Lawyer Insights

5 Ways Retailers Can Mitigate Product Liability Litigation Risk

By Alexandra Cunningham and Elizabeth Reese
Published in Law360 | September 23, 2020


No retailer ever wants or expects to sell an unsafe product. But as the direct link between a consumer and a product, retailers are often the first targets of product liability lawsuits.

And while retailers usually have no control over the design or manufacture of a product, they face a risk of liability equal to or greater than that faced by the manufacturer if a customer is injured. Recent product liability trends have left retailers wondering whether it is even possible to mitigate their litigation risk at all.

For example, in August, the California Court of Appeal, Fourth Appellate District, held in Bolger v. Amazon.com LLC[1] that Amazon could be strictly liable for injuries caused by a product it sold, but did not manufacture. The court based its ruling in part on the complexities of today's supply chain — which can make it difficult for consumers to recover from remote manufacturers — and the specific circumstances of Amazon's involvement with the transaction, which the court described as "pivotal."

Though it may strain traditional notions of product liability, Bolger is not a death knell for retailers. It merely signals that retailers must approach risk mitigation more creatively. Below, we provide five strategies for developing an effective modern-day risk mitigation program.

1. Structure business operations to conform to states' innocent seller laws.

Retailers facing product liability lawsuits may be able to invoke the protection of innocent seller laws, which are available in about half of U.S. states. These laws — sometimes referred to as seller's exception or sealed container laws — typically provide nonmanufacturing retailers a defense if they were not independently negligent.

Innocent seller defenses are especially appealing because they can often be raised early by a motion to dismiss, allowing retailers to exit a lawsuit before incurring substantial fees. But while innocent seller laws generally offer broad protection to retailers, they do not provide complete immunity.

For example, some states only insulate retailers from strict liability, preserving an injured party's right to assert negligence and warranty claims against a retailer. Most states' laws also carve out exceptions that render the defense unavailable in certain circumstances, regardless of the liability theory. Depending on the jurisdiction, a retailer may not be able to assert the defense if:

- The retailer assembled the product;

- The retailer provided any plans or specifications for the product's design, warning or instructions;
- The retailer made any independent statements about the product creating express warranties;
- The retailer marketed the product under its brand name or a private label;
- There is a corporate relationship between the retailer and the manufacturer;
- There was no sealed container or wrapping preventing the seller from discovering a defect; or
- The retailer sold the product after an expiration date printed on the product.

Additionally, most states' innocent seller laws only protect a retailer when the manufacturer is both solvent and subject to personal jurisdiction in the court hearing the claim. These requirements may make an innocent seller defense more difficult to assert for retailers doing business with overseas manufacturers or smaller, less-established manufacturers.

Companies with operations across many states may find it difficult or impossible to tailor their businesses to the peculiarities of each state's innocent seller law. But retailers can still take steps across the board to increase the likelihood that the defense will be available. Specifically, retailers should consider:

- Evaluating their roles in designing, manufacturing and advertising products, and minimizing their involvement where possible;
- Ensuring that supply agreements with overseas manufacturers include provisions consenting to jurisdiction in the U.S.;
- Requiring manufacturers to verify solvency — for example, by requiring certificates of insurance;
- Training sales representatives and customer service agents to instruct customers to refer to the manufacturer's instructions for information about a product's safety and efficacy; and
- Using contractors for any assembly services — and where utilizing assembly contractors is impractical or cost-prohibitive, ensuring that the assembly crew does not deviate from the manufacturer's instructions.

2. Draft strong indemnity provisions and require manufacturers to maintain product liability and recall insurance.

Building a strong litigation defense begins before a product ever reaches the shelves. In states without innocent seller protections, a supply agreement may be a retailer's best — and perhaps only — shot at forcing a manufacturer to defend and pay a claim.

Well-drafted indemnity provisions can shift the risk and costs of any product liability litigation to

manufacturers and upstream distributors. Retailers can also use supply agreements to require suppliers and manufacturers to maintain product liability insurance. Certificates of insurance identifying retailers as additional insureds can provide retailers with peace of mind, knowing that they have coverage in the event of a costly claim.

