

HOW MANUFACTURERS AND RETAILERS CAN COLLABORATE TO PROVIDE QUALITY PRODUCTS AND CONDUCT EFFECTIVE RECALLS

Working Together Can Improve All Aspects of Safety

Several months ago, I chaired an online seminar discussing the relationship between manufacturers and retailers in handling product safety issues.¹ In addition, years ago, when I was an in-house lawyer, and more recently as a product safety lawyer, I've had a number of experiences with retailers that sold my company's or my client's products. This article will address some of the issues discussed

during that online seminar, as well as some of my individual experiences in dealing with retailers.

In addition, I will discuss a new product safety initiative just announced by Amazon which offers a useful summary of techniques that can be utilized by manufacturers and retailers to make safer products and engage in more effective recalls.



Kenneth Ross is a Senior Contributor to In Compliance Magazine, and a former partner and now Of Counsel to Bowman and Brooke LLP. He provides legal and practical advice to manufacturers and other product sellers in all areas of product safety, regulatory compliance, and product liability prevention, including risk assessment, design, warnings and instructions, safety management, litigation management, post-sale duties, recalls, dealing with the CPSC, contracts, and document management. Ken can be reached at 952-210-2212 or at kenrossesq@gmail.com. Ken's other articles can be accessed at <https://incompliancemag.com/author/kennethross>.



By Kenneth Ross

The first thing to point out is that each retailer has different procedures for how they deal with manufacturers and consumers. Therefore, my experience in dealing with retailers and manufacturers might differ from other companies depending on the circumstances and the companies involved. Despite that, this article will point out some of the issues that need to be considered by manufacturers when dealing with retailers who sell their products.

SALES/PURCHASE CONTRACTS

In discussing the duties and responsibilities of manufacturers, distributors, dealers, and retailers, you must first look at the contracts between each party. The contract could be a sales contract issued by the manufacturer and agreed to by the purchaser, or it could be a purchase order issued by the retailer or other purchaser and agreed to by the manufacturer. Either way, here are some of the important provisions that should be carefully scrutinized and discussed by all parties.

The first issue involves sales by a manufacturer to a retailer. If the retailer sells the product and does nothing to that product, their duties and responsibilities, as well as their potential liability, are minimal. The law says that a retailer has no duty to test and inspect the products they sell and is not liable for any subsequent injury unless they knew or should have known that the product was hazardous.

However, there are some retailers that voluntarily assume additional duties through actions such as assembling the product or advising the consumer about how to safely use the product. Thus, they assume some responsibility for doing it correctly and, if they do it incorrectly, they can be held liable.

Agreements between a dealer or distributor and a manufacturer are a little different. Dealers or

distributors usually have responsibilities that go beyond those of a normal entity in the chain of distribution. For example, they may agree to provide warranty service, give safety orientations and training to purchasers, provide normal maintenance, and provide repair services outside of the warranty. Also, dealers or distributors have divided loyalties because they are advocates for their customers with the manufacturer as well as representatives of the manufacturer to the retailer.

Whether a manufacturer sells to a dealer, distributor, or retailer, the relationship should be clearly defined after it has been established. Further, the contract should reflect the duties, rights, and responsibilities of all parties in the distribution chain and clearly allocate the risks between the parties.

Issues of Financial Responsibility

In the event there is an accident or safety issue, the goal is for the party at fault to pay for the loss and protect the party that was not at fault. Many times, there may be shared responsibilities or there may be no one at fault. In such cases, each of the parties may need to defend themselves if they are sued.

Therefore, the contract between the manufacturer and dealer, distributor, or retailer should include a provision about who is financially and practically responsible when problems arise. If a purchaser just sells the product as received from the manufacturer, it makes sense for the manufacturer to indemnify and hold harmless that purchaser for all liability. If it is possible for the purchaser to do something that might create a safety issue, then the contract should be written to allow for the manufacturer to refuse to indemnify the purchaser if there is evidence that the purchaser did something that contributed to the injury.

