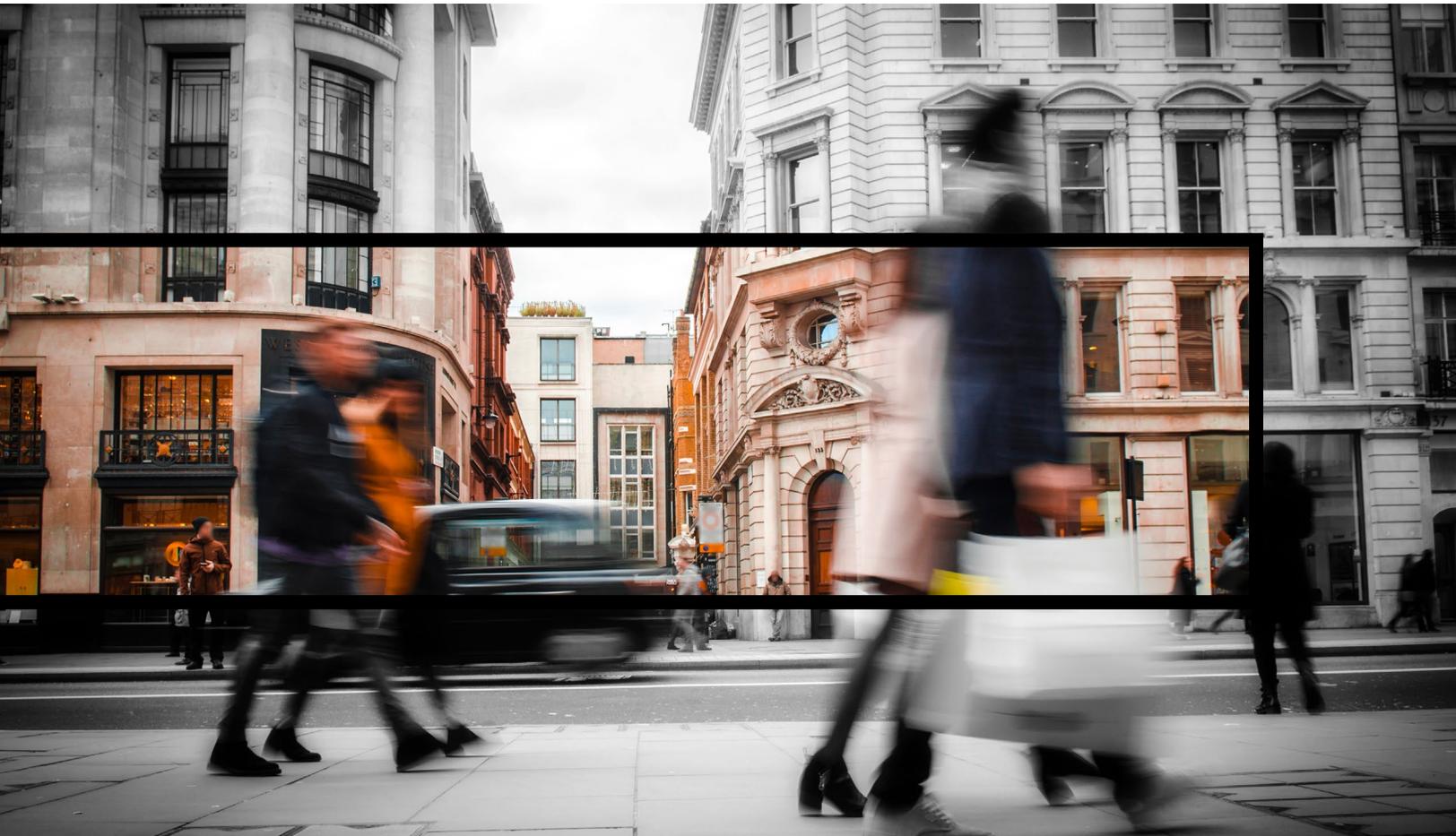


RETAIL INDUSTRY

2021 YEAR IN REVIEW



HUNTON
ANDREWS KURTH

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Dear Clients and Friends,

In 2021 it was essential for us all to think outside the box, and we have great results to show for it. These unprecedented times require innovation and creativity that have generated new opportunities and growth. Our lawyers have been right there with you—navigating new challenges and partnering with our retail clients through extraordinary circumstances.

Hunton Andrews Kurth advises more than 500 retail and consumer products clients across a broad spectrum of complex transactional, litigation and regulatory matters in the United States and worldwide. We have welcomed 75 new retail and consumer products clients in the past year, and we continue to grow and expand our work to serve the changing needs of our clients.

Our retail team comprises more than 300 lawyers across practices, advising well-known brands on complex, high stakes matters. We are proud to be recognized by *Chambers USA* as one of the top retail groups in the country, which reflects our exceptional client service and our deep understanding of issues facing the retail industry. Our lawyers are actively involved with organizations that support the retail industry through sponsorship, thought leadership, and business and legal advice. This allows us to stay ahead of the issues and offer proactive advice to our clients. We also have an established Retail and Consumer Products working group and steering committee that meet regularly to discuss developments in the industry.