Another powerful tool is recall insurance. Recall insurance is especially important for retailers selling higher-risk products like foods and beverages, over-the-counter medication, children's products and items more likely to be dangerous to consumers if defective — for example, household appliances with sharp blades or heating elements, or products containing chemicals.

In the event of a recall, retailers can incur significant costs pulling the product off the shelves, communicating recall information to affected consumers and facilitating remedies. Recall insurance can help defray those costs, and allow a retailer to focus on serving its customers.

And because the publicity associated with recalls often triggers a wave of product liability claims, cost savings realized through recall insurance can be a critical factor in positioning the company to mount a well-funded defense to those claims.

3. Require written evidence of compliance with federal safety standards.

Many consumer products must be tested and certified as compliant with federal safety standards before sale. The manufacturer — or importer, in the case of a foreign-manufactured product — must issue a special certificate called a general certificate of conformity, or GCC, for general use products, or a children's product certificate, or CPC, for products intended primarily for children age 12 or younger.

Examples of products requiring a GCC or CPC are:[2]

- Selected recreational products, including bicycles and bicycle helmets, swimming pool slides, pool and spa drain covers, fireworks and ATVs;
- Furniture and related accessories, including toddler beds, bassinets, cradles, cribs, baby swings, high chairs, children's folding chairs and stools, booster seats, changing tables, bunk beds, mattresses and carpets;
- Construction products, including consumer patching compounds, drywall, cellulose insulation and architectural glazing materials;
- Home appliances and accessories, including power mowers, garage door openers and refrigerator doors;
- Certain textiles, including some wearing apparel and children's sleepwear; and
- Paints and similar surface coatings, including those applied to consumer products.

Manufacturers and importers must make a copy of the GCC or CPC available to their immediate distributors. But those certificates may not always find their way to a retailer.

5 Ways Retailers Can Mitigate Product Liability Litigation Risk
By Alexandra Cunningham and Elizabeth Reese
Law360 | September 23, 2020

Although there is no legal requirement that retailers obtain or maintain copies of these certificates, they can play a critical role in front-end product liability risk mitigation. Retailers stocking products subject to any U.S. Consumer Product Safety Commission regulations should consider:

- Requiring suppliers and manufacturers to represent in writing that products conform fully to all applicable laws and regulations;
- Requesting that GCCs or CPCs accompany product shipments; and
- Regularly auditing the GCCs and CPCs to ensure they are current and supported by test results from a CPSC-accredited laboratory. Only a CPSC-accredited laboratory can test a children's product for compliance. While any laboratory can certify a general use product as compliant — including a manufacturer's in-house laboratory — it is a best practice to require that these products also be tested by a CPSC-accredited laboratory.

Obtaining and auditing GCCs and CPCs will not automatically insulate a retailer from liability, but the certificates offer two key advantages.

First, they provide added assurance that a product on a retailer's shelves has met the safety standard the federal government has already determined eliminates the most significant hazards posed by the product. By design, compliant products pose less risk to consumers, and thus less litigation risk to the retailer.

Second, in the event a consumer does bring a lawsuit, many states permit defendants to offer evidence of compliance with government regulations as proof they complied with the standard of care. Written assurances from the manufacturer that the product complied with federal law can be compelling evidence to a jury deciding whether the retailer reasonably ensured the safety of the product.

4. Use technology to identify emerging safety issues and comply with reporting requirements.

The first sign of a potential safety hazard is often a customer complaint, not a lawsuit. Many retailers are now using artificial intelligence to monitor customer service reports, product reviews and other forms of feedback to identify potential safety issues and problem products.

Even the best-trained customer service representative does not usually have the full picture of reports about a particular product. For example, a representative may field a call about a wheel coming loose from a bicycle, not knowing that several online reviews have already reported the same problem. The representative may log the report, but dismiss it as a one-off incident, especially if there were no injuries.