Over the years, I have had problems with purchasers who wanted to be indemnified and held harmless for all product liability claims and litigation filed against them, even if their personnel did something that made the product unsafe, thus causing an accident. One example from my days as an in-house lawyer involved the sale of power tools. Sometimes, the retailer would assemble the product incorrectly. Or they would tell the customer that they can remove the guard when they get the power tool home because it just gets in the way. Another example is a retailer that placed a picture of the power tool in their advertisements, showing the product without the safety devices that were required for safe use. In all of these cases, it isn't fair for the manufacturer to fully indemnify the retailer.

Many retailers say to manufacturers that, if you want us to buy your product, you must agree to our indemnification and hold harmless requirements. And many manufacturers do not want to raise the issue during contract negotiations. That can be a mistake if there is an incident clearly caused by the retailer's personnel, yet the retailer still expects the manufacturer to fully indemnify them and hold them harmless.

In addition, a sales contract between a manufacturer and a retailer should include a provision regarding insurance coverage for the retailer, dealer, or distributor that will cover them in the event they are sued. The amount and type of insurance, the acceptability of the insurance company, and the amount of the deductible or self-insured retention are issues of negotiation. However, it would also be fair for the retailer, dealer, or distributor to provide insurance coverage to the manufacturer in case one of their actions caused the accident.

Post-Sale Duties and Responsibilities

A further area to discuss during contract negotiations is the respective duties and responsibilities of the manufacturer and retailer after the sale of the product.² Again, this is a topic that the manufacturer's sales force might be reluctant to discuss at the beginning of a relationship. Typically, the retailer will want the manufacturer to be responsible for all costs associated with a recall or other field action.

However, there are many issues that remain to be clarified, such as the retailer's responsibility to 1) report incidents to the manufacturer, 2) accept

returned products that have been recalled, 3) place posters in the store or in the store's computer when a recall has been undertaken; 4) post social media information as required by the U.S. Consumer Product Safety Commission (CPSC); 5) email or mail letters to customers of the recalled product where they have contact information; 6) issue refunds; and 7) dispose of recalled products that have been returned to the store in accordance with CPSC requests.

If the manufacturer is responsible for paying for all recall costs, there should be an understanding before a recall commences about what these costs could be and how they can be minimized.

The CPSC has ramped up responsibilities for both manufacturers and retailers to communicate or attempt to communicate with consumers. Most of these new procedures involve enhanced use of social media to get the message out about the recall. This raises the question of who pays for social media, who is responsible for posting the messages and monitoring the responses, and where that information should go.

Additional Concerns

Other issues involve whether the manufacturer has to pay the retailer for the labor costs to place posters in the store and whether the manufacturer has to pay the retailer for the cost of mailing recall notices to known customers. Certainly, emailing customers would be a lot cheaper than sending traditional mail to that customer. Also, more retailers now have the ability to contact their customers electronically, especially retailers that are membership warehouses or that have customer loyalty programs.

Additional issues in the post-sale area that could be included in the applicable contract involve whether the manufacturer has to pay storage costs if the recalled product or the inventory is quarantined in the retailer's warehouse. Also, a number of retailers send reports of incidents to the CPSC on a regular basis. There should be a clear understanding between the manufacturer and the seller as to what information the retailer should obtain from the consumer, whether they should try to retrieve the product if possible and who receives it, whether the manufacturer can contact the consumer, and whether the retailer can file this report with the CPSC without first telling the manufacturer about these incidents. All of these things are

important to decide during contract negotiations or before the manufacturer's products are first sold.

Lastly, who has the responsibility to decide whether a recall or other corrective action is necessary? There can be situations where the manufacturer does not believe that a report to the CPSC or a recall is necessary, and the retailer disagrees. What happens then? The law says that both the retailer and the manufacturer have an independent duty to report to the CPSC. So, one or both entities may report. These situations may not be covered in the sales contract, but there should at least be an understanding of what each party is entitled to do in this situation.

If the manufacturer is a foreign company with no legal presence in the U.S., then the distributor or dealer is an importer and could be the party that receives notice from the retailer. In that case, someone must decide which party undertakes an investigation and reports the matter to the CPSC if a report is necessary.

Many retailers have established procedures that apply to all companies they purchase from. Therefore, the manufacturer may not be able to negotiate different procedures that would be employed in the event of a safety issue in the field. But a discussion should be undertaken, at least to ensure that the manufacturer understands what they should do and what the retailer will do.

