

7-1-2012

Betting Against the House: California and Nevada's Stand Against Arbitration Clauses in Home Construction Contracts

Devin Ryan

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Devin Ryan, *Betting Against the House: California and Nevada's Stand Against Arbitration Clauses in Home Construction Contracts*, 4 277 (2012).

This Student Submission - Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

BETTING AGAINST THE HOUSE: CALIFORNIA AND NEVADA'S STAND AGAINST ARBITRATION CLAUSES IN HOME CONSTRUCTION CONTRACTS

Devin Ryan*

I. INTRODUCTION

“The fellow that owns his own home is always just coming out of a hardware store.”¹ In reality, sometimes a trip to a hardware store will not nearly be enough to repair a home, such as when the repairs needed can be incredibly immense or numerous. When those situations arise, homeowners must pursue other options. For homeowners like Alon Frumer and Michelle Berliner Frumer, that option is mandatory arbitration.² In *Frumer v. National Home Insurance Co.*, the Superior Court of New Jersey, Appellate Division held an arbitration clause as valid when it was included in a home warranty agreement mandating arbitration as the exclusive remedy for resolving major structural defects claims.³ Other states do not share New Jersey's recent support of arbitration clauses in new home construction contracts and warranties.

In California and Nevada, courts and lawmakers are taking a stand against these arbitration clauses. Nevertheless, builders in these states continue to include mandatory arbitration clauses in sales contracts or warranty related documents. As a result, arbitrators are resolving homebuyers' claims of structural defects and related actions. While the effect of this may seem minor at first, the fallout of the 1990s and early 2000s home building boom has produced a score of homebuyers' defects claims. Therefore, a great deal of litigation has stayed off court dockets and been resolved privately through arbitration.

The increase in defects claims can be best described as follows:

The furious pace of home building from the late 1990s through the first half of the 2000s contributed to a surge in defects, experts say. It caused shortages of both skilled construction works and quality materials. Many municipalities also fell behind inspecting and certifying new homes . . . At the height of the boom in 2005, more than two million house were built in the U.S., according to the National Association of Home Builders, a trade group. Criterium Engineers, a national building-inspection firm, estimates that 17% of newly constructed houses built in 2006 had at least two significant defects, up from 15% in 2003.⁴

Many of the homebuyers in California and Nevada are now filing suit alleging structural defects, as these two states, in particular, have “experienced a surge in construction-

* Devin Ryan is Associate Editor of The Yearbook on Arbitration and Mediation and a 2013 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

¹ Nathalie Montreuil, EVERY DAY QUOTES, 138 (2010) (quoting American humorist Kin Hubbard).

² See *Frumer v. Nat'l Home Ins. Co.*, 18 A.3d 225, 229 (N.J. Super. Ct. App. Div. 2011) (holding a mandatory arbitration clause that covered major structural defects in a home warranty agreement was valid).

³ *Id.* at 229.

⁴ M.P. McQueen, *Cracked Houses: What the Boom Built*, THE WALL STREET JOURNAL, July 13, 2009, <http://online.wsj.com/>.

defect claims in recent years.⁵ What these homebuyers are encountering, however, is that their claims are governed by mandatory arbitration clauses, preventing them from bringing suit in court. Homebuilders, either through the sales contract or warranty related documents, have been including these clauses more often than in years past. This has left some homeowners feeling “hamstrung” by the clauses.⁶ In response, California and Nevada have attempted to curb the enforceability and applicability of mandatory arbitration clauses.⁷

Outside of California and Nevada, however, states embrace mandatory arbitration clauses as a speedy and less expensive remedy that will clear out the courts’ dockets and provide final adjudication.⁸ Despite homebuyers’ general hostility to arbitration clauses, these states view the clauses as extremely beneficial to judicial economy and, in many cases, in the interest of both parties. Unsurprisingly, the National Association of Home Builders, a non-profit trade association, shares this view.⁹

But critics allege that the public policy favoring consumer protection outweighs any gains in judicial efficiency. They cite the need for legal protection because of the unequal bargaining power between homebuilders and homebuyers. Furthermore, they acknowledge the substantial monetary and life investment the buyers make in the transaction. Nevertheless, as this article will illustrate, California and Nevada law provide that mandatory arbitration in home construction contracts can be enforced so long as the homebuilders follow appropriate procedures.