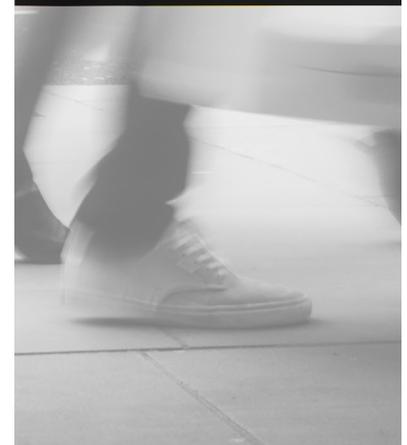
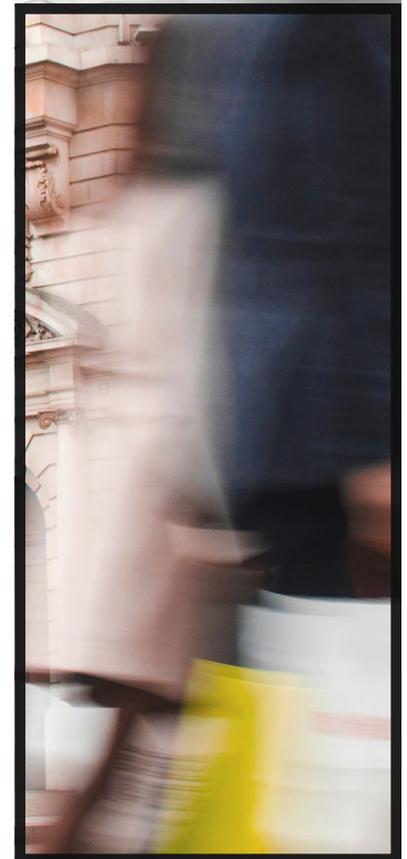
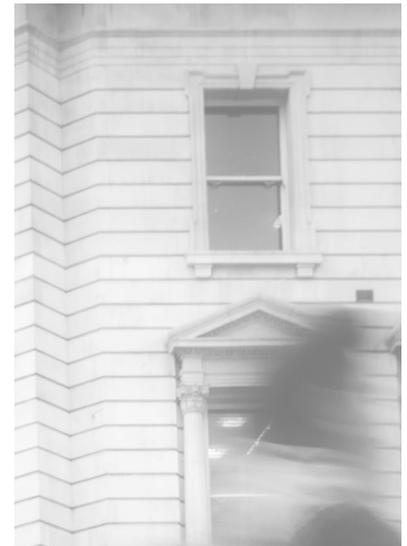
Our *2021 Retail Industry Year in Review* provides an overview of the issues and trends that impacted the retail sector in the past year, as well as a look at what retailers can expect in 2022. We take a close look at issues stemming from the COVID-19 pandemic, such as workplace vaccine mandates and supply chain disruptions, as well as a host of other topics, including recent M&A activity, evolving privacy and cybersecurity issues, e-commerce terms of use, blockchain in the IP space and many others.

I hope you will find our *2021 Retail Industry Year in Review* to be a valuable resource that provides useful commentary and analysis on the unique issues facing the retail industry. Our retail team stands ready to provide top-notch, innovative legal solutions to our clients as we embark upon a new year.


Wally Martinez
Managing Partner

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Businesses Are Not Experiencing the Wave of COVID-19 Exposure Lawsuits Initially Predicted

When the COVID-19 pandemic began, businesses anticipated the possibility of a tidal wave of personal injury and wrongful death lawsuits from employees, their family members and customers. However, as we approach the two-year mark in the pandemic, we have not seen these lawsuits materialize in the numbers anticipated. Instead of thousands of lawsuits, there have been only a few hundred—most of these against nursing homes and cruise lines associated with outbreaks in March and April 2020. Claims brought by or on behalf of employees who contracted COVID-19 in the course of their work have primarily been steered to the workers’ compensation system, where they belong. Attempts to avoid the exclusive remedy of workers’ compensation through intentional tort exceptions or expansive public nuisance theories have almost universally failed in the courts. Further, while a handful of “take-home” exposure claims by family members and suits by customers or visitors to premises have been filed, they have thus far met mixed success in the courts given the significant challenges

associated with proving causation and duty in the face of a ubiquitous and highly contagious virus.

Workers’ Compensation Coverage for COVID-19 and Exclusive Remedy for Employee Claims

It is estimated that more than 100,000 COVID-19-related workers’ compensation claims have been filed by employees or employees’ family members since March 2020.

In most jurisdictions, workers’ compensation is an employee’s exclusive remedy for a “workplace injury” or “occupational disease.” As a result, injured employees generally may not sue their employers in tort for personal injury or wrongful death. In the early months of the pandemic, it was not clear whether COVID-19 would be considered a compensable work-related injury in many states or, rather, an “ordinary disease

of life” like the flu, outside the scope of workers’ compensation coverage. However, since that time, many states through legislation or statements of policy or opinions from the applicable workers’ compensation commission have deemed COVID-19 covered by workers’ compensation. In these states and others, courts have dismissed lawsuits on the basis that workers’ compensation exclusivity bars employee tort claims. See, e.g., *Barker v. Tyson*, No. 21-223 (E.D. Pa.); *Diaz v. Fruit Harvest Family, Inc.*, No. 20CECG03608 (Cal. Sup.); *Evans v. Wal-Mart*, No. 2020LO03938 (Ill. Cir.).