PRIVATE-LABELED PRODUCTS

There are a number of other problems that arise if the manufacturer is selling the product using the retailer's name or trade name. In that situation, the retailer usually is the importer of record and any safety issues that arise about that incident would probably go directly to the retailer. In addition, if the CPSC has instituted an investigation involving a particular incident, they would contact the retailer and not the manufacturer. In that case, who should file the report with the CPSC? The retailer or manufacturer?

Another complexity occurs in cases in which the CPSC wants a recall undertaken, and the manufacturer refuses to do so. In such cases, the CPSC might then issue a unilateral press release that would name the retailer. Or, in the case of a private labeled product, the press release would be issued using the retailer's name in the headline. Again, these issues should be discussed well

before they arise so that there are no disagreements about who is responsible for doing certain things and who has the right to determine what to do.

Without contracts describing the rights and responsibilities of each party to the contract, everyone is left to wonder what they have to do and what happens if a loss occurs. Some type of contract or memorandum of understanding that sets forth basic guidelines at least gives each party an idea of the parameters of the relationship.

ONLINE RETAILERS

The significant growth of online retailers has added challenges to the relationships that must be established to deal with safety issues. There are no store personnel helping the consumer purchase the product and helping them understand how to set it up or how to use it safely. There is no store to take back the product and issue a refund or provide a replacement. There is no one the consumer can easily talk to about an incident or near miss that they had. It is harder for the "store" inventory to be quarantined and destroyed or returned. And some online retailers generally prefer to directly contact their consumers about recalled products and do not want to provide contact information to the manufacturer or the CPSC.

Thankfully, online retailers have been improving their websites and procedures to deal with many of these challenges. Amazon has officially announced a number of new initiatives in this area, but other online retailers and brick-and-mortar retailers have also made improvements in the pre-sale and post-sale safety procedures they employ.

On July 25, 2023, Amazon announced a new page on their website for customers entitled "Your Recalls and Product Safety Alerts."³ Even though Amazon proactively notifies each of its customers about product recalls and safety alerts, this page allows customers to view in one location all of these communications for products they purchased.

Amazon's July 2023 announcement explained the use of this page by saying:

"If a recall is announced or a product safety alert is issued, Amazon customers will receive a personalized email with details about the recall and see an alert

banner on top of their 'Your orders' page. This banner will link to their personal 'Your Recalls and Product Safety Alert' page for more details about potential safety hazards, as well as to the recall notice for options such as a refund, return, or repair."

The announcement also said, "With this new feature, we are able to directly reach 100% of customers who have bought a recalled product in our store and provide clear instructions on what to do next."

Other retailers have recall notices on their websites, but most of them cannot post these notices on the order page of the consumer unless the consumer has an established online account with that online retailer.

Last, Amazon offers a Recalls Logistics Service where they can issue refunds such as Amazon gift cards on behalf of the selling partner and manage return logistics. Of course, the manufacturer must pay Amazon for that service. Some other retailers may do that, too, but Amazon's logistics capabilities are very extensive, making returns and replacements fairly easy.

Amazon followed up its July 2023 announcement with another one on February 14, 2024. This document, entitled "A blueprint for private and public sector partnership to improve product safety for consumers,"²⁴ is a thoughtful discussion of the difficulties of providing safe products to consumers, as well as Amazon's ideas on how to improve product safety while still selling products to consumers.

First, Amazon discussed how they can detect and prevent the sale of unsafe or defective products on their website. On this point, they said:

"We also have robust policies and processes in place to make sure the products they want to list for sale meet applicable compliance and safety requirements. We continuously monitor our store for potentially unsafe or noncompliant products, including when we receive new information from sellers about products and brands, and from safety and regulatory bodies. These proactive efforts use a combination of advanced machine learning, safety, and compliance experts."

Amazon also listens to feedback from customers and others to identify potential safety issues that were missed by their proactive controls. This raises an

interesting question about whether manufacturers should monitor Amazon reviews of their products or let Amazon contact the manufacturer if they believe there is a safety concern. It is clear to me that, where feasible, manufacturers should monitor these reviews (maybe just the one-star and two-star reviews) to see what issues are being discussed and not wait for Amazon to contact them. This recommendation would also apply to any other retailer's website where their products are being sold.