This article will address California and Nevada’s approach to mandatory arbitration clauses, the future implications of these clauses, and the necessary measures homebuilders and warranty providers should take to have the clauses enforced.

II. MANDATORY ARBITRATION CLAUSES IN HOME CONSTRUCTION CONTRACTS

A. Mandatory Arbitration Clauses in Home Construction Contracts in California

In California, California Civil Procedure Code section 1281 follows the Federal Arbitration Act (“FAA”) and provides that arbitration agreements are “valid, enforceable and

⁵ *Id.*

⁶ *Id.*

⁷ In *Grafton Partners L.P. v. Superior Court*, 116 P.3d 479, 487-88 (Cal. 2005), the Supreme Court of California observed that the legislature provided for two devices to waive the right to a jury trial prior to a dispute: arbitration agreements and judicial reference provisions.

⁸ See, e.g., *Harrington v. Pulte Home Corp.*, 119 P.3d 1044 (Ariz. Ct. App. 2005) (upholding mandatory arbitration clause in home purchase contracts and compelling homebuyers to arbitrate their claims that homebuilders did not disclose that a pilot training aerobatic box and jet engine test facility were nearby); *In re U.S. Home Corp.*, 236 S.W.3d 761 (Tex. 2007) (holding that an arbitration clause in a warranty book, which provided that a party “may request” arbitration, made arbitration binding once the homebuilder requested it); *Zeleny v. Thompson Homes at Centreville, Inc.*, 2006 WL 2382829 (Del. Super. Ct. July 10, 2006) (holding arbitration clause in housing contract warranty required binding arbitration of plaintiffs’ claims of leaks and other defects).

⁹ *Washington Update*, NATIONAL ASSOCIATION OF HOME BUILDERS (Mar. 26, 2010), <http://nahbenews.com/nahbwash/issues/2010-03-26.html> (“NAHB strongly supports the use of alternative dispute resolution, including binding arbitration, as the most rapid and cost-effective means of resolving disputes. Invalidating binding arbitration provisions in contracts would undermine decades of jurisprudence strongly favoring arbitration of disputes where the parties have agreed to use the arbitration process. NAHB opposes any attempt to prohibit the use of pre-dispute arbitration in contracts.”).

irrevocable, save upon such grounds as exist for the revocation of any contract.”¹⁰ In this respect, California courts will invalidate mandatory arbitration clauses in home construction contracts on the basis of unconscionability, as it is a ground that “exist[s] for the revocation of any contract.”¹¹ California’s broad application of unconscionability differs heavily from that of other state courts.

1. Federal Preemption of Section 1298.7 of the California Code

Despite the great latitude California courts afford unconscionability, California lawmakers identified a need for further protection of homebuyers attempting to bring certain claims against homebuilders. The result was California Civil Procedure Code § 1298.7, which provided that an arbitration provision “shall not preclude or limit any right of action for bodily injury or wrongful death, or any right of action to which Section 337.1 or 337.15 is applicable.”¹² This was read to mean that despite language to the contrary in a home construction contract’s arbitration clause, a homebuyer could still bring defects claims in court. The court later found that the FAA, however, preempted this limitation on arbitration.¹³

In *Shepard v. Edward Mackay Enterprises*, the plaintiffs brought suit alleging construction defects caused by plumbing pipes installed by defendants and damaged further by the defendants’ subcontractor.¹⁴ The pipes leaked and “water damaged interior finishes, carpeting, cabinets and drywall.”¹⁵ The plaintiff alleged that the water damage created toxic mold, and that he suffered personal injury from exposure to that mold. The real estate purchase agreement, however, contained an arbitration provision, which stated that all disputes arising out of the contract must be resolved by binding arbitration.¹⁶ The defendant filed a motion to compel arbitration, but the plaintiff opposed the motion, stating that Section 1298.7 prohibited the court from granting the motion. The trial court denied the motion to compel because it found that the defendants “failed to demonstrate the transaction involved interstate commerce.”¹⁷ The defendants appealed and argued that the FAA preempted Section 1298.7. The appellate court held that construction of the plaintiff’s substantially affected interstate commerce because five materials suppliers provided supplies that originated outside of California to the defendant for use in constructing the house; therefore, “the FAA preempt[ed] contrary state law [Section 1298.7] in this case.”¹⁸

