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Amazon May Be Liable For Products Sold By Third Parties On Its Online Marketplace

According to the most recent economic projections, in 2019, Amazon.com will have a staggering 38% share of the U.S. e-commerce business. Earlier this year, responding to critics concerned about its influence on the market, Amazon CEO Jeff Bezos disclosed that independent merchants – i.e., third party sellers using Amazon's online marketplace – accounted for 58% of gross merchandise sales on the retail site.

Although those sellers may be "independent", there may be some momentum growing in the legal system to impose some accountability on Amazon for providing a marketplace for potentially unsafe products. Recently, a federal judge in Oxford, Mississippi, ruled that a plaintiff could seek to hold Amazon liable under Mississippi law for a house firm caused by a hoverboard sold by a third-party seller on Amazon's online marketplace. The ruling came in tandem with several lawsuits across the nation seeking to hold Amazon liable for injuries and property damage allegedly caused by items sold through the Amazon.com website by third party sellers.

In the lawsuit, State Farm Insurance company sued Amazon in an effort to recover about $600,000 in property damage after a hoverboard caught fire and destroyed its insured's house in March 2016. The devices, which became very popular with children in 2015, have been linked to multiple fires, and the U.S. Consumer Product Safety Commission estimates that more than 250 incidents of hoverboard overheating or fires have taken place since 2015.

State Farm alleged that Amazon knew that it was facilitating the sale on its platform of poor-quality, lithium-ion battery-powered hoverboards manufactured in China but failed to warn consumers about the dangers. Amazon argued that it was simply a service provider, like a credit card company, and should not be held liable for a third party's product defects.

The Court disagreed with Amazon, however, and held that its marketplace "seamlessly" facilitated the hoverboard's sellers to the Mississippi consumer. The Court also held that State Farm had sufficiently alleged that Amazon was negligent in failing to remove the hoverboards from its marketplace, and that Amazon negligently failed to warn of the risks after learning of other fires.

About half of all the items sold on Amazon.com's website are from third party sellers. Since January 1 2017, 3.3 million new sellers have joined Amazon marketplaces worldwide, the equivalent of 3,718 new sellers every day. With thousands of new sellers joining the marketplace every day, the Mississippi federal court's ruling that Amazon.com could face liability for the products sold by any of these sellers may have a profound impact on its online marketplace.

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Trial Judge Rules He Made A Mistake, Orders Partial New Trial On Columbo $70 Million Judgment

You can't make this up folks!

In a rare and disturbing change of direction, a trial judge sitting in Los Angeles County Superior Court responded to Universal's post-trial motions by declaring that he had "made a mistake" of such magnitude that it required vacating the $70 million judgment and ordering a partial new trial. This is the same trial in which the jury deliberated for only 90 minutes before delivering a unanimous 12-0 verdict in Plaintiffs' favor on all questions.

The judge alleged that his "mistake" was not taking an issue of contract interpretation away from the jury, based on a lack of conflicting extrinsic evidence. There was conflicting evidence on the meaning of the contract, but the judge ruled–months later – that the extrinsic evidence was not "conflicting" and therefore was a matter for the court, rather than the jury, to decide. What is particularly disturbing about the belated ruling is that during the jury trial, the judge took away other issues from the jury finding that there were no factual disputes, so he clearly was on top of this issue during the trial.

Moreover, there was no evidence the jury misinterpreted the contract because they were presented with four different reasons to rule in Plaintiffs' favor, only one of which might have been the way they interpreted the challenged contract term. In other words, there were at least three other reasons why the jury might have found for Plaintiffs. And, while the question of interpreting this contract term was included as a follow up question in the special verdict form, Universal asked (over Plaintiffs' objections and warnings) that questions be ordered such that the jury would skip the contract term interpretation question if they answered the previous question in Plaintiffs' favor.

Plaintiffs will appeal the ruling, amounting to another round in this heavyweight fight. Because the ruling is founded in the trial judge's subsequent interpretation of the contract term after the jury had been discharged, the court of appeal will review the issue using the most favorable de novo standard of appellate review. A win at the appellate court will reinstate the judgment. A loss will mean a rematch in the trial court. Stay tuned, the next event will likely occur in mid to late 2021!

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In This Issue

New California Rent Control – What You Need To Know

Assembly Bill 1482, the Tenant Protection Act, will put two notable statewide tenant protections in place until the bill automatically sunsets on January 1, 2030: (1) extend just cause eviction protections to tenants living in residential properties not currently covered by just cause eviction laws; and (2) prohibit owners from increasing rent by more than 5%, plus the rate of inflation, or 10% (whichever is less) more than once per 12-month period for tenants who have occupied the same unit for more than 12 months.

Currently, fewer than 20 jurisdictions within California have just cause eviction laws in place. In the absence of a local rent control ordinance or a fixed-term lease, landlords are permitted to terminate a tenancy unilaterally without stating a reason, and are only subject to advanced notice (30 days for tenants who have occupied the premises for less than one year, or 60 days for tenants who have occupied the premises for one year or more).

AB 1482 will prohibit landlords from terminating a residential tenancy without just cause and providing written notice of the just cause if a tenant has occupied the property for at least 12 months. "Just cause" includes either "at-fault just cause" or "no-fault just cause."