This blueprint does not say that Amazon will contact the manufacturer if they believe that there is a product safety issue, nor does it say that they will contact the CPSC as other retailers do. However, in 2021, Amazon established a streamlined process (called the A-z- Guarantee⁵) for resolving personal injury or property damage claims due to a defective product. This process is described as follows:

"To request compensation for property damage or personal injury that you believe was caused by a defective product purchased on Amazon, contact us, and we will help you report the safety incident. You'll receive a request from us to upload evidence supporting your claim to a secure portal, and Amazon or our third-party administrator will reach out to you in a few days. We'll work with you directly or through our external claims administrator to collect information, investigate the claim, and attempt to facilitate a resolution with you, and if necessary, our selling partner and their insurance providers."

As a manufacturer, it would certainly be better for Amazon to contact them immediately if a claim is made under their program and allow the manufacturer to investigate and resolve any valid claim with the customer. If you sell to Amazon, you should talk to them about how this procedure would work in connection with any of your future claims. In addition, you should talk to any other retailer about how claims, complaints, and incident reports will be handled by the retailer's personnel.

In the event of a product recall, Amazon's product safety blueprint has a number of proposals to modernize the recall process. They say that the current regulatory requirements are not effective, noting that the CPSC estimates a 6% effectiveness rate for all types of consumer product recalls. Amazon then says:

“They are insufficient in ensuring that retailers know what products are being recalled, they do not have a high enough bar for how retailers must notify customers to make them aware of the recall, and it can be more difficult than necessary for customers to understand what action they should take to protect themselves.”

The blueprint seeks to have manufacturers better identify the product to be recalled and they criticize the CPSC procedure of hanging posters in stores and issuing press releases to get the message out. Of course, since Amazon knows what products were bought by specific customers, they can more easily communicate with those customers. Most retailers do not have that ability. Even retailers with membership or customer loyalty programs sometimes do not have adequate contact information for many customers, or the contact information is out of date.

Amazon’s blueprint also dealt with instructions and on-product warnings that Amazon believes are inadequate. To improve these communications, Amazon says:

“To better educate our customers about how to use products, Amazon has started to incorporate messages from safety experts into our shopping experience so customers can make more informed decisions both during the purchase process and after they receive the product and are using it.”

“Similarly, we are experimenting with post-purchase messages like emails or push notifications that explain what actions to take to minimize safety risks with short, easy-to-understand usage information.”

It is not stated as to who engages these product safety experts, who approves the safety messages to customers, and who creates post-purchase messages. In all cases, the manufacturer should confirm that the safety information transmitted by Amazon is consistent with the information in the product’s warning labels and instructions.

Finally, Amazon also wants manufacturers to provide safety information digitally so it is always available, complete, can be updated as needed, and is in the customer’s preferred language.

CONCLUSION

The contract and any underlying policies and procedures govern the relationships between the manufacturer and other entities in the chain of distribution. While a manufacturer’s product safety personnel do not normally get involved in contractual matters, they should. Such personnel should be knowledgeable about what their company agrees to with any retailer, dealer, or distributor and who has the responsibility for each aspect of safety throughout the life of the product. They should incorporate the details of the agreement into their own procedures and should consider making improvements to their procedures or the procedures of any of the purchasers.

Also, I recommend that readers review the three Amazon documents discussed in this article, as well as any other publicly available best practices in design, sales, and recalls issued by other retailers, manufacturers, or trade groups. Technology is enabling more effective and efficient ways to communicate with consumers before and after sales and should be considered by everyone. This will improve the safety of finished products, as well as products that are already in the hands of consumers. ⁶⁴

ENDNOTES

1. See <https://www.productsafetyprofessionals.org/webinar-archive> for a video of this webinar that took place on February 7, 2024.
2. Ross, “Creating an Effective and Defensible Product Recall,” *In Compliance Magazine*, February 2024. <https://incompliancemag.com/creating-an-effective-and-defensible-product-recall>
3. <https://www.aboutamazon.com/news/how-amazon-works/amazon-creates-new-page-to-share-recalls-for-customers>
4. <https://www.aboutamazon.com/news/policy-news-views/how-amazon-is-improving-product-safety>
5. <https://www.amazon.com/gp/help/customer/display.html?nodeId=GS3GYAU8JGDBGWH2>