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IN THIS DOUBLE ISSUE

Arbitration agreements have long been considered an efficient, low cost, and swift dispute resolution device. While arbitration may provide those benefits in some circumstances, it is not a given that they do. This brief article addresses some of the obvious, and not so obvious, drawbacks to arbitration.

This month's newsletter also addresses the use of agency disclaimers in software agreements and the potential influence they have on liability for representations made by the alleged agent. Software agreements often create a tripartite relationship among the software developer (alleged principal), software reseller (purported agent), and software purchaser. Frequently, the reseller is the purchaser's only point of contact when buying the costly software and the purchaser will rely on the reseller's representations regarding the software. If the software fails to perform as promised by the reseller, determining whether an agency relationship exists in light of an agency disclaimer is critical for the allocation of liability as well as allocation of potentially millions in damages.

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ABOUT THE COMMITTEE

The Business Litigation Committee consists of members involved in business and commercial litigation including business torts, contract and other commercial disputes, e-commerce, antitrust issues, trade secrets and intellectual property, unfair competition and business defamation and disparagement. The Business Litigation Committee helps connect members involved in these areas around the world through networking and referral opportunities; developing and keeping current in the substantive, strategic and procedural aspects of business litigation; and affords members an international forum for sharing current developments and strategies with colleagues. Among the committee's planned activities are newsletters, publications, sponsorship of internal CLEs, and Webinars. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Arbitration: A Comparison of the Pros and Cons

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The Federal Rules of Civil Procedure were designed to "secure a just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Yet with the previously "accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *abrogated by*, *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544 (2007), coupled with the scope of discovery including not only relevant information, but also anything that is "reasonably calculated to lead to the discovery of admissible evidence," Fed. R. Civ. P 26(b)(1), litigation has become anything but "just, speedy, and inexpensive." With the advent of computers, smartphones, and tablets, the courts are on the verge of losing the war on holding down litigation costs.

Perhaps as a result of the spiraling costs of litigation, along with its often less than unpredictable results, companies have looked for alternate ways to resolve disputes. Although arbitration may be one method of doing so, it is not a cure-all and certainly is not the right approach in all circumstances. Thus, before one drafts, agrees to, or seeks to

enforce an arbitration agreement, it is worthwhile to recall the advantages and disadvantages of arbitration, particularly when compared to litigation.

I. Potential Benefits Of Arbitration

When most think of the benefits of arbitration, particularly in the business world, the top of mind response likely is cost savings. While it is true that arbitration can be cost-effective, it provides other, worthwhile benefits as well. These include privacy/confidentiality, a swift resolution with sophisticated decision-makers, and flexibility.

A. Arbitration Costs

Arbitration does not necessarily require the use of an attorney. *See* AAA Commercial Arbitration Rules, Rule 26. As a result, there is the potential to reduce legal fess during the arbitration process. In some repeat, small value claims where individual consumers or consumer goods are involved or for disputes between component parts suppliers and their purchasers, corporations could use in-house engineers or members of their in-house legal staff to arbitrate the dispute. Addressing technical difficulties that arise in an arbitration setting with in-house technical personnel, for example, can not only be cost-effective and efficient, but it also can retain the customer relationship that full blown litigation could rip asunder.

Discovery costs, one of the big ticket items in litigation, also may be reduced in arbitration. There generally is no right to discovery in arbitration. The American Arbitration Association, for example, leaves discovery to the discretion of the arbitrator to be determined at the preliminary hearing. AAA Commercial Arbitration Rules, Rule 22. Even when discovery is allowed, the documents to be produced are those [a] "not otherwise readily available to the party seeking the documents, [b] reasonably believed by the party seeking the documents to exist and [c] relevant and material to the outcome of disputed issues." *Id.* Rule 22(b). Thus, the expanded concept of information "reasonably calculated to lead to the discovery of admissible evidence" Fed. R. Civ. P. 26(b) does not appear to apply. The discovery of electronically stored information, however, still exists under this approach, *id.*, which can increase dramatically the cost of the arbitration.

