

Household Goods

Amazon Shows How Retailer Litigation Strategies Evolving

BY MARTINA BARASH

Retailers, including giant e-commerce companies like Amazon, face greater exposure in product liability suits as their roles evolve and multiply.

Traditional defenses may be less effective as they become more involved in making representations about the products they sell and exercise more oversight of the manufacturing and distribution process, attorneys say.

Retailer roles have been changing for a long time, Cheryl Possenti of Goldberg Segalla in Buffalo, N.Y., told Bloomberg BNA. Possenti represents companies in litigation and also regulatory compliance.

They generally are in a less protected legal position than they used to be, particularly if they make representations or recommendations about products or involve themselves in product quality or safety aspects, she said.

But retailers are increasingly using tools in their relationships with their suppliers, such as indemnification agreements, to help protect themselves against the cost of large liability awards, Possenti said.

Rejecting Amazon's Argument Amazon.com Inc. is one example of a company that's seeing more litigation. Sometimes it sells products directly and sometimes it facilitates sales by other companies.

Product liability plaintiffs named Amazon as a defendant in just a few suits per year through 2015. But Amazon saw at least 12 filings in 2016, according to Bloomberg Law Litigation Analytics and docket searches. Complaints against the company in 2017 match that rate.

Courts are beginning to reject Amazon's arguments that it has a hands-off role and shouldn't be held liable for product-related harm, plaintiffs' attorney Timothy G. Blood told Bloomberg BNA.

Blood, of Blood Hurst & O'Reardon LLP in San Diego, and co-counsel are handling a proposed class action against Amazon involving a dietary supplement.

"It does seem that courts are coming around to the notion that Amazon is different," Blood said.

"They're able to command conditions from sellers and they're able to exert their market power to pick and choose which sellers they want to have on their platform and what conditions sellers have to meet to sell goods on their platform," he said.

"Once they have that kind of control then liability very naturally follows," he said.

Amazon declined to comment for this article.

Other retailers that have failed to escape suits in recent years include Vitacost.com, which is Kroger Co.'s dietary-supplement unit, Target Corp. and Lumber Liquidators Inc.

Hoverboards to Coffee Makers Retailers have landed in court over a wide variety of products.

"In a product liability case, the plaintiff is always going to name the person they bought the product from, whether it's brick and mortar or online," Possenti said. "It's easier to get jurisdiction over a U.S. company," and the retailer might have property in the state, she said. Also, an in-state defendant can help a plaintiff keep a case in state court, she said.

Suits against Amazon have involved allegedly defective hoverboards, battery packs, lights, dietary supplements and a French press coffee maker, among other products.

A few product types appear to recur, such as dietary supplements and batteries, battery chargers and hoverboards, also called self-balancing scooters.

Hoverboards were a popular gift during the 2015 holiday shopping season, but a half-million of them were later recalled for batteries that were prone to catching fire. Amazon has been targeted in a number of hoverboard suits because many of the makers are based in China and are hard to sue in U.S. courts.

Innocent Sellers? "Generally, a retailer used to be in a very coveted spot," Possenti said. A company could find itself in a lawsuit "but get out very quickly, or not play a substantial role, if all they did was purchase a product from a manufacturer or importer and sell it to the public," she said.

Some states "have 'innocent retailer' rules where you can actually get out of a lawsuit if you didn't do anything to the product, didn't make any representation or assemble it or install it," she said.

"But it seems the more a retailer, including an online retailer, makes representations or makes recommendations about a product, or puts their name on the product, that could lead to additional liability outside the traditional retailer role," she said.

Plaintiffs in some cases against Amazon are making allegations along these lines. A recent complaint over an alleged hoverboard-battery fire in a Tennessee home alleged Amazon misrepresented the batteries as being made by "leading electronic makers" when they weren't.

The Tennessee family also said the retailer knew about

numerous other fires tied to the same model of scooter and should have warned consumers about the product's dangers.

The family seeks \$30 million in compensatory damages, as well as treble damages under a consumer-protection law and punitive damages.

Quality-control measures can also open retailers to liability, Possenti said.

"Even where there is an innocent retailer statute, the more the retailer is involved in the quality or safety of the product, or starts specifying aspects of the product, the more they could lose that coveted status or actually be responsible for actual negligence in product liability," she said.

The National Retail Federation trade association isn't aware of any efforts by business to change or add innocent-seller laws to protect retailers further, J. Craig Shearman, vice president for government affairs public relations, said in an email.