Employee Attempts to Avoid Workers’ Compensation Exclusivity

Plaintiffs’ lawyers have formulated creative arguments in an effort to avoid workers’ compensation exclusivity and file lawsuits on behalf of employees. However, to date, the majority of these attempts have been unsuccessful in the courts.

Several suits have been filed asserting the “intentional tort” exception built into many states’ workers’ compensation statutes. While the scope of this exception varies from state to state, in most circumstances, an employer may be sued in tort when the employer acted with the intent to injure the employee, or with the belief or knowledge that injury was substantially certain to occur. In an attempt to invoke this exception, some plaintiffs have argued that their employer’s conduct with respect to COVID-19—e.g., failing to adopt or enforce safety protocols that complied with state or federal public health guidance—rose to the level of intentionally causing harm to employees. Such arguments have largely failed, as courts have found that employers’ conduct in these cases was at most grossly negligent or reckless, and did not amount to an intentional tort. See, e.g., *Lathourakis v. Raymours Furniture Co.*, No. 59130/2020 (N.Y. Sup.);

Evans v. Wal-Mart, No. 2020LOO3938 (Ill. Cir.). In addition, at least one state—Arkansas—has amended its workers’ compensation law to clarify that requiring an employee to perform work when exposure to COVID-19 is possible, likely or certain does not qualify as intentional conduct. Ark. H.B. 1488.

A less common approach to avoid workers’ compensation exclusivity has been for employees to bring lawsuits against their employers based on a “public nuisance” theory. These cases have typically alleged that an employer has caused a public nuisance by creating an environment where COVID-19 can rapidly spread. Courts have also rejected these claims, finding that plaintiffs have failed to plead the “special injury” required to assert a claim for public nuisance. See, e.g., *Massey v. McDonald’s*, 2020CHO4247 (Ill. Cir.); *Wicker v. Walmart Inc.*, No. 5:2020cv02166 (C.D. Cal.). Some courts have further held that public nuisance claims brought by employees seeking monetary damages—as opposed to merely injunctive relief—are barred by workers’ compensation exclusivity. *Hess v. United Parcel Service Inc.*, No. 3:2021cv00093 (N.D. Cal.).

Take-Home Exposure and Customer Lawsuits

COVID-19 exposure claims brought against businesses by nonemployees have also seen little success thus far, and have been filed with significantly less frequency in 2021 than at the start of the pandemic. Household members of employees have attempted to recover for “take-home” claims against employers, where they allege exposure to COVID-19 allegedly “brought home” by the employee from his or her place of work. Since the first take-home lawsuit was filed in June 2020, less than 20 such claims have been filed. Courts have dismissed some of these cases, finding that there is no “special relationship” between the employer and

the family member that would give rise to a duty of care. *Estate of Madden v. Southwest Airlines*, No. 1:21-cv-00672-SAG (D. Md.); *Iniguez v. Aurora Packing*, No. 20-L-000372 (Ill. Cir.).

Less than 50 COVID-19–related personal injury or wrongful death lawsuits were filed by customers in 2021, none of which allege exposure to COVID-19 against a retailer. Moreover, although dozens of claims were filed against nursing homes in 2020, 2021 did not continue to see the same trend. Rather, the vast majority of nonemployee COVID-19 exposure cases in 2021 were brought against cruise lines by passengers for injuries incurred on cruises between February and April 2020. One possible explanation for this trend is that the ubiquity of the virus has made it challenging for plaintiffs to plausibly allege that they contracted the virus at a particular defendant’s business, as opposed to any other business or public space, at work or in their own homes. In this context, cruise ships provide a unique opportunity for plaintiffs to adequately plead causation, given their confined environment.

Nonetheless, plaintiffs in cruise line cases have still faced challenges, both with respect to causation, e.g., *Birkenholz v. Princess Cruises*, No. 2:20-cv-02963 (C.D. Cal.), as well as on other fronts. In particular, because COVID-19 safety protocols have changed—and continue to change—over time as understanding of the virus evolves, it is difficult for plaintiffs to prove that a defendant violated an established standard of care. For example, a defendant may point to CDC guidance for the time period at issue to demonstrate that it was not yet under a duty to adopt certain protocols, such as masking, quarantining or testing. See *Hachinsky v. Princess Cruises*, No. 2:20-CV-02963 (C.D. Cal.).

Finally, claims by retail customers have simply not materialized. In the last year, retailers have not seen any customer claims arising from exposure to COVID-19 at their businesses. The few COVID-19–related claims filed against retail pharmacies in 2021 have alleged injuries unrelated to exposure to the virus—for example, injuries arising from a self-administered COVID-19 test. *Nobre v. Holiday CVS LLC*, No. 2021cv60879 (Fla.



