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WHEN COMPANIES DECLINE YOUR BUSINESS

By Ken Grunfeld

What do you do as a consumer when a huge, everyday company refuses to do business with you? For example, what if Netflix refused to give you an account? Or if Amazon wouldn't let you be a Prime member? What if Apple didn't allow you to register for an Apple ID?

This happens all the time. In today's society, doing business with many of these ubiquitous companies may feel like an inalienable consumer right, but it is not. The reality is, these are private businesses, and they can pretty much refuse your patronage for almost any reason, or for no reason at all.

So, first things first, what do you do? The first thing you should do—the first thing almost everyone does—is contact customer service and try to find out what is going on. Most companies have detailed web pages that can help you identify the correct department to contact. Huge, multi-national companies may not always do the right thing, but they rarely do *irrational* things. Find out why you are on the blacklist. My experience is that businesses, even big businesses with tens of millions of customers, don't reject people for no reason. They may not care if they lose you as a customer along the way, but there is a reason you've been left out in the cold. Unfortunately, just because there is a reason doesn't mean they will simply tell you the reason.

Next, determine whether your treatment amounts to discrimination based on being within a protected class. Race and color were the earliest protected classes. See the Civil Rights Act of 1866 (prohibiting discrimination "in civil rights or immunities . . . on account of race, color, or previous condition of servitude."). Protected classes were expanded with the passage of the Civil Rights Act of 1964, prohibiting discrimination on the basis of race, color, national origin, sex, and religion. In 1967, Congress added age to the listed of protected classes, the Age Discrimination in Employment Act (ADEA). Finally, disability was added as a protected class. See the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA) of 1990; and the Americans with Disabilities Amendments Act in 2008. If you believe a company is discriminating against you based on being in a protected class, contact a lawyer that specializes in discrimination issues like this.

If you've been denied membership or services for any other reason, you are on much thinner ice legally. But why do companies reject customers? As a practical matter, for large companies, most people are denied accounts because something you did in the past triggered a computer algorithm. Decisions like these are not made on an individual basis by some bean-counter in a basement looking at account histories. Computers flag accounts that don't look right, and Customer Service Departments take over to deny access to these unfortunate souls.

Some algorithms are designed to identify risk. For example, if your credit card company realizes that you have 50 active credit cards and effectively a $500,000 line of credit, you

The most important thing, which is sometimes overlooked, is to make sure your client contact is the same person who can sign the engagement letter, assume control of the litigation, and give you permission to enter and withdraw your appearance.

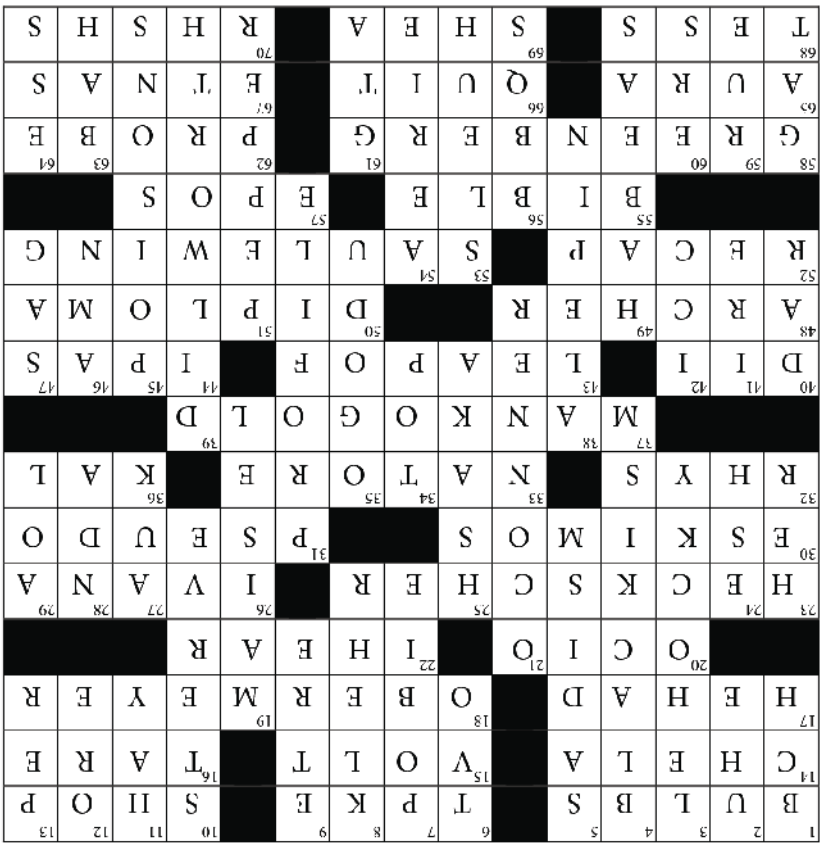
might be terminated as a client, even if you pay your bills in full every month. Some algorithms are designed to remove perceived problem customers. Sending continuous or multiple communications can actually trigger expulsion. Even if the communication is just feedback and not complaints or requests for refunds, if there is even a perception that an avenue for customer service is being taken advantage of, it can result in account termination. Algorithms can also scan for associations or relationships with other risky or flagged accounts. If you co-own an account with someone on the FBI watch list, or someone recently indicted for fraud, you will probably be booted off the network—and in all likelihood, not just for the jointly owned account, but for all your accounts!

