

## **NO COMMON SENSE – TODAY'S COST OF DOING BUSINESS**

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**What is a retailer to do?** The world today is filled with people assuming they are being disrespected and believing they are being defrauded. It's not just that some customers can be surly and demanding when they are in your store, they often seek to sue you on behalf of all your customers, wreaking havoc on your business operations and driving up your legal expenses. Common sense, courtesy, and consideration may be the retailers' best tools both at the point of sales and in court. Remember even when they sue, people are your customers.

Over the past several years, there has been a rash across the country in "consumer protection" class actions. Not health and safety challenges; those obviously should be first order of priority both from the standpoint of risk to the company and from the standpoint of reputation and "doing the right thing." For example, labeling class action claims have been increasing dramatically in the past several years and have hit a number of industries including food, health, cosmetics, pet care and others. The challenges run the gamut from trade dress to challenges about specific product content or potential scientific benefits.

**Real Risk Exposure?** This other variety of suits challenge nitpicky "common sense" product issues yet are wrapped (no pun intended) in theories of marketing fraud or other unfair practices allegations. Recent class action case topics have included: is my sandwich long enough, is there too much ice in my drink, etc. Unfortunately, many of these suits allege nationwide classes and some allege damages in the tens of millions. Depending on where the cases are filed, they may challenge sales that occurred as long as 10 years ago (under certain applicable statutes of limitations). As class action defense lawyers, we often deal with a \$10, \$50 or \$100 dollar charge which yields potential multi-million dollar risk to companies. If certified and if the business is large enough, even a \$10 charge can turn into a multi-million dollar mess if the product sells millions of times per year.

**Reputation Risk?** These types of suits often create media. Some plaintiff's law firms post on their own websites the class action suits they are handling or investigating. Yet others actually solicit consumers to submit information about experiences with your products to determine if the customer may have a claim. Retailers may be left fighting on two fronts one in the courtroom and the other on the internet. Even if the lawsuits have not ultimate merit, they drain your resources and

interfere with daily business operations at least for the folks who have to deal with them. Unfortunately, this all may be just a cost of doing business in today's world.

Meanwhile you also have a large number (and hopefully the majority) of well-meaning and loyal customers, who may get caught up as putative class members in one of these suits. More importantly, whether a suit has been filed or not, your loyal customers may be watching social media criticism of your marketing, products and, quite frankly your ethics.

**What Can a Retailer Do?** What are some of the things that a retailer can do to try to prevent such claims and to manage them if and when they do? These are few of the things that may help.

- **Be Thoughtful, Clear & Direct.** Take a look at your marketing materials and advertising. Take a look at your training manuals. Are your materials clear? Do they say what you want them to say and what the customer honestly will hear? Are your customers getting good quality products for good value? Do your sales teams know the attributes of your products and know not to overstate them?
- **Address customer concerns promptly and with care.** Are your in-store and customer service personnel taught to be courteous to listen and to take the initiative to solve problems proactively as they arise locally? Sometimes a coupon or a refund during an individual transaction can go a long way. It won't eliminate everyone's claims, but it should build customer loyalty and defer quite a few negative social media comments or even lawsuits.
- **Designate someone to think like a critic.** Mystery shoppers. Nay sayers. These are good things. Listen to your folks who may offer a suggestion about how a product is marketed or described. They may have a worthwhile point. Better for you to hear it from one of your own and make an adjustment, than to face expensive and time consuming customer litigation later.
- **Monitor social media & company ratings sites.** On social media things move very quickly and in waves. Negative momentum can mount, taking on proportions one might not have expected. Be mindful of the power of social media. Use it wisely for your company and also watch public comments about your company and products. Consider carefully whether and how to engage those who may criticize your products and company.
- **If sued, consider your counsel & insurance coverages.** Hopefully it won't happen, but if you are sued be proactive with your counsel. Share all relevant information and provide fulsome access to those needed to defend the claims. Also, consider whether you may have insurance coverage for the claims and how that will impact the defense. Listen to and evaluate counsel's assessments. Ask for explanations of anything you may not understand. If you think your counsel may not have all of the pertinent facts, help clarify what they are and how you believe they impact the assessment. Partnering closely with counsel about the details is how the best relationships are formed and the best results achieved.

## MEET THE TEAM



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