The Judicial Arbitration and Mediation Service ("JAMS") is more liberal in its approach to discovery. Thus, JAMS provides that "[t]he Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information . . . relevant to the dispute or claim immediately after commencement of the Arbitration." JAMS Rule 17. JAMS also permits the taking of one deposition as a matter of right with others in the discretion of the arbitrator. *Id.* While the JAMS Rules allow for more discovery and, therefore, begin to increase the cost of arbitration, they nevertheless seek to strike a balance between the cost of the proceedings and the equal access to information.

Arbitration does, however, have hidden costs that are not necessarily top of mind at the time of contracting. Thus, unlike the current $350 federal court filing fee, both the American Arbitration Association and JAMS charge both a filing fee and a final fee. These fees can range from approximately $1,500 for a small case administered by the American Arbitration Association to $1,000 plus ten per cent of the professional fees billed by JAMS.

In addition, the parties must pay for the arbitrator. Depending on the number of arbitrators and their hourly rate, the parties may be paying upwards of $1,500 per day for the privilege of having someone decide their dispute. Judges and juries, on the other hand, are free.

B. Swift Resolution With Experienced Decision-Makers

One of the direct benefits of limited discovery is the time it takes to reach resolution of the dispute. Arbitrations often can be completed within 15 months of the initiation of the claim. Moreover, and perhaps more importantly, the arbitrator or arbitration panel must issue the decision within thirty (30) days of the close of the hearing. *See* JAMS Rules, Rule 24; AAA Commercial Arbitration Rules, Rule 45. Motions and non-jury decisions in the federal courts can languish for months on end before a decision is made. In addition, given the limited appeal rights from an arbitration award, the likelihood of appellate delays is reduced significantly.

Also, many disputes may involve complex subject matter, such as construction or intellectual property, or may require special industry knowledge, such as finance or health care. Arbitration allows the parties to select as their neutral an individual with the specific skill-set necessary to understand and decide their dispute.

C. Flexibility

Courts can be anything but flexible. Depending on the jurisdiction, court starts at 9:00; there is a morning break and an afternoon break, with a lunch recess in between. Your case starts when called and continues, generally without interruption, until it is over. Everyone, the attorneys, the witnesses, and the client representatives, is at the mercy of the court's calendar. Arbitration, on the other hand, provides a more flexible approach. First, the parties can agree up front where to conduct the arbitration. The race to the courthouse can no longer play a part in the decision on how to resolve the dispute.

In addition, the parties have the opportunity to decide when the arbitration will be conducted. They can more easily accommodate their witnesses' schedules, including those employee-witnesses who also are involved in conducting the normal business of the client. The schedules of the attorneys also can be taken into account.

Moreover, the parties can define what claims will and will not be arbitrated and how that arbitration will be handled. For example, the parties can agree not to permit class action or

multi-party arbitrations, *see AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), including those where the claim is one for violation of the federal antitrust laws. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2103). They also can specifically structure the discovery they want.

Finally, in addition to high low agreements, the parties can agree to a "baseball arbitration." *See* JAMS Rules, Rule 33 (also called a "final offer" option). Under this approach, the award will be either the number demanded by the plaintiff or the number offered by the defendant. If the arbitrator is not informed of the two numbers, the award will be entered, but modified to represent the number closest to the arbitrator's award. JAMS Rules, Rule 33(c). This approach lets the contracting parties cap their exposure and thereby add a measure of predictability to their business relationship.

D. Privacy

Arbitration is private. Unlike a complaint filed in the clerk's office, the public is not generally made aware of the dispute. Thus, unless leaked to the press, the allegations of the parties to the arbitration as well as its resolution remain outside of the public eye.

