

“A CALL TO ARMS”

by Nicholas Johnson

Sorry avid hunters and gun collectors. This article is not about the Second Amendment, which many of you will agree has garnered extensive media coverage. Understandably with each mass shooting, the media shifts its attention to the Second Amendment, and the debate over gun control looms on. The Second Amendment has arguably become the most popular, well-known section of the United States Constitution. Our right to bear arms has become the popular “superstar” amongst our Bill of Rights, borrowing the stage from some of its co-stars of the Constitution. I’m here in the capacity of an agent for one these co-stars; to bring it back to the forefront and hopefully keep it in the limelight long enough for corporate America to end its efforts to curtail the rights which this co-star guarantees: Our right to a jury trial.

“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” *U.S. Const. amend. VII*. Companies have rallied a somewhat clandestine campaign to compromise this right, which has been eroding before our very eyes without many of us even realizing it.

The Campaign

How many of us have pledged each Monday, or each month, to live a healthier lifestyle? As part of that pledge, how many of us have purchased food items labeled as “100% Natural” and believe they really are natural? I’m raising my hand and hope I am not alone in admitting to being hoodwinked by such claims. Corporate giant General Mills recently lost a Motion to Dismiss a putative class action complaint, filed against it for alleged deceptive labeling of its “Nature Valley” granola bars. See *Rojas v. General Mills, Inc.*, 12-CV-05099-WHO, 2014 WL 1248017 (N.D. Cal. 2014). Mr. Rojas purchased these granola bars from a Safeway grocery store in San Francisco, and claimed in his lawsuit that the term “100 % natural” was deceptive

because General Mills actually uses Genetically Modified Organisms (GMOs) in these granola bars. *Id.*

After the Court denied its Motion to Dismiss, General Mills published on its website’s homepage “We’ve updated our private policy. Please note we also have new legal terms which require all disputes related to the purchase or use of any General Mills product or service to be resolved through binding arbitration.”² These changes included “joining” a General Mills product on Facebook, or downloading a coupon from its website.³ Indeed, General Mills would most likely have to prove that consumers were aware of these changes before such a “forced arbitration” clause would be enforced, but this example certainly demonstrates the length at which companies will go in order to protect their profits at the compromise of our Seventh Amendment right to a trial by jury.

Providing a leg for General Mills to stand on is perhaps the United States Supreme Court case of *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011). The Concepcions purchased cellular service from AT&T which provided free phones in exchange for service payments. *Id.* at 1744. The Concepcions entered into an arbitration agreement when they purchased the cellular service, which mandated that in order to commence any dispute proceedings, they had to first complete a Notice of Dispute form. *Id.* In the event the parties were unable to settle a dispute within 30 days, the Concepcions could then elect to proceed to arbitration. *Id.* The arbitration contract specifically provided that “claims be brought in the parties’ individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.” *Id.* The Court sided with AT&T, overruling the Ninth Circuit’s decision which found the arbitration clause unconscionable. *Id.* at 1753. The Court held that the Federal Arbitration Act⁴ preempted California’s law, which gave Courts the power to refuse the enforcement of arbitration agreements.

Origin of The Seventh Amendment

The British Navigation Acts originally passed in 1651 were aimed at maximizing the profit of the British crown by requiring that all goods to and from the American colonies be transported on British ships. This law prevented the American colonists from receiving their share of revenue, and individuals who were charged with violating this law were originally granted jury trials. However, these juries were comprised of fellow American colonists, who would often acquit these defendants.⁵ In response to the colonists' refusal to uphold these laws rooted in inequity, the Crown began to refuse to grant one's right to jury trial when charged with violating the Navigation Acts.⁶ The deprivation of a trial by jury continued for over a century, evidenced by the grievance set forth in the Declaration of Independence, "For depriving us in many cases, of the benefits of Trial by Jury." The right to a trial by jury soon after became our prized Seventh Amendment when it was ratified as part of the Bill of Rights in 1791.

The Seventh Amendment Today

Is all hope lost in light of the *Concepcion* ruling discussed above? Absolutely not. The good news is the Seventh Amendment has a critical and important supporter – you. Let's not underestimate for a minute how powerful we are as advocates and as consumers, even against a corporate giant such as General Mills. There was such outrage amongst consumers after the media reported on the legal policy which General Mills implemented concerning arbitration that, in less than one week, General Mills eradicated its arbitration policy. General Mills issued the following statement in a post by General Mills' Director of External Communications, Kristin Foster:

"As has been widely reported, General Mills recently posted a revised set of Legal Terms on our websites. Those terms – and our intentions – were widely misread, causing concern among consumers. So we've listened – and we're changing them back to what they were before. We rarely have disputes with consumers – and arbitration would have simply streamlined how complaints are handled. Many companies do the same, and we felt it would be helpful. But consumers didn't like it.

So we've reverted back to our prior terms. There's no mention of arbitration, and the arbitration provisions we had posted were never enforced. Nor will they be."

If you are nearly as inspired as I am by this outcome, join me in educating your family, friends, and clients, that we have a voice. Luckily, we have organizations such as the American Association of Justice, which has launched a grassroots campaign through its program "Take Justice Back," which provides information to attorneys and consumers of its fight to preserve our right to justice, a large part of which is our right to trial by jury. If we arm ourselves with the critical knowledge concerning corporate practices in chipping away at our Seventh Amendment rights, then perhaps we can push back as consumers did against General Mills, and firmly cement our right to a jury trial.

As consumers, we must take heed of the Seventh Amendment's importance and resist efforts of powerful corporate giants whose aim is to usurp our right to a jury trial. As John Adams once wrote, "Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds." ⁷

¹ Stephanie Strom, When 'Liking' a Brand Online Voids the Right to Sue, N.Y. Times, April 16, 2014. <http://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html>

² *Id.*

³ Federal Arbitration Act (FAA) makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2.

⁴ *Dialogue on The American Jury: We the People In Action*, American Bar Association Division for Public Education.

⁵ *Id.*



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