Published on *The National Law Review* https://natlawreview.com

Retail Industry 2021 Year in Review: Retail Giant Drops Arbitration Clause—Is This the Right Move for Your Agreement?

Article By:

Cecilia Y. Oh

Perie Reiko Koyama

RETAIL INDUSTRY 2021 YEAR IN REVIEW

After facing more than 75,000 individual arbitration demands over the last two years, in 2021 Amazon removed the mandatory arbitration provision and class action waiver from its consumer online terms of service. What remains to be seen is whether Amazon's move will trigger a larger movement by retail industry defendants to stem the tide of costly mass arbitration demands.

Corporate defendants have long relied upon arbitration clauses in consumer and employment agreements to keep disputes out of court and avoid class actions. Arbitration clauses are often paired with class or collective action waivers, which require plaintiffs to forgo class or collective actions and file individual demands. Arbitration often can be less expensive and more efficient than traditional litigation. Recently, however, plaintiffs' attorneys have circumvented the intent behind arbitration clauses and class action waivers by amassing thousands of people to file individual arbitration demands simultaneously.

While a single arbitration may be less expensive than litigating a class action, the mandatory filing fees, case management fees and arbitrator compensation for a single arbitration can exceed several thousand dollars. Multiply that by 75,000 arbitration demands, and these fees easily expand into the hundreds of millions.

At least a dozen major mass arbitration cases have been initiated in the United States over the past two years. As just a few examples, TurboTax developer Intuit faced more than 40,000 arbitration demands last year, education technology company Chegg faced 15,107 demands, Uber faced more than 12,500 demands, Postmates faced 5,257 demands in one case and 200 in another and DoorDash faced 5,010 demands. Keller Lenkner, the plaintiffs' firm behind the majority of these cases, reports that they have secured more than $375 million in related settlements.

Since the Supreme Court's decision in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), lower courts increasingly are willing to enforce arbitration clauses and grant motions to compel arbitration.

Courts are also less than sympathetic to the plight of corporate defendants seeking to avoid arbitration and the mandatory arbitration fees. A federal court in California ordered DoorDash to "immediately commence" arbitration with each of the 5,010 petitioners, putting the company on the hook for nearly $12 million in arbitration fees. In a particularly scathing opinion, the judge wrote, "[n]o doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order." Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1067–68 (N.D. Cal. 2020).

In 2019, Keller Lenkner served approximately 75,000 arbitration demands on Amazon, alleging that the company's Alexa devices recorded customers without their consent. Some of these demands were resolved in Amazon's favor, and others proceeded to arbitration. In July of 2021, Amazon announced the removal of the mandatory arbitration and class action waiver provisions from its consumer terms of service. Uber, Postmates (which was later acquired by Uber), DoorDash and Chegg also took responsive actions to mitigate the risks of mass arbitrations, although considerably less extreme than Amazon's approach. Instead, these companies retained their mandatory arbitration and class action waivers, but modified their terms of use expressly to permit class settlements, established specific procedures for adjudicating mass arbitrations or made other changes to their obligations in the event of consumer disputes. In addition to the approaches adopted by the companies discussed above, there are several other potential strategies to avoid the draconian outcomes that have occurred during the last two years, including the following:

1. Require informal dispute resolution prior to arbitration – Companies may choose to require mediation or another conciliation process prior to arbitration, which may lead to early settlement and avoid mandatory filing fees.

2. Request individualized information in arbitration demands – Many mass arbitration demands merely duplicate the same information for thousands of demand letters, with little to no individualized information for each claimant. Companies may require claimants to provide more detailed information about their claims when filing an arbitration demand, deterring the "mail merge" approach of mass demands.

3. Contractually prohibit mass arbitration – Agreements may be drafted to try to prohibit the simultaneous, coordinated filing of numerous, identical claims. Whether a court would ultimately enforce such a provision is less than certain. Any contractual language should be carefully drafted and approved by counsel.

4. Withdraw offers to pay claimants' filing fees – Many companies agree to pay the arbitration filing fees of consumers, employees or other claimants. Removing these provisions could greatly reduce the filing fees for which a company may be responsible.

5. Purchase additional insurance – Retailers may purchase additional insurance policies or enhance their existing coverage to mitigate financial risk associated with unavoidable expenses associated with dispute resolution.

Each of the strategies discussed above comes with potential benefits and risks. Companies should work with experienced counsel to draft agreements that serve the company's individual needs, guard against present risks and comply with the laws of the relevant jurisdiction(s).

National Law Review, Volume XII, Number 35