Similarly, to the extent discovery is permitted, depositions and subsequent testimony do not become a matter of public record. In addition, the public is not invited to attend the arbitration. The ability to privately resolve disputes outside the public eye, along with the protections afforded by the absence of bad publicity stemming only from the initial allegations of one party may be a significant factor in deciding upon arbitration.

II. Potential Disadvantages Of Arbitration

Although there are many benefits to arbitration, it is not without its disadvantages. These include the following, some of which more negatively impact defendants than claimants.

A. Enforcing The Arbitration Agreement May Be Costly

While there are cost-saving benefits to arbitration, the case has to get to arbitration before those benefits can be realized. Doing so may be costly and time consuming, thereby eliminating two of the advantages arbitration initially has to offer.

Notwithstanding having entered an arbitration agreement on the front end of the relationship, the party with whom your client is having the dispute may nevertheless initiate a lawsuit in its local court. Getting that dispute to arbitration, however, may take an investment in both time and money. The Federal Arbitration Act "was enacted in . . . response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *see also Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 109 S. Ct. 1248, 1255 (1989) (stating that "[t]he FAA was designed 'to overrule the judiciary's long-standing hostility

to enforce agreements to arbitrate'") (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 105 S. Ct 1238, 1241-1242 (1986)). It is not surprising to find that this hostility still exists, particularly where an individual consumer may be involved in a dispute with a national or multi-national corporation, *see, e.g. AT&T Mobility LLC v. Concepcion, supra*, or where a local plaintiff has brought suit against a foreign defendant. Home cooking is still alive and well in many jurisdictions. Litigation over whether there is a valid and enforceable arbitration agreement, as well as its scope, seemingly borders on the routine. Given the pace or backlog of some courts, resolution of the threshold question of whether the dispute must be arbitrated can take years to resolve. *See Burton's Pharmacy, Inc. et al. v. CVS Caremark Corp.* 1:11-cv-0002 (where the Complaint was filed on January 2, 2011, and the motion to compel arbitration remains pending as of this writing).

B. Limited Discovery

Knowledge is power. If discovery is limited, the ability to fully assess the strength's and weaknesses of the client's case is diminished. Memories fade, and company witnesses may recall information in manner that reflects well on them as well as the company, but may not be entirely accurate. There is some truth to the belief that some of the most important evidence -- both good and bad -- is contained in the files of the adversary. It is in your client's best interest to know both the favorable and unfavorable information. Whether that information can be accessed, however, is open to debate in an arbitration with limited discovery.

C. Limited Applicability Of The Rules Of Evidence

Evidentiary rules exist for a reason. They are designed to weed out reliable information from unreliable information. These limitations often favor defendants in civil litigation. Arbitrators, however, are not bound by the rules of evidence. *See* JAMS Rules, Rule 22(d) (stating that "[s]trict conformity to the rules of evidence is not required"); AAA Commercial Arbitration Rules, Rule 34(a) (stating that "[c]onformity to legal rules of evidence shall not be necessary"). Arbitrators under some procedures may permit witness statements even where no cross-examination has occurred or will occur. *See* JAMS Rules, Rule 22(e) (providing that "[t]he Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as he or she deems appropriate"). Moreover, even if a valid objection is made and sustained, the offending evidence already has been heard. We all know that there is no way to unring the bell, so the impact of that evidence is simply unknown.

D. There Is No Right To A Dispositive Motion

One of the most effective tools available to a defendant is a summary judgment motion.

Summary judgment is also a cost effective mechanism, allowing the parties to forego the time and expense of a hearing. Dispositive motions, however, are not permitted as a matter of right in arbitrations. *See* AAA Commercial Rules, Rule 33 (stating that "[t]he arbitrator may allow the filing of . . . a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case"); JAMS Rules, Rule 18 (stating that "[t]he Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request").

There is also a built-in disincentive toward granting dispositive motions. Arbitrators are paid by the hour. Disposing of a case early, therefore, has a direct impact on the fess of the arbitrator. Moreover, as noted above, some organizations charge based on a percentage of the fee earned by the arbitrator. Thus, permitting the filing of dispositive motions, much less granting them, may not be in the best interest of the arbitrator or his or her organization.