At-fault just causes include, but are not limited to: default in payment of rent; a breach of a material term of the lease; criminal activity by the tenant on the residential real property; assigning or subletting the premises in violation of the tenant's lease; or using the premises for an unlawful purpose.

No-fault just causes include, but are not limited to: intent by the property owner (or the owner's spouse, domestic partner, children, grandchildren, parents, or grandparents) to occupy the residential property; withdrawal of the residential real property from the rental market; or intent to demolish or to substantially remodel the residential real property.

Prior to terminating a tenancy for just cause that is curable, AB 1482 requires that the landlord first gives notice to the tenant with an opportunity to cure. Additionally, the new law requires under a no-fault just cause termination that the property owner do either one of two things: (1) assist the tenant with relocation by providing a direct payment to the tenant; or (2) waive in writing the payment of rent for the final month of the tenancy. The amount of the relocation assistance or rent waiver shall be equal to one month of the tenant's rent that was in effect when the owner issued the tenancy termination notice.

It should also be noted that residential real property subject to a local ordinance requiring just cause for termination, whether the ordinance has already been adopted or is adopted in the future, will only be subject to either the requirements under AB 1482, or the local ordinance if it is "more protective," but will not be subject to both state and local law regarding just cause evictions concurrently.

Rent Increases

Under AB 1482, a landlord is not permitted to, over the course of any 12-month period, increase the rental rate for a dwelling or a unit by more than 5%, plus the rate of inflation, or 10%, whichever is lower, of the lowest rental rate charged for that dwelling or unit at any time during the 12 months prior to the effective date of the increase. Additionally, landlords are not permitted to increase rent in more than two increments over that 12-month period.

However, AB 1482 does not institute any rent restrictions on vacant units. For any new tenancy, landlords can establish the initial rent. The rent increase restriction under AB 1482 applies only after the initial rental rate has been established.

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New Prohibition On Mandatory Arbitration Agreements For Employment Claims Goes Into Effect On January 1, 2020 – But Serious Questions Remain About The Law's Enforceability

On January 1, 2020, a new law will go into effect that could dramatically change the landscape of employment litigation in California. Among other things, this new law, section 432.6 of the Labor Code, prohibits employers from requiring employees to sign agreements to arbitrate employment related disputes and not only poses civil liability against violating employers, but it also makes violation of the law a misdemeanor. The new law states in part: "A person shall not, as a condition of employment, continued employment, or the receipt of any employment related benefit, require any applicant for employment or any employee to waive any right, forum or procedure for a violation of [the Fair Employment and Housing Act or the labor code]." In lay person's terms, that statutory language essentially means that after January 1, 2020, with few exceptions, California employers must litigate their work place related disputes with employees in court before a judge and jury, rather than in the much more employer-friendly and confidential arbitration forum. The law expressly states that it "applies to contracts for employment entered into, modified or extended on or after January 1, 2020", so while this statute has not yet been interpreted by any appellate court to clarify the meaning of this language, it appears likely that this law will spare agreements to arbitrate that employees executed prior to January 1, 2020. (continued on page 4)

Your Company Holiday Party; Tips To Limit Potential Liability

This holiday season, if your company is planning to throw a holiday party, here are a few tips you might consider to lessen the chances that those celebrations take a turn for the worst.

A number of California court cases demonstrate how employers create significant legal risks for themselves when they provide alcohol to employees or permit employees to consume alcohol at company sponsored events. The liabilities range from an employee injuring or killing someone due to drunk driving, to workers compensation cases where intoxicated employees injure themselves or other employees, to sexual harassment cases where an employee complains an intoxicated co-worker behaved inappropriately at the work event. There are a number of measures employers can take to limit the legal exposure caused by the poor choices of intoxicated employees.

For example, consider holding the party in the afternoon, at the worksite, without alcohol. If you plan on something more elaborate, plan to offer alternatives to alcoholic drinks, limit the amount of alcohol you provide and also consider limiting the types of alcohol served to just beer and wine. As a final measure, provide alternative transportation for your employees and guests.

No matter what measures you take as an employer hosting the party, make sure those limitations are enforced as no doing so also opens the door for liability.

For example, in the 2013 case *Purton v. Marriott International, Inc.* (2013) 218 Cal.App.4th 499, *Marriott* was found liable for deaths caused by its employee who drove drunk following *Marriott's* holiday party. The court in *Purton* found it significant that *Marriott* did not enforce the two-drink ticket rule it had implemented at its party.

In short, employers should be mindful that hosting a holiday party, or any company event, can be risky without careful planning. To that end, it is always a good idea for the employer to consult legal counsel prior to the party to make sure measures are in place that allow everyone attending the event a relaxed and enjoyable time.

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California Employers Can No Longer Include No-Rehire Provisions In Settlement Agreements

Every time a new year starts, new laws affecting California employers go into effect. One of the (many) laws going into effect this year includes a ban on "no-rehire" provisions in settlement agreements that California employers reach with aggrieved employees.

