

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## CivilLITIGATION

# Arbitration: Managing litigation risk in the digital age

General Mills, the food conglomerate, recently made headlines when it changed the legal terms on its website and reversed course after a social media backlash. General Mills' actions, however, highlight how companies can use social media and the Internet to manage their litigation risks.

According to the now-defunct terms, in exchange for benefits derived from interacting with the company in various capacities, consumers agreed to resolve any dispute with General Mills through binding arbitration and waived the right to consolidate claims.

The broad language encompassed a variety of contacts between the company and consumers. Anyone who used General Mills' websites, became a member of a General Mills website or online community, subscribed to email newsletters, downloaded or printed a digital coupon, entered a sweepstakes or contest, redeemed a promotional offer, or otherwise participated in a General Mills offering agreed to these terms.

Following a New York Times article and subsequent public outcry on social media, General Mills issued an apology and returned to its previous legal terms. Media coverage focused on fears of losing the right to sue General Mills in the event of mislabeling or unintended contamination.

It is likely that the backlash General Mills suffered is due in large part to the fact that it is the first large food producer to attempt to implement a mandatory arbitration clause with a class-action waiver. However, it is unlikely that General Mills' course reversal signals a change in the prevailing corporate attitude towards arbitration and class-action waivers.

Many large corporations, such as Verizon and Dropbox, currently include mandatory arbitration clauses and class action waivers in the legal terms and conditions governing contracts with consumers. Controlling the forum for dispute resolution and limiting exposure to class actions just makes sense for businesses.

While consumers tend to disfavor mandatory arbitration clauses, the clauses typically do not keep consumers from purchasing a product or using a company's service. Few consumers read the terms and conditions before clicking "I accept" when using a company's online services. For companies of any size, dispute resolution through mandatory arbitration offers a significant advantage. The benefits of arbitration include reduced litigation costs, quicker resolutions to claims, and flexibility. Arbitration also offers participants the benefit of privacy: The proceedings and outcome are not a matter of public record.

There is growing legal precedent supporting the use of arbitration clauses in consumer contacts. In a series of recent cases, the Supreme Court supports arbitration as a method of resolving disputes. In *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), AT&T customers instituted a class-action suit alleging that the company defrauded customers by charging sales tax on phones advertised as free. The cellphone contract provided that all disputes must be resolved through arbitration individually. The Supreme Court held that the Federal Arbitration Act preempts state laws which deem class-action waivers in arbitration agreements unenforceable.

In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), merchants instituted an antitrust class-action against American Express. American Express moved for individual arbitration based on the terms of the credit card company's arbitration agreement with the merchants. The Supreme Court held that the contractual waiver of class arbitration is enforceable even if the cost of proving an individual arbitration exceeds the potential recovery. The court noted that arbitration agreements are matters of contract and must be "rigorously enforce[d]."

Using coupons available on a company's website or participation in associated social media forums to create a contract with consumers, which includes an agreement to settle disputes

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By **JILLIAN K. FARRAR**  
Daily Record  
Columnist

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through mandatory arbitration and a class action waiver, helps businesses use the pervasiveness of modern technology to try to reduce their exposure to litigation.

While it remains to be seen whether broad language on mandatory arbitration for online interactions like that used by General Mills is enforceable, litigating the enforceability of such language is an expensive and formidable initial barrier to anyone wishing to avoid arbitration by bringing suit.

There are potential risks, however, and use of the Internet and social media by businesses can be a double edged sword. The backlash suffered by General Mills in response to its change in

legal terms provides a cautionary tale. While mitigating litigation costs and maintaining privacy are certainly appealing, negative press or consumer feedback through freely accessible social media can have a significant impact on a business.

Businesses must communicate their legal terms in a manner that will not offend customers. Companies looking to bind customers with mandatory arbitration clauses and class-action waivers through use of benefits provided on websites and through social media should do so carefully.

*Jillian K. Farrar is an associate in Underberg & Kessler's Litigation and Creditors' Rights practice groups. She concentrates her practice in litigation, bankruptcy and collections.*