E. Victory v. Compromise

The inability to bring forward a dispositive motion plays into the notion that another name for arbitration is compromise. Those with claims of little merit may seek refuge in the low cost, speedy arbitration that will ultimately provide some reward at the end of the day.

The view that arbitrators merely "split the baby" finds support in the rules of some of the major arbitration organizations. JAMS provides that "[i]n determining the merits of the dispute, the Arbitrator shall be ***guided*** by the rules of law agreed upon by the parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate." JAMS Rules, Rule 24(c) (emphasis added). The American Arbitration Association provides that "[t]he Arbitrator may grant any remedy or relief that the arbitrator deems just and equitable within the scope of the agreement of the parties . . . ." AAA Commercial Arbitration Rules, Rule 47; *see also* JAMS Rules, Rule 24(c) (stating in part that "[t]he Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement"). In some circumstances, a compromise result may leave both parties dissatisfied.

F. Limited Appeal Rights

Court must confirm an arbitration award unless it was procured by "corruption," "fraud," "undue means" or where the arbitrators were guilty of misconduct or "exceeded their powers." 9 U.S.C. § 10. The award also may be modified or corrected

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of

any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. 11. Moreover, unlike most matters for arbitration, the parties cannot contract for more robust appellate review. *Hall Street Assocs. L.L.C. v. Mattel, Inc.*, 522 U.S. 576 (2008).

The ability to have a decision reviewed on appeal is of significant value to both parties. Parties certainly structure their relationship with an understanding of the applicable legal principles that will govern going forward. If those legal principles are misunderstood or misapplied, the nature of the relationship is changed. The inability to have appellate review, therefore, is of consequence.

III. Conclusion

Arbitration is a tried and true alternate dispute resolution technique. It has the potential to provide for the swift and cost efficient resolution of claims. It is not, however, necessarily the best method for resolving disputes or the best method for resolving every dispute. Rather, before deciding to recommend to your client to use or enter arbitration agreements at the beginning of a relationship, or recommending that a dispute not currently subject to arbitration be arbitrated, the advantages and disadvantages of arbitration need to be considered and weighed. One size simply does not fill all litigants.

Disclaiming an Agency Relationship – Can it be Done?

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Agency disclaimers are an important tool used in contracts to limit potential liability. These disclaimers appear in a wide variety of contexts – agreements between hospitals and physicians, agreements between franchisors and franchisees, and supply agreements. One modern context for agency disclaimers is in software agreements, agreements which pervade everyday life. In fact, we all have clients that have ongoing needs for increased technological advances to run their businesses, and they are not merely purchasing software from a box to serve these needs. Instead, clients turn to Enterprise Resource Planning ("ERP") software to serve as the businesses' corporate backbone, and it is used to run all aspects of their businesses from accounting through warehouse management. Companies ranging in size from Fortune 100 companies to small Mom and Pop organizations use this type of sophisticated software. ERP software,

however, requires customization to handle the needs of any given business. Due to its high level of customization and integration, ERP Software is a major capital investment for a business that could run into the millions of dollars to purchase, and if it fails, result in very significant damages. Because of the way in which ERP Software is distributed, it is important to understand the impact of agency disclaimers.

In the ERP context, ERP Software Developers ("Developers" or "Purported Principals") frequently work solely through a distribution channel of qualified Resellers ("Resellers" or "Purported Agents"), and do not deal with the ultimate Purchaser directly. Instead, the Developer will rely on the Reseller to interface directly with the Purchaser.

During this process, the Reseller will make representations to the Purchaser about the ERP Software's abilities, limitations, hardware requirements, etc. Typically, if the ERP software fails, a Purchaser will likely argue that it relied on the Reseller's representations and that the Reseller served as the Developer's agent. The Purchaser will do this in an attempt to bring more defendants (and a deeper pocket) to the table.