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“strength lies in its
business-friendly approach.”

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Cir.). In addition to the challenges associated with proving causation, the nonexistence of customer claims may be due in large part to COVID-19 business immunity laws. Since the start of the pandemic, at least 30 states have passed immunity legislation, providing liability protection for businesses in relation to COVID-19 claims. Although coverage varies from state to state, these laws generally prohibit lawsuits alleging COVID-19 exposure absent a showing of gross negligence, willful misconduct or failure to follow applicable public health orders. Thus, even where customers can adequately allege causation, there are still significant hurdles to establishing liability for businesses.

Conclusion

Although the COVID-19 pandemic has catalyzed a vast and diverse body of litigation, retailers and other businesses have not seen the tidal wave of personal injury and wrongful death lawsuits that were initially predicted. This is due in large part to states' workers' compensation regimes, which generally bar tort claims by employees for work-related injuries. Novel arguments raised by plaintiffs over the last two years have largely failed to circumvent that framework.

Furthermore, pleading causation and breach of duty in the context of COVID-19 has proven particularly challenging for many plaintiffs due to the pervasive nature of the virus and experts' evolving understanding of its transmissibility. While the statute of limitations for COVID-19 lawsuits will be two to three years in most jurisdictions, and thus has not yet expired even for those claims arising at the very beginning of the pandemic, a future onslaught of lawsuits seems unlikely given the lack of early success.

With these limitations in mind, the best litigation avoidance strategy for businesses remains compliance with applicable state and federal guidance, even as it evolves and becomes more difficult to enforce in a fatigued population. Businesses should continue taking reasonable measures to protect their employees and customers from exposure to COVID-19, including by adapting protocols as necessary to track the best practices set forth in changing public health guidance. To the extent the tidal wave or even a trickle of COVID-19 lawsuits against retailers materializes over the next few years, demonstrating compliance with operative federal, state and local requirements related to COVID-19 remains the best defense to personal injury and wrongful death claims. ■



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What You Need to Know About the Enforceability of e-Commerce Terms of Use

The use of retail websites and mobile applications to make online purchases continued to experience rapid growth in 2021, fueled by the COVID-19 variants and rapid advances in technology. Those consumers who were accustomed to shopping in brick-and-mortar establishments before the pandemic, discovered the convenience and unlimited array of choices made possible through e-commerce. Even as pandemic restrictions began to ease, many consumers continued to shop from the comfort of their own living rooms, having overcome the initial friction associated with first-time purchases through a particular e-commerce site. Revenue from retail e-commerce in the United States alone was estimated at roughly \$768 billion in 2021 and is forecasted to exceed \$1.3 trillion by 2025.¹

The growth of e-commerce comes with a myriad of risks for retailers,

including class action claims involving data breaches² and alleged violations of consumer privacy rights³, Title III of the Americans with Disabilities Act⁴, Telephone Consumer Protection Act⁵, Section I of the Sherman Antitrust Act⁶, among other examples. Some of these risks, and retailers' associated liability and exposure created by such risks, can be mitigated by putting into place binding and enforceable contracts with users of e-commerce websites and mobile applications in the form of online "terms of use." This article examines two significant areas of exposure for online retailers related to the enforceability of online terms of use.

Terms of Use must be affirmatively accepted by users.

In the United States, the creation of enforceable online terms of use (Terms of Use) requires, among

other things, the affirmative manifestation of assent from the user. Terms of Use presented in the form of a "clickwrap" agreement have replaced earlier forms of electronic contracting. The defining feature of clickwrap agreements is that users affirmatively manifest their acceptance of the Terms of Use by clicking "I agree" or checking a box next to an attestation acknowledging acceptance of the Terms of Use. Currently, clickwrap agreements represent the most prevalent form of "wrap" agreement, and have become the gold standard for agreeing to Terms of Use in connection with e-commerce transactions.

More recently, however, some retailers have shifted to a relatively new form of electronic contracting, referred to as the "sign-in wrap" agreement. The key characteristic of the sign-in wrap is the use of a dual-purpose button (e.g., a button to "Complete Purchase" or "Sign-In") to both accept the Terms of Use and perform a separate function, such as signing into the user's account or completing a purchase. This shift represents retailers' strong desire to reduce friction in the customer experience by requiring fewer clicks to complete a particular transaction. Generally, sign-in wrap agreements will be enforced only if: (1) a reasonably prudent user would be on notice of the existence and contents of the Terms of Use, and (2) the user proceeds to click on the dual-purpose button with the intention of being bound to such Terms of Use. Whether a sign-in process satisfies the first prong requires a fact-specific analysis of the particular details of the process (e.g., placement of the attestation, font size and color, proximity of



the Terms of Use, etc.). When presenting Terms of Use in the form of a sign-in wrap agreement, retailers should be aware that less friction in the acceptance process generally results in more risk that the sign-in wrap will not be enforceable against the user.