Platform Argument Blood said Amazon has gone further than just arguing that the innocent-seller defense should apply to it as a retailer.

"With Amazon, it's been even more aggressive: 'We're not even the seller, we just match willing buyers and willing sellers, just providing the street where the market's set up.'"

That's "a bit of a fiction when it comes to Amazon, because they are so big and so powerful and able to dictate so much of both sides of the transaction," he said.

Amazon's latest earnings report showed its quarterly sales increased 23 percent to \$35.7 billion in the first quarter of 2017, according to Bloomberg News. Its reach is ever-expanding as the world's largest on-line retailer, a force in tech, and a Wall Street juggernaut. Its market capitalization alone of nearly \$440 billion exceeds the valuations of huge competitors combined, according to Fortune.

The argument that the company doesn't know what's going on and can't be held responsible "becomes very hard to believe because it's simply not true as a factual matter," Blood said. "Over the years, they've grown into such a powerhouse that they're unique among retailers."

That makes it different, for example, from such other online retail platforms as eBay Inc. and Craigslist Inc.

"Even eBay is set up a little differently from Amazon because Amazon has such control over both the buyer and the seller," Blood said.

Changing Times Both Blood and Possenti de-emphasized the distinction between online and brick-and-mortar retailers in the e-commerce age. "With on-line retailers, the hope would be they'd be every bit as liable as a brick-and-mortar retailer would be," Blood said.

When Amazon is facilitating the sale of goods by "what is possibly a very small, undercapitalized company and distributing those goods throughout the country, it fits very neatly into longstanding tort law that

Amazon would be held liable" for resulting harms, he said.

Possenti pointed to categories in the supply chain and said the big changes started before the rise of on-line sales. "Even long before e-commerce became a standard way of doing business, the traditional roles of manufacturers, importers, distributors and retailers had been changing," she said.

"It seems today that the company you think of as the manufacturer probably isn't. And they may not even be an importer if their products are direct imports," she said. "They may be a retailer as well as what you think of as a manufacturer, if they're selling their product themselves."

Retailer Self-Protection Possenti said techniques these online and other retailers are increasingly trying to use to avoid liability, such as disclaimers, aren't always effective.

"There's no way to completely avoid liability, because as clever as you can be, a clever plaintiffs' attorney can come up with arguments" to keep a retailer in court, she said.

The seriousness of the case and the inaccessibility of the manufacturer or designer—those in Asia, for example—tend to push plaintiffs' attorneys to come up with those arguments, she said.

Retailers may not be able to stay out of court, but they are finding ways to protect themselves, she said.

"What I've seen, just in the past few years, is a more robust system of indemnification agreements" involving the retailer, the American company it purchased from and even the overseas manufacturer, she said.

"And they're demanding named insured status on the Asian insurance policies. It used to be a pass-through bucket brigade," she said. "But now the retailers are asking for direct indemnification, direct named insured status."

With that kind of arrangement, "the retailer will tender the defense in indemnification to the company it bought the product from or to the manufacturer," Possenti said. "The retailer doesn't have to pay for the defense anymore, they don't have to pay for any judgment, but their name is still on the lawsuit."

"The Asian insurers are realizing there is a market for selling product liability insurance to manufacturers in Asia because it makes their products more marketable" to American companies, she said.

"So I think the market is evolving," she said. "It's good for consumers and good for business also."

Pushing Arbitration And, as plaintiffs' attorney Blood points out, retailers like Amazon are also using standard defenses, especially terms in sale contracts that call for the arbitration of claims.

"Amazon is very aggressive in using the arbitration agreement as a shield, to shield it from liability," he said.

People click a box saying they've read the terms and conditions, though they rarely do, he said. "And even if they read it they probably didn't understand it," he said.

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But in litigation against the company, the question becomes “how much of a fiction the courts are willing to tolerate to enforce arbitration agreements,” he said.

One mandatory-arbitration battle that reached an appeals court was in *Nicosia v. Amazon.com, Inc.* There, the U.S. Court of Appeals for the Second Circuit revived a proposed class action over Amazon’s alleged sale of a weight-loss supplement containing a stimulant that had been pulled from the market. Blood and other attorneys represented the consumer, Dean Nicosia, in that suit.

The trial court ruled that Nicosia was bound by a mandatory arbitration provision and so couldn’t pursue his claims in court. But the appeals court reversed that decision.

Nicosia is now back in the trial court, which is still working through the arbitration issues on remand, Blood said.

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