Circuit

U.S. Court of Federal
Claims

U.S. Supreme Court

U.S. Tax Court

Representative First Chair Cases

Tommy Knox; et al. v. First Southern Cash Advance; et al. New Hanover Co., North Carolina case no. 05-CVS-445 (2010) and Community State Bank; et al. v. Tommy Knox; et al. U.S. District Court, Middle District of North Carolina case no. 1:05CV226 (2010). Currently representing pay-day lender in putative state court class action and related federal court action under section 27 of the Federal Deposit Insurance Act.

Avista Turbine Power, Inc. v Rathdrum Power, LLC (2009)

Obtained multi-million dollar arbitration award for the owner of a combined cycle electricity generation facility and successfully defended against claims for breach of a natural gas tolling agreement. The evidence included thousands of documents created over an eleven year period together with testimony from a dozen witnesses with expert testimony ranging from thermodynamics and fuel heat content to gas and electrical engineering and metering.

Yamauchi (USA) Corp. v. Cox

Mecklenburg Co., North Carolina case no. 09-CVS-3976 (2009). Represented US subsidiary of a Japanese corporation in obtaining restraining order, injunction, attachment, and expedited discovery against employee for embezzlement of over a million dollars from the company.