¹⁰ CAL. CIV. PRO. CODE § 1281; accord Federal Arbitration Act, 9 U.S.C. § 2 (2006).

¹¹ CAL. CIV. PRO. CODE § 1281.

¹² CAL. CIV. PRO. CODE §§ 337.1, 337.15 govern the statute of limitations for claims relating to construction or improvement of real property. Section 337.1 states that actions for damages “from persons performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction of an improvement to real property more than four years after the substantial completion of such improvement.” Section 337.15 states that an action to obtain damages “from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property” cannot be brought “more than 10 years after the substantial completion of the development or improvement.”

¹³ See *Shepard v. Edward Mackay Enters.*, 56 Cal. Rptr. 3d 326, 333 (Cal. Ct. App. 2007).

¹⁴ *Id.*

¹⁵ *Id.* at 327.

¹⁶ *Id.* at 327–28.

¹⁷ *Id.* at 328.

¹⁸ *Id.* at 328, 333.

This was consistent with the appellate court's ruling in *Basura v. U.S. Home Corp.*¹⁹ In *Basura*, sixty homebuyers brought suit against the defendant alleging design and construction defects after a variety of problems arose, including "cracked foundation slabs."²⁰ The sales agreements contained arbitration clauses that covered any disputes arising out of the agreement. In twenty-eight of the contracts, however, the defendant did not initial the arbitration clause.²¹ The defendant filed a motion to compel arbitration, but the plaintiffs argued that Section 1298.7 allowed their suit to go forward. The court held that Section 2 of the FAA preempted Section 1298.7 of the California Code because "the California statute is a state law applicable only to arbitration agreements, allowing a purchaser to pursue a construction and design defect action against a developer in court, despite having signed an agreement to convey real property containing an arbitration clause."²² The court's ruling aligned with *Doctor's Associates, Inc. v. Casarotto*, where the Court held that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."²³

2. California Courts Turn to Unconscionability

After the federal preemption of Section 1298.7, the courts turned to unconscionability to limit the impact of mandatory arbitration agreements in home construction contracts. A series of cases followed which addressed the issue of whether mandatory arbitration clauses' in home construction warranties were unconscionable: *Baker v. Osborne Development Corp.*;²⁴ *Bruni v. Didion*;²⁵ and *Adajar v. RWR Homes, Inc.*²⁶

First, in *Baker v. Osborne Development Corp.*, homeowners sued the homebuilder, Osborne, arguing that several houses were defective.²⁷ Problems with the houses included "soil movement; foundation deficiencies; plumbing leaks; stucco, window, and roof problems; finish problems relating to cabinets, floor tiles, and countertops; and problems with the framing and electrical, heating, plumbing, and ventilation systems."²⁸ Osborne filed a motion to compel arbitration and argued that an arbitration agreement in the warranty booklet mandated arbitration of the claims. In addition, the Builder Application signed by both parties and sent to Home Buyers Warranty Corporation stated that the parties consented to the terms and the binding

¹⁹ *Basura v. U.S. Home Corp.*, 120 Cal. Rptr. 2d 328 (Cal. App. Ct. 2002).

²⁰ *Id.* at 330.

²¹ *Id.*

²² *Id.* at 333; *cf.* *Woolls v. Superior Ct.*, 25 Cal. Rptr. 3d 426, 438-39 (Cal. Ct. App. 2005) (holding that the state law mandatory notice provision was not preempted the FAA and the arbitration agreements were unenforceable because "[t]he instant case, involving the renovation of a single family residence, lies at the opposite end of the spectrum from *Basura*, which involved the construction of a large scale housing development" and the defendant failed to make any factual declarations that the transaction involved interstate commerce).