To mitigate enforceability risks associated with the sign-in wrap style of acceptance, retailers should consider each of the following questions in the context of their acceptance process:

- Is the attestation of acceptance clear and conspicuous, relative to the rest of the page?
- Is the attestation positioned in close proximity to the dual-purpose button?
- Does the attestation include a hyperlink to the Terms of Use?
- Is the hyperlink visually distinct from the rest of the attestation?
- Are users required to re-accept the Terms of Use upon each amendment?

Of course, a strong sign-in process is meaningless unless it is part of an appropriate, risk-based electronic signature process that includes systems and procedures to manage version control, user authentication and record retention. When designing and implementing any Terms of Use acceptance process for e-commerce sites, retailers should facilitate close coordination between the application development teams and legal counsel to ensure that a positive user experience is harmonized with the relevant contract formation requirements.

Not all binding arbitration and class action waiver provisions are, in fact, binding.

The benefits of including binding arbitration and class action waiver provisions in Terms of Use are compelling to many online retailers. Individual arbitration sessions are generally less costly than litigation and are concluded more quickly and efficiently than litigation. Moreover, arbitration proceedings are

confidential, such that retailers may avoid the negative publicity and potential reputational harm that may be associated with litigation, the threat of which may induce retailers to quickly settle even frivolous claims spearheaded by plaintiffs' firms. However, several factors may impact whether courts will enforce binding arbitration and class action waiver provisions in Terms of Use. This section discusses best practices designed to ensure that binding arbitration and class action waiver provisions are enforceable against consumers in disputes with retailers, which are governed by Terms of Use.

The Federal Arbitration Act (FAA) was enacted by Congress on February 12, 1925. The FAA gives a party to an arbitration agreement the right to ask the court to compel arbitration as long as the claim falls within the scope of arbitration. The FAA preempts inconsistent state laws and applies regardless of whether the lawsuit is filed in a state or federal court, as long as the claim involves interstate commerce.⁷ In a series of watershed decisions, the US Supreme Court confirmed the validity and enforceability of binding arbitration and class action waiver provisions in Terms of Use. These decisions, along with several lower courts' decisions that followed, highlight certain features of binding arbitration and class action waiver provisions, the presence of which are more likely to result in enforceability of these provisions in a retailer's Terms of Use. These best practices include the following:

Include class action waiver within the arbitration agreement rather than as a

standalone provision in the Terms of Use to ensure FAA preemption applies.

- Include clear and conspicuous language that puts the consumer on notice that the Terms of Use include a binding arbitration and class action waiver provision.
- Location of arbitration proceedings should be held in a convenient location for the consumer.
- Consider language that helps the consumer offset the financial burden of arbitration by offering to pay for the costs of arbitration and/or their reasonable attorneys' fees.
- Consider providing for a limited opt-out right if exercised within a reasonable period following acceptance of the arbitration agreement.

These specific issues are part of the overall contracting considerations with respect to Terms of Use. When creating or reviewing Terms of Use, online retailers should give close consideration to how Terms of Use and binding arbitration and class action waiver provisions are presented to consumers to ensure that each will be enforceable against the consumer in the event of a dispute. Finally, once Terms of Use are posted, online retailers should continue to periodically update their Terms of Use to conform to changes in law. ■

¹ <https://www.statista.com/outlook/digital-markets>

² See, e.g., *Barr v. Drizly*, 2021 U.S. Dist. LEXIS 217158 (D. Mass. Nov. 4, 2021); *McCreary v. Filters Fast, LLC*, 3:20-cv-595-FDW-DCK (W.D.N.C. July 19, 2021)

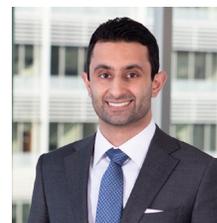
³ See, e.g., *In re: Zoom Video Communications, Inc. Privacy Litigation*, Case No. 5:20-cv-02155-LHK (N.D. Cal. Oct. 21, 2021)

⁴ See, e.g., *Mendizabal v. Nike, Inc.* Case No. 1:17-cv-09498 (S.D.N.Y. 2017)

⁵ See, e.g., *Facebook v. Duguid*, 141 S.Ct. 1163 (2021); *LaGuardia v. Designer Brands, Inc.*, No. 2:20-cv-2311 (S.D. Ohio Sept. 9, 2021)

⁶ See, e.g., *Thompson v. 1-800 Contacts, Inc.*, Case No. 2:16-cv-01183 (D. Utah 2018)

⁷ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)



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Supply Chain Disruption? Don't Overlook Insurance

Thanks to a confluence of unrelated events, including pandemic, ice storms, wildfires and drought, consumer goods like furniture, groceries, toys and electronics, among other things, and their component parts, have been increasingly difficult to obtain. Despite growing demand for these products and materials, businesses have been unable to meet manufacturer and end consumer needs due to the ongoing global supply chain disruption.

Supply chain disruptions can have immediate and long-term ramifications. In some instances, it can take years for a company to fully recover from a supply chain disruption, and the potential financial implications can be staggering. While many businesses may already have protection against these losses, for those that do not, the supply chain disruption of 2021 should serve as a wakeup call to develop an effective risk management solution.

