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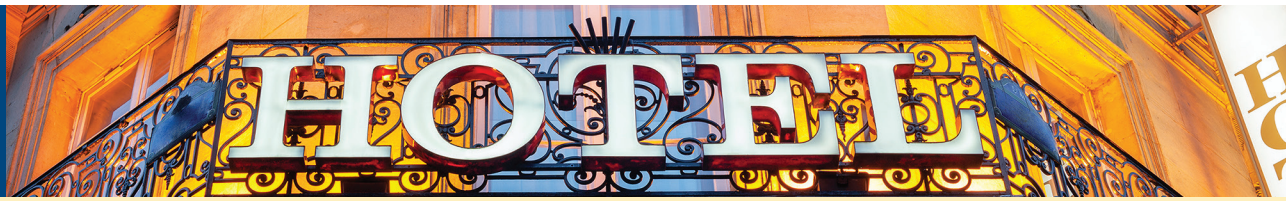

Customer Connection

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Committee Leadership

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In This Issue

for defense and indemnification in case there are claims for TCPA violations that arise out of that marketing.

Be warned, lawsuits are being filed without knowing whether an Autodialer is being used. In those cases, your client may still have to take on the expense of fighting a baseless lawsuit, with potential Class Action claims. They will need to be prepared to incur the expense of written discovery, depositions and Summary Judgment to prove they weren't using an Autodialer. In some of those cases, it may be better to protect the client and avoid disclosure of the client database (and a list of potential new Plaintiffs to opposing counsel) by resolving the case for a minimal cost of defense. There is a potential to get these cases resolved early and quickly at a minimal cost to the client if you have a reasonable opposing counsel.

Insurance Coverage?

Companies may think they are protected under their insurance policies because a TCPA violation could be considered an "advertising injury." However, many insurance policies specifically exclude TCPA violations from coverage. If one insurance policy excludes coverage, you may also want to consider the company's Errors and Omissions Policy. Also, some courts have held that TCPA exclusions are unenforceable.[16]

Issues for Franchisors/Franchisees

One potential issue for franchisors/franchisees to be aware of is the sharing of a client database. The franchisor may have obtained the cell phone number when a potential customer signs up for information online. The franchisor may have obtained general "marketing" consent but did not obtain express consent to receive text messages. The franchisee should make sure they take the extra step to obtain that express consent before sending any texts to those customers. A franchisee may not be familiar with this area of law. Many are not financially able to absorb the cost of this type of lawsuit. Franchisors should ensure that they are informing their franchisees by providing them with guidance and warnings concerning TCPA. If the franchisor has not obtained prior express consent for text messaging, they should inform the franchisee that an extra step is needed before those texts are sent to customers.

Conclusion

Businesses and lawyers should all be aware of this area of law. We have seen small businesses get blindsided by a lawsuit and learn an expensive lesson on marketing. Many large companies across the United States have also seen multimillion dollar settlements and verdicts for failing to get express consent to calls or texts. Educate yourself and your clients now and avoid exposure in the future.

Shawn Libman is a partner at law firm of Bowman and Brooke, LLP, in Miami, Florida. She earned her JD from the University of Miami in 2004 and is admitted to practice law before the State and Federal Courts of Florida. She handles a variety of personal injury and commercial litigation cases for retail and hospitality clients.

[16] See *Cincinnati Insurance Co. v. Chapman*, 2016 IL App (1st) 150919, ¶ 1, 403 Ill. Dec. 887, 889, 55 N.E.3d 74, 76 (May 23, 2016).

A Spider Web of Liability

Exploring Risks for Retailers, Restaurants, and the Local Delivery of Their Products

By Jason T. Vuchinich and Tiffany R. Winks


To anyone's view, the retail industry is rapidly changing. When it comes to carrying out a profitable retail enterprise, efforts aimed at attracting shoppers to brick and mortar storefronts are no longer enough. Retailers must undertake new strategies and initiatives to make themselves viable in the modern marketplace. One major component of this change is the trend in the delivery of goods. Consumers nationwide are becoming accustomed to shopping online and having their chosen products delivered to them instead of venturing out and visiting physical retail

locations. Fast and efficient delivery of products has become the expectation among consumers. In response to this, it has been estimated that 65 percent of retailers will offer same-day delivery by 2019. *See,* https://smallbiztrends.com/2018/08/growth-of-same-day-delivery.html.

