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PERSPECTIVE

Arbitration: coming to store near you?

By Claudia M. Vetesi
and Lisa A. Wongchenko

The food industry may be catching on to the growing trend of binding arbitration agreements. General Mills recently added a binding arbitration provision to the legal terms on its website, then withdrew the changes a few days later in response to consumer feedback. The desire to curb the rise in food litigation is not surprising. Many food companies are battling consumer class actions challenging the labeling on their food products as false and misleading. The targeted statements include terms such as "all natural," "natural source of antioxidants," and the ingredient name "evaporated cane juice." General Mills' attempt to incorporate binding arbitration into its transactions with consumers may not have stuck this time, but the concerns underlying that attempt are still very present for the food industry. Surely other efforts to use arbitration clauses to close the class action floodgates will follow.

General Mills' Arbitration Clause

General Mills recently revised the legal terms on its website, notifying consumers that the terms now contain "a binding arbitration clause and class action waiver." It explained that all claims arising from the purchase or use of General Mills' products would be resolved through informal negotiations or binding arbitration. Consumers could choose to opt out by notifying the company in writing.

But these terms would not apply to just anyone. General Mills explained in its terms and conditions: "In exchange for the benefits, discounts, content features, services, or other offerings that you receive or have access to by using our websites, joining our sites as a member, downloading or printing a digital coupon, entering a sweepstakes contest, redeeming a promotional offer, or otherwise participating in any other General Mills offering, you are agreeing to these terms."

Arbitration Clauses on the Rise

General Mills' arbitration clause was a logical development, as arbitration becomes an increasingly available tool to resolve legal disputes. The expansion of binding arbitration and class action waivers has its roots in the U.S. Supreme Court's ruling in *AT&T Mobility v. Concepcion*, which held that California's judicial rule invalidating class action waivers as unconscionable was preempted by the Federal Arbitration Act. The Supreme Court reasoned that the principal purpose of the act is to ensure that "private arbitration agreements are enforced according to their terms," and California's law stood "as an obstacle" to Congress's objectives. 131 S. Ct. 1740, 1748, 1753 (2011).

Since *Concepcion*, businesses have increasingly adopted binding arbitration provisions into their contracts with consumers. Credit card and phone companies in particular have availed themselves of this opportunity. Consumers who agree to these terms are prohibited from bringing class action lawsuits and must instead bring their individual complaints in an arbitration forum. The result is that companies can avoid having to litigate costly, high-risk class actions.

Arbitration clauses, however, are most easily adopted when a consumer already has to sign a contract. Notably excluded from these types of transactions are food purchases. But as more consumers interact directly with companies through the Internet, the playing field has been leveling. Consumers may not sign a contract when they buy a box of cereal, but they do agree to the company's terms of use when they visit its website. Adding an arbitration clause to those terms was the logical next step.

Resistance to Arbitrating Food Disputes

Binding arbitration in the food arena, however, was met with some skepticism by the public and media. Perhaps the most difficult issue is defining the type of consumer action that fits within the scope of consent. Is navigating a company's website for food products, or "liking" the page on Facebook sufficient to constitute consent? Opponents are sure to argue that such action is too passive. Requiring consumers to "check" a box and confirm that they have read and agree to the terms is most likely the strongest case for consent. However, there are other actions short of checking a box that fall somewhere in the middle, such as downloading coupons from the company's website, or entering a sweepstakes contest. Companies contemplating arbitration clauses should carefully consider how to define consumer consent to avoid confusion.

At the root of the reservations regarding arbitrating food disputes is the concern that legal rights are being taken away from consumers. People may be worried about the legal rights of a hypothetical person who gets sick after eating contaminated food. But the more likely scenario involves class actions challenging compliance with technical labeling regulations or alleging far-fetched claims of deception. For example, the "Froot Loops" cereal label has been challenged as misleading because the cereal does not contain real fruit, and "Cap'n Crunch's Crunch Berries" cereal has been targeted for failing to contain real berries. Arbitration clauses in the food industry cannot be separated from the background of this rising tide of food labeling class actions. Even meritless cases can be expensive to defend and often attract copycat cases in other jurisdictions. All it takes is a single plaintiff to claim he was misled by some aspect of a food label to require defending a case regarding the hypothetical and unlikely deception of consumers nationwide. Binding arbitration was likely seen as a way out of this predicament.

We should expect to see more attempts to incorporate binding arbitration into the purchase of food products. Learning from early efforts, companies may try to formalize the arbitration provisions by placing them on food labels, or even inside the food products. Perhaps consumers will have more to review than the nutrition facts box during future trips to the grocery store.

Claudia Vetesi and **Lisa Wongchenko** *are litigation associates in Morrison & Foerster LLP's Consumer Litigation and Class Action Practice Group. They are frequent contributors to Morrison & Foerster's Private Surgeon General Class Action Defender blog and can be reached at cvetesi@mofo.com and lwongchenko@mofo.com.*

CLAUDIA VETESI
Morrison & Foerster

LISA WONGCHENKO
Morrison & Foerster