Algorithms often don't pick up on coincidences or the human element of many transactions. For example, sometimes bank deposits of just under $10,000 are flagged as risky transactions.[1] After returning from a European vacation, a wealthy customer made a $9,500 cash deposit because she hadn't spent all of her shopping money. Her bank terminated her bank account and her credit card account, no questions asked. Other times, things may happen that are out of your control. An employee was given a reward-points airline ticket from his boss to travel to meet a client. The airline suspected that the reward points were purchased from another person in violation of the program. Without any investigation, the airline canceled the employee's reward points membership and took all of his previously earned reward points. In both instances, even after submitting affidavits and conducting multiple exchanges with customer service representatives, the companies refused to relent.

So, what do you do now? If you are a celebrity or have a million Instagram followers, the answer is easy: send out a blast complaining about the service you received. Press and public perception really do matter to public companies of this scale, but only if it moves the needle. A tweet to your 200 followers probably won't accomplish that. You do have other options, including: (1) contacting the Consumer Financial Protection Bureau (https://www.consumerfinance.gov/complaint/); filing a complaint with the Better Business Bureau (https://www.bbb.org/consumer-complaints/file-a-complaint/get-started); notifying your states' Attorney General's office—Pennsylvania, for example, accepts complaints through the Bureau of Consumer Protection—(https://www.attorneygeneral.gov/wp-content/uploads/2017/11/BCP_Complaint_Form.pdf); engaging in online forums or blogs (I often look at https://www.yelp.com/ and https://www.pissedconsumer.com/, but there are also usually product- or industry-specific blogs that exist); calling or writing to your favorite local newspaper or television news station; or starting or responding to Facebook pages with other aggrieved customers.

All these options help, but they probably will not get you the remedy you seek, which in most instances is simply an invitation back into the good graces of the company. As a class action lawyer, contacting me is sometimes the next step taken by frustrated consumers. In reality, however, these scenarios are rarely viable class action cases. When I tell people that, I usually hear: "But if they are doing this to me, they must be doing it to others." That is true. But that alone, sadly, is not enough to bring

Answers to the Crossword Puzzle on Page 47



Sometimes bringing a lawsuit or having an attorney like me write a letter is what it takes to find a real human being with authority within the company to actually listen to your client's story and do the right thing.

a class action. The Rule 23 foundational tenets of numerosity, commonality, typicality, and adequacy are usually not met when a company decides to part ways with you as a customer. Individual issues usually predominate these determinations, and there can also be problems of ascertainability, standing, and concrete injury-in-fact.

In some instances, I encounter a consumer who is angry enough (and has enough disposable income) to hire me to take the fight to these companies. I always tell these people that I don't recommend this course of action, even though it may be a passion project for them.

The first thing I do is read the company's Terms of Service, which are usually available online. The Terms of Service tell me where to bring an action and what law applies. More often than not nowadays, the company has inserted an arbitration clause with a class action waiver into the Terms of Service.[2] So, once I determine where and how to bring the action, next, I need to determine whether the company did anything that was inconsistent with the Terms of Service. This is the true challenge. Terms of Service are written by the company with their own interests in mind. Consumers almost never read them. You would be shocked to learn what you've "agreed to" in these consumer contracts. But again, I digress. This is the world we now live in.

There are multiple ways to find chinks in the corporate armor. Sometimes there are obligations of the company in the Terms of Service to the consumer that are breached by the company in terminating the relationship. For example, many companies establish a review, notice, and appeal procedure before an account can be terminated. Have they followed their own protocols? Sometimes the terms themselves create ambiguity that can be used as a basis for a lawsuit. For example, if reward points are redeemable for a specific amount of money, they cannot simply be taken at the company's discretion without providing an opportunity for redemption. Finally, a company's marketing or advertising may be inconsistent with the terms. Have you ever seen TurboTax's promise of FREE tax preparation services? But are consumers really given the option to have TurboTax file returns for free?

In many instances, simply putting the case in suit and litigating it becomes enough leverage for a company to relent. Sometimes bringing a lawsuit or having an attorney like me write a letter is what it takes to find a real human being with authority within the company to actually listen to your client's story and do the right thing. It helps that these issues may resonate with thousands of other customers, so filing the case can generate significant media attention.

Is it worth it to sue for your "right" to call an Uber? To have food delivered to your house by DoorDash? To pay the babysitter with Venmo? To watch shows offered on Hulu? Maybe not. While I always recommend against it, there are lawyers out there like me willing to take these companies all the way to trial if need be to exercise your right to enjoy their products and services. Usually it all works out in the end.

[1] The Currency and Foreign Transaction Reporting Act of 1970 (also referred to as the Bank Secrecy Act) requires that a bank report any cash transaction of $10,000 or more to the Internal Revenue Service and allows for flexibility reporting any perceived suspicious deposit.

[2] The reason companies insert arbitration clauses into consumer contracts is to avoid class action liability. The U.S. Chamber of Commerce party line is that consumer arbitrations streamline litigation, but that is a lawyer-driven fallacy that unfortunately has been blessed to some extent by our current Supreme Court bench. Individual arbitrations cost more, lack transparency, and result in corporation-favorable verdicts much more often than trial court verdicts. This is in part because, after all, the company is the arbitrators' client. But I digress, because these cases are usually not viable class actions anyway. ■

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