²³ *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

²⁴ *Baker v. Osborne Dev. Corp.*, 71 Cal. Rptr. 3d 854 (Cal. App. Ct. 2005).

²⁵ *Bruni v. Didion*, 73 Cal. Rptr. 3d 395 (Cal. App. Ct. 2005).

²⁶ *Adajar v. RWR Homes, Inc.*, 73 Cal. Rptr. 3d 17 (Cal. App. Ct. 2005). All three cases involve new home construction warranty programs provided by Home Buyers Warranty Corporation ("HBW"), a Colorado corporation. To obtain coverage under the program, a builder sends an enrollment fee and application form signed by both the builder and the buyer. *See Baker*, 71 Cal. Rptr. 3d at 857; *Bruni*, 73 Cal. Rptr. 3d at 402; *Adajar*, 73 Cal. Rptr. 3d at 19. Then, HBW sends the buyer a certificate of warranty coverage and a warranty book. *See Baker*, 71 Cal. Rptr. 3d at 857; *Bruni*, 73 Cal. Rptr. 3d at 402.

²⁷ *Baker*, 71 Cal. Rptr. 3d at 857.

²⁸ *Id.*

arbitration provision.²⁹ The homebuyers countered by stating at the time they signed the Builder Application, the only arbitration clause they knew of was in the sales agreement. That arbitration provision limited its application to disputes over the deposit of funds in escrow.³⁰ In fact, the homebuyers only received the booklet a few weeks after moving into their homes. The court held that the arbitration agreement was “both procedurally and substantively unconscionable and therefore unenforceable.”³¹ The agreement was procedurally unconscionable because Osborne failed to alert the homebuyers to the arbitration clause, meeting the surprise element, and the parties had unequal bargaining power, meeting the oppressive element.³² It was also substantively unconscionable because the arbitration clause was “one-sided.”³³

Similarly, in *Bruni v. Didion*, the homebuyers were not told to read the warranty, which contained an arbitration clause, before signing it and were never told how the warranty would affect their legal rights.³⁴ Some homebuyers received the warranty documents after signing, while some never received them at all. In addition, the arbitration provisions “[took] up roughly one full page in a 30-page booklet,” which was entirely “in single-spaced, 10-point type.”³⁵ The arbitration provisions also were “not distinguished from the rest of the booklet by either bolding or capitalization.”³⁶ The court held that the arbitration clauses were procedurally unconscionable because the clauses were practically hidden from the homebuyers, the defendants failed to inform the plaintiffs about the clauses, and the sales agreement was a contract of adhesion. Furthermore, the arbitration clauses were substantively unconscionable because they violated the plaintiffs’ reasonable expectations.³⁷

Finally, in *Adajar v. RWR Homes, Inc.*, the homebuyers signed a warranty application, which provided that by signing, they affirmed that they saw a video about the warranty and received a sample warranty booklet.³⁸ In addition, the application provided that by signing, the homebuyers agreed to the terms of the binding arbitration provision. At trial, however, the builders were unable to produce a copy of the sample booklet and submitted 2001 and 2002 versions of the actual warranty instead.³⁹ The homebuyers argued that they could not be bound by the unknown terms of an arbitration provision and that most of them did not receive a video or a copy of the sample warranty booklet. The court held that the builders failed to prove the existence of an arbitration agreement.⁴⁰ The court distinguished this case from *Wise v. Tidal Construction Co.*,⁴¹ where the buyer signed a warranty application attached to a warranty booklet containing the arbitration clause. The court stated that if the builders produced the actual arbitration clause, as the builder did in *Wise*, the case might be different.⁴² But considering *Adajar* and the two preceding cases, *Baker* and *Bruni*, it is difficult to see the court enforcing the arbitration clause contained in the warranty booklet.

²⁹ *Id.*

³⁰ *Id.* at 858.

³¹ *Id.* at 864.