Major retailers, even outside the grocery business, are stepping up to answer the call. Target purchased Shipt, a same-day grocery delivery service, and intends for Shipt to provide same-day delivery for all major product categories available at Target. *See*, https://techcrunch.com/2018/12/18/targets-same-day-delivery-service-shipt-will-include-all-major-product-categories-in-2019/. We are also seeing retailers like Barns & Noble, Best Buy, The Container Store, Bloomingdale's, Macy's, and Neiman Marcus all offer same day delivery services in certain markets. *See*, https://www.retailmenot.com/blog/same-day-delivery.html. To streamline these shipping processes while remaining profitable has proven to be a difficult task for retailers, especially given consumers' expectations of costs associated with shipping and the goods they purchase online. *See,* https://www.supermarketnews.com/online-retail/retailers-face-delivery-disconnect. However, these profitability concerns are not the only issues facing the retail industry in light of this new boon for product delivery services, the various avenues for potential liability associated with them creates significant risk for retailers and their insurers.

These risks apply to both retailers who create, implement, and manage their own product delivery services directly to consumers and those who entrust the delivery of their food and products to third party delivery services. The latter is also quite prevalent with restaurants, where services such as Doordash, Grubhub, Uber Eats, and Postmates are becoming more prevalent as third-party food delivery services across the United States. *See,* https://www.forbes.com/sites/andriacheng/2018/06/26/americans-appetite-for-delivered-food-has-grown-way-beyond-pizza-and-chinese-food/#2c2636a617e6. These new developments beg the inquiry as to what retailers and restaurants need to be worried about, and how they can protect themselves from potential liability.

For example, the risks associated with delivery services pose many liability concerns for customers, drivers, delivery service companies, and retailers alike. Performing as a delivery driver is unexpectedly a risky profession. The most obvious perils surround automobile accidents. It is not just the driver who stands to bear the risk, even if the driver is operating his own vehicle, but also the retailer and delivery service company for whom the driver is delivering. However, the retailer and delivery service company are not limited to the claims by the driver but are also exposed to claims by third-parties associated with the automobile accident. Beyond the risks related to the use of an automobile, the driver could slip and fall at the customer's property or the retailer's property, resulting in a spider web of conceivable claims. Likewise, drivers are exposed to the harsh realities of criminal activity by customers or third-party assailants or may in fact commit a crime themselves while on the job. All of these scenarios have potential to boomerang liability back to the delivery service company and, ultimately, the retailer.

When it comes to the delivery of meals or groceries, from a customer's perspective, the most important parts are the food and the timeliness of its delivery. Yes, if the food arrives late or disheveled, the customer will be unhappy, but probably will not have a legal claim. But, what if the driver contaminates the food during delivery; can the retailer or delivery service company be held responsible? Restaurants, grocery stores and retailers alike need to understand that persons injured or made ill by the consumption of a food or beverage product containing a dangerous object or deleterious substance my recover damages from manufactures or sellers of the unwholesome product in actions brought under one or more theories of liability, including breach of implied warranty, strict liability in tort, and negligence. These are all liability concerns faced by this new wave of app-based dining.