One such solution is insurance, and many businesses may already have this protection among the wide-ranging

coverages that comprise their existing all-risk commercial property and business income insurance policies. Below we explore how these coverages can help mitigate present and future supply chain risks.

The Risks

The global supply chain consists of interrelated industries of manufacturing, transportation and logistics that manufacture and move component parts and finished products from their points of manufacture to end consumers. The global supply chain management market size value was \$15.85 billion in 2019 and is projected to reach \$37.41 billion by 2027.¹

Global and local supply chains can be affected by natural disasters, transportation failures, geopolitical instability, price hikes and cyberattacks, among myriad other things. Before the COVID-19 pandemic, the leading cause of supply chain disruption was unplanned IT outages. However, a combination of

factors during the last year, including the COVID-19 pandemic, natural disasters and extreme weather such as the ice storms in Texas, droughts in Asia and wildfires in California, has affected suppliers' and transporters' ability to keep up with demand, resulting in significant supply chain disruptions that have affected countless industries.

These supply chain disruptions have underscored the importance that policyholders be mindful of how unforeseen risks can cause disruptions that lead to massive business losses and extra expenses. For example, Amazon warned that its entire fourth-quarter profit could be wiped out by a surge in the cost of labor and fulfillment.² Apple said it lost \$6 billion in sales because it cannot meet consumer demand.³ Ultimately, for any company, significant supply chain disruptions can reduce revenue, cut into market share, threaten production and distribution, inflate costs and eventually affect the company's bottom line.

Fortunately, insurance may provide coverage for supply chain-related claims.

The Relevant Insurance Coverages

Contingent Business Interruption Coverage

In the wake of a supply chain-related loss, policyholders should review their commercial property and business income insurance policies as a potential source of coverage. These policies often include, among other potentially applicable coverages, coverage specifically applicable to financial loss caused by a disruption in the insured's upstream and downstream supply chain. This coverage is typically referred to as contingent business interruption (CBI) coverage.

Generally, CBI protects against lost profits resulting from an interruption of the insured's business that results from an

event affecting the property of a supplier or customer of the insured business. CBI requires that the event that causes the disruption be a covered cause of loss under the policy. The microchip shortage that has been ongoing since early 2021 is a good example. According to investigative reports, the microchip shortage can be traced back to at least four key events: the deep freeze in Texas that forced closure of several microchip factories, a fire at a Japanese microchip factory, a drought in Taiwan that limited access to water needed to produce microchips and the COVID-19 pandemic. If any of these causes is a covered cause of loss under the insurance policy of the affected business, its CBI coverage should apply to the resulting business income loss.

CBI coverage can also apply to losses caused by damage to a “dependent property,” which is one on which the policyholder relies to operate its business, such as a distribution center. For example, if a policyholder’s business is disrupted

because a hurricane damages a supplier’s factory and the supplier cannot deliver its goods or a fire destroys the policyholder’s distribution center and prevents the policyholder from selling its products, CBI may apply to cover the resulting loss. Likewise, CBI may apply if the damage occurs to property of another that the insured business relies upon to attract customers to the insured’s business.

As with any insurance coverage, policyholders should carefully review their policies to understand the scope of their CBI coverage as these coverages can vary greatly between different policy forms. In particular, policyholders should consider whether there is a waiting period before coverage kicks in and whether coverage requires a complete cessation of the policyholder’s operations or whether a partial interruption or slowdown is enough. If, for example, there is a long waiting period in the policy, the policyholder is responsible for lost profits until the waiting period expires and coverage incepts.

In addition, policyholders should look to which suppliers trigger coverage—some policies only cover damage suffered by direct suppliers or customers, while others include indirect suppliers or customers. Different policies also provide different sublimits depending on the type and tier of a supplier. For example, if your company is part of a complex supply chain, you are more likely to need coverage that includes a high sublimit for indirect suppliers. But if you are at the early stages of a supply chain, your company would be better served by coverage that extends to downstream customers.

Policyholders also should carefully examine any potentially applicable exclusions, including, for example, virus exclusions and extreme temperature exclusions. Collectively, and individually, these provisions can substantially transform the scope of coverage following a supply chain disruption.



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Extra Expense Coverage

In addition to covering losses of business income, first-party all-risk policies typically cover the increased operating expenses that a policyholder incurs in order to continue its business despite a disrupting event. Some examples of these “extra expenses” include the added costs to receive goods for sale or replacement goods and increased transportation, labor and logistical costs.

To facilitate coverage for extra expenses, as with any other claim, policyholders should keep accurate and contemporaneous records of the extra expenses incurred to support a potential claim.

Supply Chain Coverage

The increased risks posed by today’s global supply chain have also led to specialty “supply chain insurance.” Though there is not yet any “standard” form for “supply chain insurance,” this coverage is designed generally to provide an “all risks”-type coverage that will reimburse a policyholder for lost profits and related costs that are caused by the disruptions in the supply chain. Like the CBI coverages discussed above, this policy

type is designed to provide coverage even if the insured business has not suffered any physical damage. In addition, these coverages are readily customizable to include coverage for losses caused by events such as government-related disruptions, social unrest, pandemics, labor issues, production process issues and financial issues.