³² *Id.* at 863.

³³ *Id.* at 864.

³⁴ *Bruni*, 73 Cal. Rptr. 3d at 404.

³⁵ *Id.* at 413.

³⁶ *Id.*

³⁷ *Id.* at 414.

³⁸ *Adajar*, 73 Cal. Rptr. 3d at 19.

³⁹ *Id.* at 20.

⁴⁰ *Id.* at 22.

⁴¹ *Wise v. Tidal Constr. Co.*, 583 S.E.2d 466 (Ga. 2003).

⁴² *Adajar*, 73 Cal. Rptr. 3d at 24.

One common thread ties all of the above cases together – the homebuyers did not actually receive the warranty documents, which contained the arbitration clauses, until after they signed the sales contract. While reference was made to the existence of arbitration clauses, the buyers were not afforded the opportunity to read the warranty’s actual terms. It appears that so long as homebuilders, and by extension warranty providers, supply the actual arbitration agreement to the buyer prior to or at the closing, the arbitration agreement will generally be upheld.

Why then do these cases keep arising in California? Are homebuilders and warranty providers trying to backdoor arbitration agreements into their sales contracts and warranty provisions? Or are they making honest mistakes and not learning from them?

B. Mandatory Arbitration Clauses in Home Construction Contracts in Nevada

Nevada courts also oppose mandatory arbitration provisions in home construction contracts. Similar to California, Nevada courts are sympathetic to homebuyers because of the unequal bargaining power in sales of new homes. Examination of Nevada’s approach will focus on three cases: *Burch v. Second Judicial District Court of State of ex rel. County of Washoe*;⁴³ *D.R. Horton, Inc. v. Green*;⁴⁴ and *Gonski v. Second Judicial District Court of State of ex rel. County of Washoe*.⁴⁵

We begin with *Burch v. Second Judicial District Court of State of ex rel. County of Washoe*, where the plaintiffs, James and Linda Burch, purchased a new home constructed by the defendant in 1997.⁴⁶ Four months after the closing, the defendant gave Linda Burch a thirty-one-page warranty booklet supplied by HBW and asked her to sign a warranty application form to enroll in HBW’s warranty. She signed the application but did not read the warranty booklet.⁴⁷ The warranty covered material and workmanship defects for one year; electrical, plumbing and mechanical systems defects for two years; and structural defects for ten years. In 1999, the plaintiffs noticed severe problems with their house, including “saturated floor joists, wet insulation, muddy ground, and a wet, moldy foundation.”⁴⁸ Consequently, they asked the defendant to remedy the problems. Mediation attempts fell through, so the plaintiffs filed complaint in district court.⁴⁹ The defendant filed a motion to compel arbitration, which the district court granted after concluding that the parties entered into a valid contractual agreement to arbitrate. The plaintiffs then filed a petition for a writ of mandamus, later granted by the Supreme Court of Nevada.⁵⁰ The court held that the arbitration clause in the warranty booklet was unconscionable and unenforceable.⁵¹ The court noted that the clause was procedurally unconscionable because the plaintiffs were told the warranty would offer “extra protection for

⁴³ *Burch v. Second Judicial Dist. Ct. of State ex rel. Cnty. of Washoe*, 49 P.3d 647 (Nev. 2002).

⁴⁴ *D.R. Horton, Inc. v. Green*, 96 P.3d 1159 (Nev. 2004).

⁴⁵ *Gonski v. Second Judicial Dist. Ct. of State of ex rel. Cnty. of Washoe*, 245 P.3d 1164 (Nev. 2010).

⁴⁶ *Burch*, 49 P.3d at 648.

⁴⁷ *Id.*

⁴⁸ *Id.* at 649.

⁴⁹ *Id.*

⁵⁰ *Id.* at 440. Note that at the time of this case, NEV. REV. STAT. ANN. § 38.205 held that court orders granting a motion to compel arbitration were not immediately appealable. Due to this, parties would file a petition for a writ of mandamus to challenge the motion to compel. The governing statute for a writ of mandamus is NEV. REV. STAT. ANN. § 34.170, which states that a “writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.”

