

Class Action Countermeasures

Discussions of the Strategic Considerations Involved in Class Action Defense

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Book Review — Verdict for the Defense

By Andrew Trask

The other week, fellow blogger (and ABA Blawg 100 writer) Russell Jackson sent me a copy of *Verdict for the Defense: Fighting Jackpot Justice with Firewall Defense Strategies* by Greenberg Traurig lawyer Rob Herrington. (Which just goes to show - sending books to bloggers can work.)

Verdict for the Defense provides a practical take on class action and mass tort defense, written for businesspeople rather than lawyers. (And you can tell. While most class-action books are heavy on the footnotes and the citations, this one alludes to the legal rulings, and focuses more on actual advice.) Herrington focuses on his area of expertise--products liability and consumer-fraud class actions--which enables him to provide specific counsel about how to head off potential class actions.

Herrington's "firewall" strategy consists of seeking out--and then blocking off--several of the more common, preventable sources of class actions. Starting from the premise that the best defense is to be a good company (one I wholeheartedly agree with), he recommends a full audit of the company's most popular products (the ones most likely to get the company sued in a class action) to make sure there are no (1)



significant problems lurking or (2) minor, but recurring issues that might serve as the basis for a complaint. He also recommends a review of customer service, to stave off lawsuits that might originate from disgruntled customers or common internet complaints. Some of Herrington's advice is clearly aspirational: most companies don't aim to have bad customer service, but instead find themselves fighting against constraints like organizational inertia. And companies should, of course, be careful that any product audits don't provide blueprints for subsequent class actions. But in addition to the common-sense exhortations, Herrington provides some immensely practical advice for enabling the defense of largely meritless class actions, including:

- **Being careful about choice-of-law clauses.** As Herrington points out, a number

of companies employ nationwide choice-of-law clauses that provide little advantage in individual cases, but make bringing nationwide classes much easier for plaintiffs. By contrast, choosing the law of the consumer's home state can serve as both a gesture of goodwill to customers and not hand plaintiffs' counsel a free pass to a nationwide class.

- **Changing up contracts frequently to take account of changing circumstances.** Many companies operate in constantly-changing regulatory environments, with constantly-changing products. Under those circumstances, it makes little sense to rely on possibly obsolete boilerplate. By performing a yearly review of consumer contracts, a company

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can make sure that it catches any glitches earlier rather than later, limiting its exposure over time.

- **Writing attractive arbitration provisions.** While the Supreme Court's *Concepcion* opinion clearly establishes a preference for arbitration, it never hurts to make sure that the arbitration procedure is one that truly aggrieved customers would actually want to use.
- **Adding “more than compliant” advertisements into a rotation if some ads appear vulnerable.** Given some of the fraud theories out there, there is clearly no way to lawyer-proof advertisements. But, should an ad appear to be an attractive nuisance for the plaintiffs' bar, it may not require a complete overhaul of a sound advertising campaign. It is possible to make incremental shifts to reduce risk by adding advertisements that disclose even more information.

So, can defense lawyers get anything out of this? Yes. Leaving aside Herrington's advice on litigating class actions (which, while sound, is probably a little low in citations for lawyers), it provides good insight into what a conscientious client will be thinking. More importantly, *Verdict for the Defense* helps identify what the best practices should be among clients. And that should help class-action defense lawyers act more like trusted advisors than hired guns. ■