As we embark on 2022, we do so under the continued strain caused by 2021’s supply chain disruptions. Companies that experienced losses in 2021 should consult their insurance and assess coverage for existing losses. For companies without available coverage, they should consult their insurance professionals about adding supply chain and contingent coverages to their renewing policies. In all cases, however, policyholders should understand what coverage they have available and, when loss occurs, consult with an insurance professional to ensure that all available coverage is utilized for maximum recovery. ■

¹ <https://www.businesswire.com/Global-Supply-Chain-Management-Market-2020-to-2027-by-ResearchAndMarkets.com>

² <https://www.bloomberg.com/news/articles/2021-10-28/amazon-projects-holiday-sales-that-suggest-pandemic-boom-is-over>

³ <https://apnews.com/article/technology-business-earnings-apple-inc-dd75298b973ecd8aef9ba45aa>



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Treble Damages Without Setting Foot in Massachusetts!?!?

In today's world, business is conducted in all manner of ways, over vast distances and across invisible borders. Retailers working to expand their reach to consumers nationwide or partnering with vendors and other businesses across state lines have long known that doing so likely means that their conduct becomes subject to the laws of the jurisdiction where their counterparty is located. This, of course, makes intuitive sense in the context of traditional business dealings that are in person, or at least consist of regular contact and conduct within the counterparty's jurisdiction.

But, times have changed and—particularly in the context of the COVID-19 pandemic—business is increasingly conducted through remote and virtual means. In those cases where the business relationship is based entirely on these electronic contacts, does a retailer need to worry anymore about the laws in its counterparty's jurisdiction? What happens, for example, when a retailer from

Mississippi intentionally breaches a contract with its web designer in Massachusetts, or posts a defamatory review about its Massachusetts web designer on its website, hosted on servers in and owned by an Oregon company—all without ever selling a product or setting foot in Massachusetts, and even contractually choosing Mississippi law to govern? Can the Massachusetts web designer still avail itself of Massachusetts' unfair and deceptive trade practices statute, Mass. Gen. Laws ch. 93A (Chapter 93A), because the alleged conduct occurred “primarily and substantially” within Massachusetts? See Mass. Gen. Laws ch. 93A, § 11. The answer may not be so obvious.

It is not uncommon for business litigation matters in Massachusetts to include claims under Chapter 93A (whether affirmative or counter claims). The regular inclusion of Chapter 93A claims is understandable as a potentially significant leverage point in any litigation. The penalties available



for a successful Chapter 93A claim can be two or three times actual damages, plus attorney fees—see Mass. Gen. Laws ch. 93, § 11—making viable claims very credible settlement tools, while deterring future improper conduct. The statute, of course, defines the type of conduct subject to its governance. However, Massachusetts courts have a long history of interpreting the statute rather broadly to encompass a more wide-ranging scope of conduct than may be obvious on the face of the statute—including simply breaching a contract with the intention to create leverage for renegotiation. See, e.g., *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, 55 (1st Cir. 1998) (Chapter 93A violation found where defendants' “wrongful purpose was to extract a favorable settlement from [plaintiff] for less than the amount [defendant] knew it owed by repeatedly promising to pay, not doing so, stringing out the process, and forcing [plaintiff] to sue”); *Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc.*, 754 F.2d 10, 17–19 (1st Cir.1985) (Chapter 93A violation found where payment withheld as a “wedge” to enhance bargaining power); *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 474 (1991) (“conduct in disregard of known contractual arrangements and intended to secure benefits for the breaching party constitutes an unfair act or practice for c. 93A purposes”).

Further worry for an out-of-state retailer subject to a Chapter 93A claim is that Massachusetts courts have uniformly held that challenges to “primarily and substantially” involve fact-based inquiries. As such, Chapter 93A claims routinely survive a motion to dismiss simply if the verified

complaint simply alleges harm to a plaintiff located in Massachusetts and that the injury—such as financial harm or reliance on a misleading statement—occurred in Massachusetts. Achieving this relatively low bar for pleadings, the litigation regularly moves into the expensive and invasive discovery phase, putting greater pressure on retailer defendants to settle regardless of the merits. See, e.g., *Pegasystems, Inc. v. Appian Corp.*, 424 F. Supp. 3d 214, 224 (D. Mass. 2019); *Jofran Sales, Inc. v. Watkins & Shepard Trucking, Inc.*, 216 F. Supp. 3d 206, 216 (D. Mass. 2016). Retailers, and many other companies today, enter into all manner of business arrangements without ever setting foot themselves or with their products in the jurisdiction of their counterparty. Meetings are handled through telephone, Zoom and emails. Contracts, invoices, orders and instructions are passed back

and forth electronically. Even a retailer’s “Massachusetts” vendor, such as the web designer, may not do anything more in Massachusetts than call its workforce in India to design the website, which is delivered to the retailer’s contracted server platform in Oregon. Surprisingly to many businesses outside Massachusetts, simply housing the alleged subject matter of the dispute in Massachusetts can defeat a motion to dismiss. See, e.g., *KPM Analytics N. Am. Corp. v. Blue Sun Sci., LLC*, No. 4:21-CV-10572-TSH, 2021 WL 2982866, at *16–17 (D. Mass. July 15, 2021) (plaintiff adequately alleged that injury occurred primarily and substantially in Massachusetts where complaint asserted that plaintiff was based in Massachusetts, “where the disputed trade secrets are electronically stored”).

