



Marketers, Be Prepared!

Setting up an ADR program may be a good marketing strategy.

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AN EMERGING TREND in the law will affect how companies market their products and services. It involves making alternate dispute resolution (ADR) agreements part of consumer sales, and it could be coming to products and services near you.

ADR refers to dispute resolution processes in which a professional, neutral third party assists parties in reaching an agreement to avoid a more costly and time-consuming courtroom trial. It is typically less formal than a court proceeding. ADR comes in a variety of flavors, with the most common being mediation and arbitration. In mediation, a skilled go-between conducts settlement negotiations. Arbitration, on the other hand, is akin to a simplified trial without a jury and usually without broad-ranging pre-trial discovery (discovery is an often extensive and expensive fact-gathering phase of a court proceeding). Many businesses have turned to ADR agreements in an effort to mitigate the delay, expense, and unpredictability of litigation.

Though ADR agreements were once confined to business to business or specialized transactions, they have found widespread application to consumer sales in the last decade. Initially, it was companies selling services to the public (such as cable TV and credit cards) that made these agreements a condition of using their services. Although most product manufacturers have yet to adopt such clauses on a large-scale basis, this is the emerging next step.

A Primer on Labeling Requirements

A successful ADR program for consumer sales must stand up to specific challenges and learn from similar agreements that failed. This affects marketers, who must incorporate such language into product labeling, packaging, and instructions.

Companies must understand that it's not possible to fulfill every desire they may have when it comes to drafting an Agreement to Settle Disputes Outside of Court. A legally enforceable ADR agreement must avoid one-sidedness and be fair. While each situation

is unique (and the factors variable), a fair and enforceable ADR agreement will have at least some of the following features of which marketers should be aware:

- A notice on the outside of each product box or package (or in the information accompanying the purchase of a service) that purchase or use of the product / service is subject to an ADR agreement. Notice presents the consumer with an opportunity to weigh the agreement in the purchase decision and prevents later argument that some "fine print" agreement was forced upon him or her.
- A paragraph informing the consumer that the agreement covers any person who buys or uses the product/service.
- A paragraph allowing any party to resort to small claims court for minor disputes. By allowing a party to seek redress for a minor claim in this manner, the agreement may avoid attack on the grounds that it makes small claims too expensive to bring.
- A paragraph explaining that the parties to the agreement are waiving the right to seek redress in court. The agreement is more likely to be upheld if an unambiguous notice is given to consumers about the rights they are relinquishing.
- A paragraph fixing the location of the ADR proceedings near to the claimant's home or the place of occurrence. The theory behind this clause is that a claimant should not have to travel further than he or she would have traveled to court.
- A paragraph stating that the company will pay at least part of the costs of the ADR proceeding. Because ADR agreements are sometimes attacked on the purported grounds that they are more expensive to consumers than litigation, a fair approach here helps block that argument.

- A paragraph giving the consumer a reasonable choice to exit the relationship if he or she does not agree with the terms. Thus, depending on the circumstances, the agreement might allow customers to return the product for a refund within a reasonable time of purchase if they do not agree with ADR.

Ensuring Consumer Acceptability

Marketers must ask three key questions in their company: (1) Is an ADR program being considered or implemented? (2) If so, has the company studied the potential sales impact? (3) What can the marketer do to minimize the risk of a negative sales impact? If a company decides to use an ADR agreement, marketers will have to team with lawyers to develop a notice that meets both of their needs. Similarly, marketers and lawyers will need to work together to determine how and where to place the agreement.

As stated here, reasonable notice of the ADR agreement must be given to ensure enforceability. Regardless of what form is selected, though, it stands

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to reason that the presence of an ADR agreement might have a negative effect on product sales. Marketers must be part of the process. Marketers must determine whether, given the choice, consumers may opt for the product or service without an ADR agreement rather than the one with it. If such a situation presents itself, the marketing department will be tasked with tapping into consumer perceptions and motivations to determine how best to sell the products without abandoning the ADR agreement.

Marketers may face a situation in which their competitors have not yet adopted an ADR agreement. They must then consider a key question: Will the company be at a competitive disadvantage if it implements an ADR program? After all, the company does not want the benefits generated from using ADR to disappear in a sales drop. The increased presence of ADR agreements suggests that many companies providing services or goods to the public

eventually will adopt some type of ADR agreement. But until then, marketers will have their hands full. The key is to understand how consumers make their decisions to buy, and how best to gain the advantage based on all of the factors presented.

Not everyone likes the increased use of ADR agreements. Despite a strong jurisprudence and public policy favoring ADR, plaintiffs' lawyers and some special interest groups have balked at ADR agreements as denying consumers their "day in court." Web sites detail the "evils" of ADR and profess the destruction of consumer rights. Marketers need to be ready to deal with criticism of ADR agreements, both from the media and from consumer groups. While the breadth of anti-ADR sentiment is formally unmeasured, it plainly represents something marketing departments must consider when they attach ADR agreements to their products.

The Future of ADR Agreements

In the long term, the positives of fairly drafted ADR agreements will most likely outweigh the negatives. A properly drafted ADR agreement can bring measurable benefits to a business by lowering the legal costs of doing business, while simultaneously being fair and beneficial to consumers through reduced cost and time requirements. Settling disputes through ADR can save cases from the "jackpot" syndrome that may occur in some courts and instead provide fair and meaningful relief to the truly injured, while protecting the rights of companies who have done nothing wrong. If unnecessary legal costs are reduced, consumers and companies both can benefit from lower priced goods and services.

In most every way, ADR provides an advantage to businesses when compared to litigation. Consequently, as companies work with their lawyers to reduce their litigation burden, marketers should prepare for the future. Getting consumers to accept the agreements, dealing with competitors, and handling opposing special interests are just some of the challenges facing marketing departments because of this emergent legal development. ■

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