However, the agency argument may well be contrary to disclaimers contained in documents signed by the Purchaser which may include development agreements, license agreements or other contracts with the Developers or Resellers. These documents will govern the relationship, and perhaps, the allocation of potential liability. Accordingly, principles of agency law and the impact of any disclaimers will come into play in the event the software fails to perform as represented and litigation ensues.

When analyzing this for a client, you must consider: (1) Are Resellers working as the ERP Developers' agents? (2) If so, does that mean that Developers may be held liable for Resellers' actions or representations? (3) And, importantly, can an ERP Developer prevent potential liability for its Resellers' actions or representations through an agency disclaimer with either the Reseller or the Purchaser of the ERP software? Whether you represent the Developer, Reseller or Purchaser, this article provides a look into the law of agency and the effect of disclaimers so that companies might become aware of the protection, or lack of protection, that disclaimers provide.

A. The Reseller May Well Be The Developer's Agent

Despite the cutting-edge nature of the product being sold, legal liability in this situation is determined by, and rests upon, the application of agency law, which has existed for over a century. Whether an agency relationship exists is a question of fact, and is determined under one of three theories: actual authority, apparent authority, or agency by estoppel.[1] Actual authority is just that – the principal expresses an intent for

[1] *See, e.g., Brainard v. Am. Skandia Life Assur. Corp.*, 432 F.3d 655, 661 (6th Cir. 2005).

the agent to act on behalf of the principal, and the agent understands that intent.[2] Even if the agent is not "authorized," a principal's liability for an agent's acts and contracts is not limited to those which are expressly authorized. Apparent authority exists when "the principal held the agent out to the public as possessing sufficient authority to act on his behalf and that the person dealing with the agent knew these facts, and acting in good faith had reason to believe that the agent possessed the necessary authority" and the determination must be based on acts of the principal, not the unilateral acts of the purported agent.[3] Agency by estoppel is closely related to agency by apparent authority: agency by estoppel prevents a party from disclaiming an agency relationship if the party has allowed circumstances to exist which reasonably lead a third person to believe they were dealing with an agent of the party, and a third party detrimentally relied on that belief.[4]

In a recent Ohio district court case, the Court addressed whether the facts were sufficient for the Reseller of ERP software to be the Developer's agent.[5] In this case, a Distribution Company purchased ERP Software based, in large part, on the representations by the Reseller that the software could handle up to several hundred users. When the ERP software failed to perform as promised, the Distribution Company filed suit against both the Developer and Reseller. Notably, the agreement between the Developer and Reseller disclaimed an agency relationship. However, the claims against the Developer survived, because the Distribution Company claimed the Reseller was the Developer's agent, and provided factual support for its position. In reaching its conclusion, the Court recognized that there was no "indication that the [Distribution Company] was aware of these agreements [and disclaimers]," and, further, "factual issues" remained as to whether the Developer "could be found liable through a theory of apparent agency or agency by estoppel." [6] In ruling on the summary judgment, the Court concluded the "evidence is sufficient to support a finding by reasonable jurors that [Developer], directly and/or through third parties that it held out as agents and/or partners, represented" that the ERP Software could handle the user size.[7]

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[2] *See Williams v. Caterpillar Inc.*, 940 F. Supp. 2d 840, 845 (C. D. Ill. 2013).

[3] *Ohio State Bar Assn. v. Martin*, 118 Ohio St.3d 119,126, 886 N.E.2d 827 (Ohio 2008).

[4] Restatement (Third) of Agency § 2.05 (2006); *See also, Cullen v. BMW of North America, Inc.,* 490 F. Supp. 249, 253 (E.D.N.Y. 1980) (stating that although no actual agency relationship exists, such an agency may arise where the party charged as principal permits the putative agent to act in such manner that a reasonable man might infer that an agency relationship in fact existed); *Karavos Compania Naviera S.A. v. Atlantica Export Corp.,* 588 F.2d 1, 11 (2d Cir. 1978)(agency by estoppel may arise if the person sought to be charged intentionally or carelessly caused the plaintiff to believe in the authority of the purported agent.").