⁵¹ *Burch*, 49 P.3d at 651.

their home,” did not have an opportunity to read the application or booklet or watch the HBW video, were not “sophisticated consumers,” did not understand the warranty’s terms, and could not easily find the arbitration clause.⁵² The clause was substantively unconscionable because it granted the defendant’s insurer, NHIC, “the unilateral and exclusive right to decide the rules that govern the arbitration and to select the arbitrators.”⁵³ The court noted, however, that it was not “hold[ing] that a homebuyer warranty with an arbitration clause will always be unconscionable or unenforceable,” but that in this case, “the HBW and its arbitration clause [were] unconscionable and, therefore, unenforceable.”⁵⁴

The court expanded on *Burch* in *D.R. Horton, Inc. v. Green*. In *D.R. Horton*, the plaintiffs purchased homes from the defendant builder.⁵⁵ The two-page sales agreements, printed in very small font, contained an arbitration clause at the bottom of the second page. “With the exception of the paragraph title, which was in bold capital letters like the other contract headings, nothing drew special attention to this provision.”⁵⁶ Neither of the plaintiffs “understood that they would be required to fund one-half of the expenses of the arbitration and that these expenses could be more costly than standard litigation.”⁵⁷ This was contrary to Nevada statute Section 40.655(1)(a), which allowed a construction defect claimant to “recover attorney fees or other damages proximately caused by the construction defect controversy.”⁵⁸ After several problems developed with their homes, the plaintiffs notified the defendant that they intended to bring construction defect claims. After the mediation process was unsuccessful, the defendant demanded arbitration.⁵⁹ The plaintiffs responded by filing a complaint in district court seeking a declaration that the arbitration agreement was unenforceable. Then the defendant filed a motion to compel arbitration, which the trial court denied.⁶⁰ While the Supreme Court of Nevada found that the sales agreement was not a contract of adhesion, as the trial court did, it held that the arbitration agreement was unconscionable because “it was inconspicuous, one-sided and failed to advise the Homebuyers that significant rights under Nevada law would be waived by agreeing to arbitration.”⁶¹

Lastly, in *Gonski v. Second Judicial District Court of State of ex rel. County of Washoe*, the plaintiffs purchased a home in a housing development from the defendant.⁶² Months after the purchase, the plaintiffs alerted the defendant to several construction defects. After mediation attempts failed, the plaintiffs filed a complaint in district court.⁶³ Then, the defendant attempted to enforce two arbitration agreements, one in the sales agreement and the other in a limited warranty. The district court found that the arbitration agreements were not unconscionable and granted the motion to compel arbitration.⁶⁴ The plaintiffs filed a petition for a writ of mandamus, which the Supreme Court of Nevada granted. The court held that the arbitration agreement was

⁵² *Id.* at 650.

⁵³ *Id.*

⁵⁴ *Id.* at 651.

⁵⁵ *D.R. Horton*, 96 P.3d at 1160.

⁵⁶ *Id.* at 1161.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1164.

⁵⁹ *Id.* at 1161.

⁶⁰ *Id.* at 1162. Under NEV. REV. STAT. ANN. § 38.247(1)(a), motions denying a motion to compel arbitration are immediately appealable.

⁶¹ *D.R. Horton*, 96 P.3d at 1163, 1165.

⁶² *Gonski*, 245 P.3d at 1166.

⁶³ *Id.*

⁶⁴ *Id.* at 1168.

unconscionable.⁶⁵ While the arbitration clause's procedural unconscionability from the signing and failure to highlight was low, the substantive unconscionability was high because it failed to "adequately address the arbitration costs and disregard[ed] . . . NRS Chapter 40 rights."⁶⁶

From these cases, it appears that Nevada courts follow a similar approach to California. Recognizing an apparent need for added consumer protection in home construction contracts, the courts place a heavy emphasis on homebuilders making arbitration clauses readily identifiable and fully providing them to homebuyers, with an opportunity to read, before the closing.

