Retail and Hospitality

Common Sense and The Defense of Retailers in Product Liability Suits

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Let's be honest. Retailers don't like product liability suits. They frequently result in a drain on time and resources, a great deal of paper work, and depositions of personnel. Even those that are assumed by the manufacturer require a year or more of updates and reporting requirements, and these are the easy ones. There is no profit in a product liability suit. The product that is subject of the suit has already been sold. Many retailers would rather simply avoid such actions altogether. Yet, product liability cases are a part of doing business in the retail world. Because of this, a prudent retailer must have a game plan in place in the event that this occurs. This article briefly outlines such a plan for retailers.

To understand the need for a plan, the first step is to understand why retailers are targeted in product liability suits. Although it may seem counter-intuitive to allow product liability suits against retailers, most states allow such direct actions holding retailers to the same standards as product designers or manufacturers. The rationale behind this rule is that the retailer is in the chain of distribution and, thus, could protect against the risk. Even in states which have codified the defense of the innocent seller, such statutes have many exceptions that allow direct actions against the retailer. In those jurisdictions, retailers may be sued where they were involved in the design or manufacturing of the product, the development of its packaging or marketing, when the product was sold as a private label (i.e., held out as the retailer's own product), or where the manufacturer is not subject to jurisdiction of the court. Regardless of jurisdictions, claimants' counsel frequently maintain direct actions against the retailers in product liability cases for strategic reasons, such as attempts to avoid removal to Federal Court, or to include the appearance of a "big pocket" at trial. Fortunately, there exist some common-sense steps for the retailer to try and avoid and to defend such cases.

Step 1: Prepare Through The Use of Strong Terms and Conditions

The first step in protecting a retailer against future product liability claims is to ensure strong terms and conditions exist in its agreements with the manufacturer and suppliers of these products (including agreements or purchase orders). Strong terms and conditions provide that the seller defend and indemnify the retailer from any claims arising out of the sale of the subject product to the extent allowed by law. The terms may specify that they apply to all claims, even the retailer's own negligence, as recognized by the jurisdiction in which the indemnity claim is proceeding. Strong terms also include the procurement of insurance (setting limits consistent with the risks), which names the retailer as an additional insured in the event of any claim, including product liability claims. The preferred terms also include a provision which specifically rejects any other terms and conditions in invoices sent by the manufacturer, as well as any other quotation or other sales document. Also, consistently applying the terms on all of the retailer's purchases can help. Many companies reference their own terms on all orders, releases, and even requests for quotations. References to the terms are included in emails and discussions with manufacturers from buyers. Many retailers include a reference to terms and conditions on websites, which allow the manufacturer to reference them at any time. Buyers can be trained to use

only approved forms and to include reference to the Purchase Order terms and conditions on any communication discussing the purchase of such goods.

Step 2: Obtain Vendors Endorsements Specifically Naming The Retailer In Policies

This step is simple. It is not enough to contractually require that the manufacturer obtain insurance, the retailer must take affirmative steps to make certain that this is accomplished. Without an actual endorsement from its carrier that names the retailer, the carrier may simply deny coverage. Many times, despite the written agreement with the retailer, the manufacturer breaches the agreement by failing to follow through with obtaining the actual necessary endorsement. In the event of a suit, the retailer is left without another entity to tender its defense to and, potentially, may end up as the target defendant in a large injury case. To protect itself against these instances, a Vendors Endorsement that specifically names the retailer as an additional insured from the insurance company can be obtained. Vendors Endorsements specifically naming the retailer could be collected from all suppliers and stored by the retailer in a safe location for easy access. Insurance companies regularly provide such endorsements in their policies, and will typically provide a certificate noting that this endorsement is included within the policy. Retailer buyers could be trained to follow up and obtain these endorsements. The endorsements could be saved allowing for an effective tender (see below).

Step 3: Save Instruction Manuals, Copies of Packaging and Warnings

In addition to obtaining protection from the manufacturer and its insurer, a retailer can also take steps to try to protect itself if the retailer or insurer are no longer able to defend it. Having access to key documents to defend itself from such suits is an important step in making sure that the retailer is always prepared in the event of a product liability suit. A retailer could maintain a practice to always save valuable information related to the product it sells in the event of a lawsuit. This includes product instructions, warnings, testing records (if applicable) and packaging materials. In this age where the ability to save items electronically is easy, obtaining information from the supplier is easily accomplished. Buyers could be trained to request such information. Having product instructions, warnings, and packaging is essential in the defense of product liability claims. These items often provide key defenses to later lawsuits, especially if the product is misused or used contrary to instructions. In any product in which there is the potential for product liability claims, the best practice is for the retailer to obtain electronic (pdf) copies of these items and save them for use in the event of any future claim. This is especially important if the manufacturer ceases doing business or is not subject to the jurisdiction of the court.

Step 4: The Effective Tender To Both The Manufacturer and Its Carrier

If notice of a product liability claim is made, the retailer should immediately tender its defense to its own carrier, as well as to ***both*** the manufacturer and the manufacturer's carrier. Separate tenders are key because the duties to defend under Purchase Order terms and conditions, common law, and Insurance Contracts typically are governed by different terms or law. Carriers for manufacturers frequently will deny claims for indemnity under the Purchase Orders despite having independent (and frequently more expansive duties) under the insurance policy. Tendering directly to the carrier under its own policy may help to undermine such attempts. Unless the tender is made separately, the carriers frequently claim that a tender was not made under the policy, thus prohibiting the carrier from having

to defend the case. Tendering to both the carrier and the manufacturer covers both avenues of tender and provides the most expeditious way in obtaining a defense to product liability claims.

Step 5: Defending A Case In Those Instances When The Retailer Is The Last One Standing

Despite the efforts set forth above, there is always a possibility that the manufacturer and its carrier do not accept the tender of the defense. This may occur if the manufacturer is out of business, is overseas and is not subject to the jurisdiction of the court, or is unresponsive. In most states, in the absence of the manufacturer, the retailer then steps into the shoes of the manufacturer in these situations and could be held liable as if it were the manufacturer itself. In such cases, the retailer must defend itself against the allegations. This can be a difficult task because the retailer frequently was not involved in the design or manufacture of the products and lacks design drawings, testing or quality control records. In such cases, finding experienced product liability counsel who are knowledgeable about the industry and product liability, in general, can be essential in defending the product and the retailer. Product liability is a specialty in the law. There are unique methods of arguing against liability of the retailer that may be employed in such cases. Further, finding experts in the field that can explain the design, use, and manufacture of the product can make the defense of such claims much easier. The ability to, at least, reference the instructions, warnings, and packaging that were provided with the product is an important first step in the defense of the products.