Legal Matters®

Business Law
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Congress kills arbitration rule

Financial institutions can continue to block customers from banding together in class-action lawsuits, thanks to Congress' decision to kill a pending arbitration regulation.

The Consumer Financial Protection Bureau's (CFPB) "arbitration rule," which would have barred companies from including forced-arbitration clauses in financial contracts such as credit card agreements and car loans, was slated to take effect in March 2018. The House passed a resolution repealing the regulation in July of 2017, followed by the Senate in late October.

Republicans argued that the CFPB regulation primarily benefitted trial lawyers and could hurt Americans who would end up paying more for financial services.

Democrats and consumer-advocacy groups said the rule protected consumers and small business interests and gave them greater recourse when a company's actions prove harmful.

Arbitration clauses are often buried in the fine print when consumers sign up for credit or financial services. Because the clauses have become relatively ubiquitous, consumers may have to choose between agreeing to arbitration or going without essential services.

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Several lobbying groups, including the U.S. Chamber of Commerce and the American Bankers Association, had previously filed a federal lawsuit challenging the CFPB arbitration rule. Among their arguments, they maintained that the rule failed to advance the consumer's interest as required by the Dodd-Frank Act because it precludes the use of an arbitration mechanism in favor of class action litigation. The plaintiffs maintained that arbitration is better for consumers than courtrooms and

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Protect your business idea before you patent

The patent process is lengthy, complicated and expensive. So how can an inventor or small business owner move forward with an innovation? Eventually you're going to have to share your idea with someone who will help develop it, manufacture it, or otherwise bring it to market.

Here are three legal tools you can use, with assistance from an attorney:

► **Work-for-hire agreement:** When you hire someone to help develop your innovation, a work-for-hire agreement establishes that you own all progress and improvements. Anything they do to contribute to your product, you own. Contributing individuals must still be listed on future patent applications, but they will have no ownership rights to your invention.

► **Non-compete agreement:** Employees and contractors should sign a non-compete agreement that prevents them from starting (or working for) a business that threatens yours.

► **Non-disclosure agreement:** Before you disclose product information, require consultants and vendors to sign a non-disclosure agreement. Such an agreement prohibits them from sharing information about your innovation with a third-party.

Beyond these legal agreements, you may file for a provisional patent application, available from the U.S. Patent and Trademark Office (USPTO). The USPTO has an application assistance unit and an inventors' assistance center which can answer general questions, send you the necessary forms and provide non-legal assistance

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Safeguard trade secrets

Your company's proprietary information is your secret sauce. It's what makes your company distinct and competitive in the market. Yet too few businesses put real time and attention into protecting this valuable information.

If information is stolen and you choose to pursue legal measures, you have an obligation to show that you took reasonable steps to protect your proprietary data. But this kind of litigation can be a slow process that may never really compensate you for your loss. So don't wait for your confidential information to walk out the door. Take action now by making a small but continued investment in protecting your business's trade secrets.

Here are some steps you can take:

1) **Secure non-disclosure agreements:** Don't let impatience or an assumed sense of trust prevent you from getting a signed non-disclosure agreement before you begin confidential business discussions. Make it standard business practice to use these agreements whenever sensitive information could be revealed.
2) **Customize non-disclosure agreements:** There's no one size fits all for these contracts. Consult with an attorney who will help you draft legally defensible agreements that outline the nature of the obligation, what constitutes a breach, and what is considered permitted use. Typically, these agreements will vary for vendors, employees and business partners.
3) **Update agreements:** Put quality assurance measures in place to validate that these agreements are properly signed, dated, filed and updated as business relationships (such as employee or vendor roles) evolve.
4) **Compartmentalize information:** When possible, keep proprietary information separate and distinct from routine business information. These practices make it easier to restrict access, trace those who viewed confidential files, avoid disclosure, and ultimately defend your legal position if necessary.
5) **Train employees:** Provide staff education on what constitutes sensitive information and how to protect it. Training may include issues around on-site visitors, information carried offsite and photography in the workplace.

FTC targets gaming influencers in first official enforcement action

The FTC is continuing its scrutiny of social media influencers who fail to disclose paid endorsements and other compensatory arrangements. In September of this year, the FTC took its first law enforcement action, settling charges with YouTube broadcasters Trevor Martin and Thomas Cassell, known on their channels as "TmarTn" and "Syndicate."