C. Future Implication

The future implications of mandatory arbitration clauses in home construction contracts are plentiful. Primarily, they facilitate the recovery of the real estate market by efficiently resolving disputes born out of the real estate boom. Mandatory arbitration clauses in home construction contracts have softened the potential blow of the surge in construction defects claims on the real estate market. Homebuilders already struggling in California and Nevada have not been exposed to lengthy, more expensive lawsuits arising from homebuyers' construction defects claims. As a result, they have been able to keep costs down, which undoubtedly aids in their recovery.

Additionally, the privacy of arbitration results in a restoration of confidence in homebuilders. Public lawsuits exposing construction defects, at a time when new homebuyers are scarce, could lead to more potential buyers abstaining from purchasing a new home. While this may seem as though buyers are being blindfolded from the problem of construction defects so that homebuilders can gain some public confidence, the near future will tell whether the increase in defects claim truly arose from a shortage of quality workmanship in the wake of the housing boom. But with the real estate market in recovery, will workmanship improve because homebuilders are no longer struggling to keep up with demand? Or will workmanship decrease or remain the same because homebuilders are trying to cut costs, leading them to hire less skilled and cheaper contractors? Only time will tell.

Conversely, some homebuyers feel slighted by not being able to bring suit in court to recover damages from their defects claims. This disposition is fueled by parties such as Home Owners Against Deficient Dwellings ("HADD"), a consumer interest group that advises homeowners to "[a]void arbitration clauses" because "[a]rbitration can be biased in the company's favor, and it's private so others can't find out about complaints."⁶⁷ Further, despite the strong federal policy favoring arbitration, a federal interest may be argued to exist in protecting homeowners' ability to bring suit in court. If a homeowner's "loan is financed through the FHA [Federal Housing Authority] or VA [Department of Veterans' Affairs] and you file a claim against the third-party warranty company, [the homeowner] can choose between arbitration or going to court."⁶⁸ Therefore, it appears as though the federal government has identified an interest in protecting homeowners' ability to resolve warranty claims in court.

⁶⁵ *Id.* at 1173.

⁶⁶ *Id.*; see NEV. REV. STAT. ANN. § 40.655(1)(a).

⁶⁷ *Binding Arbitration*, HOME OWNERS AGAINST DEFICIENT DWELLINGS, (Dec. 5, 2008), <http://www.hadd.com/arbitration> (last visited Apr. 19, 2012).

⁶⁸ *Warranties for Newly Built Homes: Know Your Options*, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea03.shtm> (last modified April 24, 2009).

Ultimately, however, the many benefits of enforcing mandatory arbitration clauses in new home construction contracts outweigh any perceived detriments. Arbitration is generally cheaper and will provide a quicker remedy for homeowners and homebuilders alike. When problems with homes develop, homeowners are forced in many cases to live in hotels, with family, or with friends while their houses are repaired. These repairs can be lengthy and, in some situations, impossible. Adding a lengthy adjudication process to the traumatic effect of construction defects is too much for consumers. They should realize that arbitration often provides a better, less costly, and more expedient solution than a civil suit.

III. CONCLUSION

In the end, California and Nevada are invalidating arbitration agreements on the grounds of unconscionability when other states are enforcing those agreements. The courts in these states hinge their decisions on whether failure of homebuilders to alert homebuyers of the clauses and what they provide; whether the print was a larger font size, capitalized, or bolded; whether the terms of the arbitration clause were given to the homebuyers prior to the closing; and whether the homebuyers had an opportunity to read the arbitration clause.

Beneath the reasoning of these court decisions lies a disposition disfavoring arbitration clauses in home construction contracts. What these courts should realize, however, is that arbitration contracts aid in the recovery of the real estate market. In addition, despite increased construction defects claims, courts have benefited from less cases clogging up their dockets.

At the same time, however, it should be stated that not all arbitration clauses in home construction contracts should be enforced. Inevitably, courts in California and Nevada will rightly declare some clauses unconscionable. However, these courts should join the majority of jurisdictions and lighten their stance on arbitration clauses in home construction contracts.