A central component to these tort claims is the legal relationship each retailer, grocery store and restaurant creates and maintains with the individuals comprising the delivery service. Because of this, courts are forced to shine light on aspects of employment law for drivers. This fairly recent concept of food delivery services has left courts struggling to define a driver's status as an employee verse an independent contractor. However, in 2018, a California court found a Grubhub driver, who sued the popular delivery company for back wages, overtime, and expenses reimbursement, was an independent contractor and not an employee. Thus, the driver was not entitled to make such claims. *See, Raef Lawson v. Grubhub, Inc., et al*, 302 F. Supp.3d 1071 (N.D. Calif. 2018). While this case was in the employment context, it is directly relevant to the liability of retailers involved in the delivery of products because the relationship with the delivery driver as an employee or as an independent contractor exemplifies whether a retailer will be exposed to liability. The independent contractor evaluation will vary from state to state. Often, an alleged employer can only be vicariously liable for the actions of their employees, not independent contractors. However, if

an alleged employer exercises more than supervision over the independent contractor, amounting to their operation of or control over the independent contractor, (where the employer dictates the time, manner, method, and means of execution of an independent contractor's services), then independent contractors in those situations will often be viewed as employees under the law.

In light of the liability concerns above, it is important for retailers, restaurants, and grocery stores to assess their relationships with the individuals carrying out the delivery of their products. The first place to look is at the contractual agreements with the third-party product delivery service. Often, the third party delivery services will attempt to insulate themselves from liability, and shift any risk onto the retailer, grocery store, or restaurant providing the product. *See,* https://www.jdsupra.com/legalnews/cost-of-convenience-for-the-grocery-92183/.

Therefore, due diligence and the assistance of counsel when entering into these arrangements is critical. However, even expertly drafted contractual language cannot guarantee the exculpation of liability for a retailer, grocery store, or restaurant. One reason, as alluded to above, is that the relationship between the retailer and the independent contractor may be very similar to that between an employee-employer when the retailer exerts operational control over the independent contractor's methods and means of execution in the carrying out of their services. In such instances, the retailer may be estopped from insulating themselves from liability by arguing the alleged negligent actor was an independent contractor. Another manner in which contractual language could fall short is when there are actual negligent acts attributable to the retailer. Public policy of many states prohibits an entity from obtaining contractual indemnity for its own negligence. Even with these contractual terms in place, retailers, grocery stores and restaurants can still be drug into litigation and pre-suit claims. The solution of tendering the defense in these instances, can still present challenges (along with litigation costs).

Sound contractual language can accomplish a great deal, but the risks of liability still abound with a retailer casting out vehicles across its locale for the purpose of conducting business. Of course the generally known theories of negligence are to be considered, but other theories of liability can present challenges for retailers, grocery stores and restaurants engaging in the use of delivery services. These theories include potential liability as a joint venture, bailment, apparent agency, and vicarious liability. Because of these various theories of recovery which can be pled against retailers, restaurants and grocery stores, entities in this line of work need to scrutinize all aspects of their relationship with that which is providing their delivery services.

For a grocery store or restaurant utilizing the services of Grubhub, Uber Eats, or Door Dash, it will be important to strictly stay within the lines of an independent contractor relationship. This will likely entail the assistance of counsel when drafting the contractual agreements, ensuring the inclusion of terms to indemnify the restaurant or grocery store from liability due to the actions of the drivers of the third party food delivery services. Such language should address potential food liability as well, and be cognizant of any unique aspects of law present in states where the restaurant or grocery store is operating. Then, if a retailer chooses to exert control over their delivery enterprise, they should take all precautions necessary to ensure the safest and most efficient system both for their employees and customers. This could involve diligent background checks, comprehensive training policies, regimented equipment maintenance procedures, and regular safety meetings.

This new era of retail is exciting as it allows the industry to translate into the future with new technologies and superior service for its customers. But it is not without its risks. Those involved in this emerging business practice need to ensure they account for and attempt to avoid all potential liability, but also be prepared to defend themselves against it.

Jason T. Vuchinich and Tiffany R. Winks are attorneys in Hall Booth Smith's Atlanta office. Mr. Vuchinich's practice focuses on general liability, retail and hospitality, and product liability. He has defended a wide range of clients, including national corporations, commercial property owners, and retail establishments through all stages of litigation. Ms. Winks' practice focuses on serving clients by providing a high-quality legal defense in the areas of general liability, premises liability, and construction litigation. She has successfully litigated a wide variety of cases at both the state and federal level.