No-rehire provisions are very common in settlement agreements between employers and employees who have filed a claim against their employer in any forum. As part of a resolution of the employee's claim, employers typically include a provision prohibiting the employee from ever applying for a job with the employer anywhere in the country. If the employee tries to apply, the employer can immediately reject the application, and some provisions typically include language allowing an employer to fire the employee if they are ever hired by the company anywhere in the country.

As of January 1, 2020, these common provisions are no longer allowed in California. The reasoning for the ban is that alleged victims of harassment or discrimination may be discouraged from reporting issues in the workplace if they know they will never be able to work for the employer again. Therefore, to encourage people to report perceived workplace harassment or discrimination, and to strengthen California's aversion to restraints on trade, these provisions are prohibited.

It is important to note, however, that the provision only applies to employees who have filed a claim against their employer – meaning severance agreements offered to an employee at termination may still contain no-rehire provisions as long as the employee has not filed a claim against the employer and employers are not required to employ or rehire a person if there is a legitimate reason for terminating their employment.

The law also does not require employers to rehire any former employees or disgruntled employees, and does not prevent employers from agreeing to end a current employment relationship with a person who has filed a claim. Furthermore, if an employee files a claim against their employer, and the employer has made a good faith determination that the aggrieved employee engaged in sexual harassment, a no-rehire provision is still appropriate.

The end of every year is a good time to contact BKCG to learn more about this and other changes affecting employers. For starters, all employers should review their standard settlement agreements that they enter into with employees to make sure they do not run afoul of this new law by making sure settlement agreements do not include no-rehire provisions.

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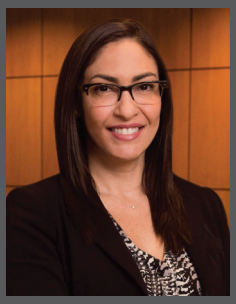
The Most Stringent Consumer Data Privacy Act In The Country Takes Effect In California On January 1, 2020

On June 28, 2018, the California legislature unanimously passed AB-375, known as the California Consumer Privacy Act of 2018. The Act grants Californians a list of new rights related to their personal information and how certain companies collect, use, and disseminate that information. The Act applies to companies that either (1) have gross revenues of over $25,000,000, or (2) buy, receive, or sell personal information of at least 50,000 consumers, or (3) derive at least 50% of their revenue from selling personal consumer information. The Act comes at the heels of recent data privacy scandals such as Facebook's Cambridge Analytica debacle.

The Act is far-reaching and grants consumers numerous new rights regarding their personal information including the rights, among others, to request from these companies:



- the specific personal information collected;
- the deletion of any information collected;
- the company's purpose for collecting or selling the information;
- the categories of third-parties with whom the personal information is shared; and
- to opt-out and cease the sale of the consumer's private information.

The Act thus affects companies such as Facebook and Google that generate revenue through online targeted advertising to consumers, as well as companies such as Experian and Oracle that collect consumer data for profit, requiring drastic changes to their business models and data collection procedures. These and similar companies must now assess whether the Act applies to their business, and then create systems and privacy policies to prepare for inevitable access, deletion, and information requests from consumers enabled under the Act.

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New Prohibition On Mandatory Arbitration Agreements For Employment Claims Goes Into Effect On January 1, 2020 – But Serious Questions Remain About The Law's Enforceability (continued from page 2)

Adding substantial uncertainty to this new labor code section is the fact that it may conflict with federal law known as the Federal Arbitration Act (FAA) that Congress enacted long ago to ensure the validity and enforcement of agreements to arbitrate. Federal law generally prohibits states from enacting laws that conflict with federal law on a given subject matter that "occupies the field" on that subject. When this conflict occurs, federal courts usually conclude that the federal law preempts the state law, rendering it unenforceable. Federal courts have already struck many states' laws that sought to limit parties' ability to arbitrate on preemption grounds, and thus it is anticipated that parties will challenge the enforceability of this new law on that same preemption doctrine. Indeed, California's former governor Jerry Brown had vetoed prior versions of this new law because he felt that a law which restricted employer's rights to compel employees to arbitrate plainly conflicted with the FAA and would get struck down by federal courts. Of a similar proposed law, former Governor Jerry Brown said "This bill plainly violates federal law".

Because California's legislature knew that the preemption doctrine poses a grave risk to this new law, the statute includes some language that says: "Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act". Since no court has interpreted this language yet, nobody truly knows what it means. Lawyers representing employers will undoubtedly argue that any arbitration agreement governed by the FAA, which is most of them, is not impacted by this law. Lawyers representing employees are expected to argue that this language was only intended to exempt FAA-protected agreements before this new law went into effect.

As demonstrated above, the new law and its impacts are both complicated and uncertain. California employers should speak with their counsel regarding what, if anything, they should do in light of this new law's implementation. For some employers, it may make sense to review prior arbitration agreements to ensure those agreements are governed by the FAA, and thus preserve the viability of arguing the new law does not apply. Other employers may determine that risks posed by the statute are too significant and elect to cease having their employees sign agreements to arbitrate after January 1, 2020. Every employer's situation and tolerance for risk is different, which is why every employer should consult with their lawyer to discuss the impacts of this law and how they want to respond to it.

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