Without elevation of that report to a supervisor or cross-referencing with the online reviews, the company may not know there may be a serious safety issue with the bicycle. If a different customer later files a lawsuit over an injury suffered when a wheel came loose, the company may find itself struggling to explain to a jury why it did not remove the bicycles from inventory after receiving several reports about loose wheels.

Artificial intelligence can help fill these gaps, enabling retailers to detect broader trends and catch any reports that may otherwise fall through the cracks. Systems can be adapted to suit a company's specific needs, but generally scan, flag and elevate incident reports based on keywords — whether they appear in

customer service reports, warranty claims or online reviews.

Such systems can also be used to generate analytics to help retailers digest product-specific trends, and identify manufacturers that may have recurring quality and safety issues across multiple products.

5. Track litigation and regulatory trends to anticipate product liability litigation.

Tracking emerging regulation and litigation trends can help retailers stay one step ahead of plaintiffs looking to capitalize on novel theories. Plaintiffs often file cases just before anticipated regulatory action in the hopes of exploiting a finding in their favor.

In particular, retailers selling products that may contain chemicals — even in trace amounts — should keep a close eye on the U.S. Environmental Protection Agency's chemical risk evaluation process. Recent amendments to the Toxic Substances Control Act require the EPA to identify and conduct risk evaluations on high priority chemicals commonly found in consumer products.

If the EPA concludes that a high priority chemical poses an unreasonable risk to human health or the environment, it must issue regulations addressing that risk. Those regulations could range anywhere from limiting the amount of a chemical in a particular product to an outright ban on all products containing the chemical. Product liability plaintiffs will likely seek to use those unreasonable risk determinations as evidence of a chemical's danger, even at low amounts.

To date, EPA has identified 30 high priority chemicals found in products such as:

- Building products
- Plastic pipes
- Children's toys
- Food packaging
- Cosmetics
- Flame retardants and fire extinguishers
- Perfumes
- Cleaning solutions
- Furniture care and carpet cleaning products
- Paint thinners
- Glues and adhesives
- Synthetic rubber

The EPA is currently finalizing its first 10 risk evaluations, and is due to complete the next twenty no later than June 2023. While any regulations affecting these products may still be several years away, retailers should begin reviewing their product lines now to identify any liability vulnerabilities and shift as much risk back to the manufacturers as possible.

Conclusion

Retailers may not always have control over the design or manufacture of the products they sell, but they do have powerful risk mitigation tools at their disposal. Effective use of these tools creates a demand for safer products, and shifts the risk back to manufacturers when they fall short. Just as importantly, these

tools can generate significant cost savings for retailers, who will spend fewer dollars on litigation, and can reinvest that money into their businesses.

Notes

1. Bolger v. Amazon.com LLC, Calif. Ct. App., 4th Dist., No. D075738.

2. The full list of general products requiring written certifications of compliance is located at https://www.cpsc.gov/Business--Manufacturing/Testing-Certification/Lab-Accreditation/Rules-Requiring-a-General-Certificate-of-Conformity. The full list of children's products requiring written certifications of compliance is located at https://www.cpsc.gov/Business--Manufacturing/Testing-Certification/Lab-Accreditation/Rules-Requiring-Third-Party-Testing/.

Alexandra B. Cunningham *is a partner in the firm's Products and Mass Tort Litigation group in the firm's Richmond office. Alexandra's litigation practice focuses on product liability, toxic tort and environmental litigation, food contamination claims, complex commercial litigation, including mass torts, class actions and multidistrict litigation, general commercial litigation, and appellate advocacy. She can be reached at +1 (804) 787-8087 or acunningham@HuntonAK.com.*

Elizabeth Reese *is an associate in the firm's Products and Mass Tort Litigation group in the firm's Richmond office. Elizabeth helps companies navigate the complexities of product liability litigation and product safety regulation, providing insight into how strategic litigation decisions and comprehensive compliance programs can position companies for long-range success. She can be reached at +1 (804) 787-8060 or ereese@HuntonAK.com*