



## The Alternative Dispute Resolution Agreement Advantage in Consumer Sales

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## Introduction

Many companies selling products or services to the consuming public have experienced ballooning litigation in recent years, accompanied by expense, negative publicity, and other damaging impact.

Consumer products manufacturers often become defendants in forums where an unfavorable judiciary, unfavorable jury pool, or both, leave them with unattractive options — settle disputed matters at levels that do not reflect objective risk and value, or face the prospect of trial with millions at risk on an uneven playing field.

Moreover, the slow pace of litigation in many forums has caused some companies to accumulate an inventory of lingering cases, with little prospect of defending their product or reaching a fair settlement before years pass and litigation expenses mount. The advantages and efficiencies of an alternative thus can bring welcome relief to all litigants.

## Alternative Dispute Resolution — Product Sales Agreements

Schiff Hardin actively counsels consumer product manufacturers with respect to the advantages of alternative dispute resolution (“ADR”) agreements in connection with product sales. Our firm’s experience in drafting these types of agreements is complemented by our extensive depth in product liability litigation and alternative dispute resolution.

## The Legal Trend Favoring Alternative Dispute Resolution Agreements

An underpinning of our products and services in this regard is a positive legal trend strongly favoring enforcement of ADR agreements. Such agreements, at one time generally confined to business-to-business or other specialized transactions, have found widespread acceptance in consumer transactions in the last decade.

Companies providing products and services to the public have attempted to mitigate their litigation burden with ADR agreements. These may provide for mandatory mediation (settlement negotiation facilitated by a skilled go-between) and/or mandatory arbitration (a simplified quasi-trial, without a jury and typically with limited discovery).

Businesses ranging from cable television providers to credit card companies have made such agreements a condition of using their services. While some lawyers and

special interest groups have balked at ADR agreements as denying consumers their “day in court,” ADR agreements have enjoyed relatively widespread acceptance.

Key to that success is a strong jurisprudence and public policy favoring ADR, particularly under the Federal Arbitration Act (“FAA”). Equally critical to success, however, is that the clause be well-balanced so as to withstand attacks as “unfair” or “unconscionable.” While the law of unconscionability varies by jurisdiction, it has been generally described as “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”

## Schiff Hardin’s Alternative Dispute Resolution — Product Sales Agreement Innovation Services

Schiff Hardin’s innovation is to take an ADR agreement similar to those widely accepted for consumer services and apply it to the sale of consumer products.

This technique has been tested only on a limited basis — our research indicates that such clauses have been enforced in sales of manufactured housing and computers, but not adopted (on any large-scale basis) by any major manufacturer of consumer goods.

Of course, we expect opponents to argue fervently that courts must reject the ADR agreement as involving something (from their viewpoint) entirely different from services or technology or manufactured housing sales — personal injury by a product. We face opponents who will cite specific laws and precedent in almost a dozen jurisdictions disfavoring consumer or personal injury arbitration. The FAA, however, has no such prohibition. Indeed, our plan is to preempt the patchwork of unfavorable state laws by applying the FAA to our clients’ products — sold in “interstate commerce” as they typically are — and therefore enforce the ADR agreement.

## Legal Research Supporting Schiff Hardin’s Alternative Dispute Resolution — Product Sales Agreement Innovation Services

With these goals in mind, we have researched federal law and the laws of the fifty states to find every precedent (favorable and otherwise), and to anticipate and defend against every attack. We have drafted an ADR agreement for our clients designed to meet potential challenges and

be fair to consumers. Our research revealed many instances in which ADR agreements failed because the company drafting the clause overreached in drafting, and attempted to enforce a one-sided clause. We have learned from others' mistakes. We have made some compromises that we hope will avoid successful arguments that the ADR agreement is "unconscionable" (a common attack) because it is "one-sided" or "unfair" to the consumer. Thus, for example, our ADR agreement allows the consumer the option of using small claims court for small matters, promises that our client will pay the arbitrator's charges, preserves any right to attorneys fees that a prevailing party may otherwise have, allows arbitration to proceed reasonably near the claimant's home, and does not seek to limit non-economic damages (as we strongly would have preferred).

Moreover, we have grappled with how to give the consumer a "choice" to exit the relationship if he or she does not agree with the terms — a key factor that courts have cited for enforceability (*e.g.*, cancel the credit card or cable television service, or return the product). We have taken some signals from so-called "shrink-wrap" contracts in the software sales arena — contracts to which the consumer agrees upon opening the software package — and adapted it to our proposed plan.

While incorporating compromises, we have designed an ADR agreement that should bring net benefits to our clients. We believe that if a client implements a fair clause under circumstances where consumers assent to the terms, our prospects for successful enforcement are excellent.

Let us know how we can tailor a clause to bring net benefits to your business.

## About the Author

William E. Meyer, Jr. concentrates his practice in general litigation, both civil and criminal, including the defense of class actions, reinsurance litigation, financial and banking matters, tort and products liability cases, and complex white collar criminal matters for a variety of clients.

## About Schiff Hardin LLP

Schiff Hardin LLP was founded in 1864, and we are Chicago's oldest large law firm. In the past 140 years we have grown to more than 325 attorneys, with additional offices in New York, New York; Washington, D.C.; Lake Forest, Illinois; Atlanta, Georgia; and Dublin, Ireland.

As a general practice firm with local, regional, national, and international clients, Schiff Hardin has significant experience in most areas of the law. For more information visit our Web site at [www.schiffhardin.com](http://www.schiffhardin.com).