Martin and Cassell were charged with using their platforms to deceptively endorse CSGO Lotto by failing to disclose they were joint owners of the online betting service, and with allegedly paying other influencers to promote the site without requiring disclosures.

Meanwhile, the commission continues to send warning letters to high-impact influencers, including celebrities and athletes, and has updated its guidance for influencers and marketers.

For business owners and marketers, the takeaways are two-fold:

1) When endorsing a product online, you must disclose when you have a financial interest or family relationship with a brand.
2) When providing compensation to online influencers, you must require them to provide "clear and conspicuous" notification of the sponsorship. This applies whether you provided monetary compensation or gave an influencer something of value.

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The FTC has issued guidance on what constitutes a clear sponsorship disclosure, indicating that such disclosures should be evident to the consumer at a glance, without having to click through a posting. In Instagram posts, for example, sponsorships or other material connections should be made within the first three lines of text that are viewable without clicking on the "more" link.

FTC Endorsement Guidelines are issued under the Consumer Review Fairness Act, which protects consumers' ability to share their honest opinions about a business's products, services, or conduct, and provides transparency for consumers who are evaluating others' endorsements.

When you should mediate a legal dispute

If your business is involved in a legal dispute, you may voluntarily agree or be required to participate in mediation. Mediation is an alternative way of setting disputes that involves negotiation with support from a neutral third-party.

Typically, mediation involves key decision makers from each party as well as their legal counsel. The mediator begins by leading the parties through a confidential review of the situation at hand. Then, depending on the nature of the conflict, the mediator may place each party in separate rooms and act as a go-between to facilitate a jointly-agreeable resolution.

Advocates for mediation argue that it creates cooperative resolutions, opens the door to more innovative solutions, and may even help preserve certain business relationships. What's more, mediation can provide significant costs savings over a lengthy litigation process.

Consult your attorney about when to mediate. Ask your counsel to help you understand your opponent's potential legal standing and to provide a cost estimate of taking the case forward through the court system.

While entering mediation early in a conflict may save money, litigation is sometimes an essential part of the fact-finding process. Furthermore, litigation may reveal valuable information for (or against) your position.

You and the opposing party may agree to enter mediation at any time in the legal process. The mediation process is non-binding, and if the parties cannot come to a resolution, your case may return to standard legal procedures. Mediation is distinct from arbitration, where an arbitrator reviews your case and makes a binding ruling.

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class action lawsuits. In a related opinion piece published in *Forbes,* Republican senators Tom Cotton and Keith Rothfus suggested that the rule, if left standing, would place considerable pressure on the banking system, particularly on community banks, which would have to hold more funds in reserve against potential litigation rather than lending to small business and community members.

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How to shield your website or app from copycats

They say that imitation is the sincerest form of flattery. That's all well and good if someone copies your new outfit. But imitation is a whole other issue when it comes to online innovation.

Let's say you've just come up with a new online business idea and you're convinced it has the potential to be the next big market disrupter, like Uber or Airbnb. Can you patent the website, app or software? The unhappy answer is that it depends.

Websites, as a whole, are not patentable. However, there may be certain aspects of a site that qualify for patent protection. In the U.S., some businesses have had success patenting a software *process* while others have secured patents for *business methods*.

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For example, Amazon holds a patent on its one-click checkout. Others hold patents on specific, technical algorithms or other unique functionality made possible by software code.

But patents are difficult and expensive to obtain. You could be locked in the patenting process for years, only to find out your application failed.

Alternative ways to protect your online ideas include copyrights, trademarks and confidentiality agreements. These tools can be used to protect the content of your site as well as your brand, logo, tagline and product names. A copyright can also protect the source code used to develop your site. (Code itself is not patentable.)

Confidentiality agreements and non-disclosure agreements present different ways to protect your concept. They can be used to deter employees or vendors from copying your idea or sharing proprietary business information with a third party.

Software and app innovations can revolutionize the way your company operates, adding significant business value. Don't let patent challenges stop you from getting ahead of the competition. Consult an experienced attorney who can advise you on the best methods for defending your innovation.