[5] *Hodell Natco Industries, Inc. v. SAP America, Inc.*, 13 F. Supp.3d 786, 806 n. 7 (N.D. Ohio 2013)

[6] *Id.*

[7] *Id.* at 808.

As with any agency determination, surrounding facts were considered. In this decision, the Court noted that the Purported Agent admitted that they were the Developer's "Partners" authorized to market and service the ERP software, and further admitted in discovery that they were the Developer's agents.[8]

In sum, the Court considered all surrounding facts and, construing them in the light most favorable to the Distribution Company, concluded the case was not appropriate for summary judgment.

In considering whether an agency relationship exists, practitioners should look at all the materials that exist between the parties. This includes marketing materials given by the Reseller to the Purchaser – how is the Developer described? Is the Developer described as a "partner" to the Reseller or other similar term? Does the Developer's logo appear prominently on the marketing materials along with the Reseller's logo? Do the materials indicate that the Developer has "certified" or "authorized" the Reseller? What about invoices, correspondence, or training materials? Again, do these documents indicate that the Developer and Reseller have a "partnership" or show that the Developer has permitted the Reseller to claim that it is working on behalf of the Developer and make product representations? Another key piece of information to review would be the actual agreement between the Developer and Reseller. In this contract, what has the Developer authorized the Reseller to do on its behalf? Finally, is the Reseller the only contact for the Purchaser and are all product representations made solely through the Reseller? Again, this may support a finding that the Reseller has been authorized to do so by the Developer and lead to a finding of an agency relationship.

B. Can the Developer Effectively Disclaim an Agency Relationship?

The above case is an example of how a disclaimer simply will not always serve to prevent liability. Can liability be avoided through disclaimers under any circumstances? The short answer is that it depends.

The Restatement provides that a contractual provision attempting to define whether certain parties are or are not in an agency relationship "is not controlling" of a court's determination of that issue.[9] Most jurisdictions are in accord with the Restatement's reasoning.[10] Rather, in determining whether an agency relationship

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[8] *Id.* at note 7.

[9] *See* Restatement (Third) of Agency § 1.02 (2006). Such provisions may be relevant factors to guide the court's consideration, but they are not dispositive. *See id.* at Comment b ("Although such statements are relevant to determining whether the parties consent to a relationship of agency, their presence in an agreement is not determinative and does not preclude the relevance of other indicia of consent.").

[10] *See, e.g., Hodell Natco Industries, Inc.,* 13 F.Supp.3d at 806 n. 7; *Bartholomew v. Burger King Corp.*, 15 F. Supp. 3d 1043, 1049 (D. Haw. 2014) ("a disclaimer of agency in a franchise agreement will not, by itself, defeat liability where the

exists, "the fact finder must examine the facts surrounding the relationship to see if a true principal-agent relationship existed" rather than simply enforcing a clause negating agency in a written contract.[11] And"[i]n the absence of any express authority, the question depends upon a review of the surrounding facts and .the inference that the court might properly draw from them."[12] In other words, the disclaimer alone will not serve to obviate a finding of a principal/agent relationship if other factors support such a conclusion.

If disclaiming an agency relationship between the Developer and Reseller fails, what happens when the Developer notifies the Purchaser directly, through a license agreement, that the Reseller is not the Developer's agent? In other words, will .directly disclaiming an agency relationship between the principal and the third party obviate potential liability? Many cases show that the Restatement rule is also applicable to purported disclaimers of agency directly between the alleged principal and third party, and courts will often consider the circumstances of the particular case rather than simply enforcing the disclaimer.

