



## Alerts

### Supreme Court of Louisiana Upholds Use of Arbitration Clauses in Retainer Agreements

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*Lawyers for the Profession® Alert*

*Hodges v. Reasonover*, \_\_\_ So. 3d \_\_\_, 2012 WL 2529403 (La. 2012)

#### Brief Summary

The Supreme Court of Louisiana held there is no *per se* rule against arbitration clauses in attorney-client retainer agreements provided that the clause is fair and reasonable to the client. However, the attorneys' fiduciary obligation to the client encompasses ethical duties of loyalty and candor, which in turn require lawyers to fully disclose the scope and the terms of the arbitration clause. An attorney must clearly explain the precise types of disputes the arbitration clause is meant to cover and must set forth, in plain language, those legal rights that the parties will give up by agreeing to arbitration. Here, however, defendant lawyers did not make the necessary disclosures, and the arbitration clause was thus unenforceable.

#### Complete Summary

Plaintiff clients retained the lawyers to sue a company in federal court in Atlanta. The parties agreed to a "blended" fee schedule, and the retainer agreement contained the following arbitration clause:

Any dispute, disagreement or controversy of any kind concerning this agreement, the services provided hereunder, or any other dispute of any nature or kind that may arise among us, shall be submitted to arbitration, in New Orleans, Louisiana. Such arbitration shall be submitted to the American Arbitration Association.

The clients' alleged claims against the other company ultimately failed to survive a motion for summary judgment. They subsequently sued the lawyers for legal malpractice. The attorneys filed declinatory exceptions alleging improper venue and lack of subject matter jurisdiction based on the binding arbitration clause. The district court denied those exceptions, citing La. R. Prof'l. Conduct 1.8(h)(1), which states: "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." The court found that the mandatory arbitration clause was a prospective limitation of liability, and because the clients were not represented by independent counsel, the arbitration clause was invalid. The court of appeal denied the lawyers' request for supervisory writs, although the Supreme Court of Louisiana granted the

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attorneys' writs to address the enforceability of mandatory arbitration clauses in attorney-client agreements.

The Supreme Court of Louisiana initially noted that the case presented two important countervailing public policies: Louisiana and federal law explicitly favor the enforcement of arbitration clauses in written contracts. By the same token, Louisiana law also imposes a fiduciary duty of the highest order requiring attorneys to act with the utmost fidelity and forthrightness in their dealings with clients, and any contractual clause which may limit the client's rights against the lawyer is subject to close scrutiny.

The Court held:

After our careful study, we hold there is no *per se* rule against arbitration clauses in attorney-client retainer agreements, provided the clause is fair and reasonable to the client. However, the attorneys' fiduciary obligation to the client encompasses ethical duties of loyalty and candor, which in turn require attorneys to fully disclose the scope and the terms of the arbitration clause. An attorney must clearly explain the precise types of disputes the arbitration clause is meant to cover and must set forth, in plain language, those legal rights the parties will give up by agreeing to arbitration. In this case, the defendants did not make the necessary disclosures, thus, the arbitration clause is unenforceable. Accordingly, the judgment of the lower courts is affirmed.

In summary, the Supreme Court of Louisiana held that, at a minimum, the attorney must disclose the following legal effects of binding arbitration, assuming they are applicable:

- Waiver of the right to a jury trial;
- Waiver of the right to an appeal;
- Waiver of the right to broad discovery under the Louisiana Code of Civil Procedure and/or Federal Rules of Civil Procedure;
- Arbitration may involve substantial upfront costs compared to litigation;
- Explicit disclosure of the nature of claims covered by the arbitration clause, such as fee disputes or malpractice claims;
- The arbitration clause does not impinge upon the client's right to make a disciplinary complaint to the appropriate authorities; and
- The client has the opportunity to speak with independent counsel before signing the contract.

Here, the court found that because the necessary disclosures were not met, the arbitration clause was unenforceable.

### **Significance of Opinion**

This decision is noteworthy because it provides a detailed analysis of two important public policies involved with respect to the enforceability of arbitration clauses in retainer agreements. It is significant with respect to the specific and extensive disclosures which are required for an arbitration clause to be enforceable.

For further information, please contact [Terrence P. McAvoy](#).

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