As one example, the Washington Supreme Court did consider this issue in a malpractice case involving a hospital, physician and patient. In *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490, 498 (Wash. 2011), the plaintiffs had signed a form which provided that the defendant doctor was not an agent of the defendant hospital. Noting "other relevant considerations," such as discharge instructions that included the hospital's name, the fact that the doctor's name tag also included the hospital's name, and the plaintiffs' receipt of billing statements from the hospital for the service rendered by the doctor, the Supreme Court of Washington held that a genuine issue of material fact existed as to whether the doctor was in fact an agent of the hospital, and the disclaimer was "but one factor to consider." *Id*. This rationale has been applied in other factual settings as well.[13]

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circumstances indicate that the requisite control exists"); *Gulf Ins. Co. v. Transatlantic Reins. Co.*, 69 A.D.3d 71, 886 N.Y.S.2d 133, 151-52, (N.Y. App. Div. 2009) (disregarding an disclaimer of an agency provision because a review of the contract showed that the "true relationship" of the parties was "that of principal and agent"); *Shaw v. Delta Airlines, Inc.*, 798 F. Supp. 1453, 1457 (D. Nev. 1992) ("it is clear that a clause negating agency in a written contract is not controlling"); *See also, In Re Microsoft Antitrust Litigation*, 214 F.R.D. 371, 375 (D. Md. 2003)(considering various factors, including disclaimer of license agreement, and concluding that large account resellers are not Microsoft's agents).

[11] *Shaw*, 798 F. Supp. at 1457. In *Board of Trade v. Hammond Elevator Co.*, 198 U.S. 424, 438, 25 S. Ct. 740 (1905), the United States Supreme Court applied equitable principle, stating that "the relations between the [disclaiming parties] are, as between themselves, expressly disclaimed to be those of principal and agent, [but] is not decisive of their relations so far as third parties dealing with them upon the basis of their being agents are concerned."

[12] *Id*. at 438 (quoting *Mutual Life Ins. Co. v. Spratley,* 172 U.S. 602, 615 (1899)).

[13] In *C&J Vantage Leasing Co. v. Outlook Farm Golf Club, LLC*, 784 N.W.2d 753 (Iowa 2010), the

C. Avoiding Liability

In light of the Restatement rule and the various decisions interpreting and applying the rule, companies should be aware that a disclaimer alone will not necessarily mean that an agency relationship does not exist. While disclaimers are advisable and likely useful, the facts and circumstances will likely dictate whether an agency relationship exists and whether liability attaches.

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defendant golf club had signed an acknowledgement that a supplier of golf carts was not an agent of the plaintiff leasing company. The Iowa Supreme Court held that "such a contractual statement is not necessarily conclusive as to the non- existence of such a relationship." *Id*. at 760 (quotation marks and citations omitted). Instead, evidence that the supplier had negotiated the terms of the deal between the leasing company and the club, and had provided "the paperwork used in the transaction," created a genuine issue of material fact as to whether the supplier was the leasing company's agent. *Id*. Further, in *Colonial Pac. Leasing Corp. v. McNatt*, 486 S.E.2d 804 (Ga. 1997), the defendant business had signed finance leases which stated that employees of an equipment supplier were not agents of the plaintiff finance company. The Supreme Court of Georgia stated that the disclaimer of agency provision was not dispositive of the issue, but held that no agency relationship existed because there was no evidence that the employees of the supplier acted as anything more than "aconduit of information between" the business and the finance company. *Id*. at 270-71. *But see,Potomac Leasing Co. v. Thrasher*, 181 Ga. App. 883, 354 S.E.2d 210 (Ga.Ct.App. 1987), which came to the opposite holding based on similar facts. The *Thrasher* court held that a disclaimer of agency by the finance company in that case did not overcome the fact that the supplier's salesmen were provided with blank copies of the finance company's leasing documents and instructions on how to fill the documents out, and were authorized to negotiate leases with customers on the finance company's behalf. *Id*. at 212-213.

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