Given the ease and proliferation of web-based business, the age of Zoom and virtual meetings, and cross-border

business dealings, retailers and other businesses alike need to look carefully at the potential consequences of statutes like Massachusetts’ Chapter 93A, which they may not normally think they would be subject to, when no traditional business has been conducted in Massachusetts. Of course, on the flip side, for retailers and businesses located in Massachusetts, Chapter 93A may be just the leverage needed to bring a dispute to a favorable resolution. ■



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The Hunton Andrews Kurth litigation team developed the interactive **COVID-19 Complaint Tracker**, an infographic-based tool that tracks coronavirus litigation at the federal and state levels. The tracker is an authoritative resource on the number and types of litigation related to COVID-19 and has received extensive media attention.





CPSC's Aggressive Enforcement in 2021 Signals Increased Regulatory and Product Liability Risk for Retail Industry

Introduction

The Consumer Product Safety Commission (CPSC) ramped up its enforcement efforts in 2021, raising regulatory and litigation risk for the retail industry. 2021 saw the return of civil penalties after a two-year hiatus, and also brought the first-ever criminal prosecution of a company for failure to report a product defect under the Consumer Product Safety Act (CPSA). The CPSC also facilitated over 220 voluntary recalls over the course of 2021—slightly less than its historic average, but still in line with expectations particularly given ongoing administrative delays caused by COVID-19.

The highest-profile CPSC action of the year was its public spat with Peloton over its refusal to recall its Tread+ machines. The CPSC's handling of the Peloton issue suggests that the agency may now

expect companies to report patterns of customer misuse or disregard of warnings as “product hazards.”

The CPSC's reinvigorated—and ultimately less predictable—approach to enforcement should be on every retailer's radar heading into 2022.

The CPSC's 2021 Civil Penalties and Historic Criminal Penalty

Following a nearly two-year drought in civil penalties, in January 2021 the CPSC issued a \$12 million penalty against Walter Kidde Portable Equipment for failure to report alleged defects in fire extinguishers.¹ In February 2021, Cybex International was hit with a \$7.95 million fine for failure to report alleged defects in two of its exercise machines.²



The most significant penalty news of 2021, however, was the first-ever corporate criminal prosecution in the nearly 50-year history of the CPSC. The Department of Justice announced on October 29, 2021, that Gree Electric Appliances' United States subsidiary agreed to plead guilty to one felony count for willfully failing to report a defect in its humidifiers, which allegedly caught fire. The Gree defendants agreed to pay more than \$91 million in criminal fines and provide restitution to victims of fires caused by the humidifiers. Two Gree executives have also been criminally charged and await trial.

The CPSC's Aggressive Unilateral Product Safety Enforcement in 2021

The CPSC has long cast itself as a cooperative partner in product safety, working with companies to issue joint press releases regarding recalls and offering flexibility to companies that have attempted to meet their reporting obligations in good faith. But that image has shifted in recent years as the CPSC has more frequently made public its disagreements with certain companies over the handling of product safety issues.

In April 2021, for example, the CPSC issued a unilateral warning to consumers to stop using Peloton's Tread+ following reports of a toddler's death. After the CPSC issued its warning (including actual video of a child being sucked under the machine), Peloton publicly accused the CPSC of being “inaccurate and misleading.” Less than two weeks later, Peloton

announced that it “made a mistake” and issued a recall. In effect, the unilateral warning allowed the CPSC to control the narrative and forced Peloton to defend itself in the court of public opinion.

The Peloton dispute also suggests that the CPSC may now be looking differently at what constitutes a “reportable defect.” Peloton initially defended its decision not to recall the Tread+ by pointing to its very clear warnings to keep children and pets away from the machine. But the CPSC’s treatment of the Peloton issue suggests that the agency believes that a pattern of consumer misuse or disregard for a warning nevertheless constitutes a reportable product hazard.

The CPSC’s view of pervasive product misuse as a “product hazard” was also on display in September 2021 when the agency announced the voluntary recall of more than 3 million “Boppy” infant loungers following reports of eight infant deaths. The loungers were never marketed as infant sleep products and included warnings against such use, but parents still used the products as sleep products. Despite the disregard for Boppy’s explicit warnings, the company and the CPSC agreed that the products should be recalled—suggesting that the CPSC’s enforcement focus may be on “reasonably anticipated” uses, not simply advertised uses.

Looking Ahead to 2022 and Beyond

Heading into 2022, we expect civil penalties to once again become the norm for the CPSC. Less certain is whether the Gree prosecution signals a CPSC appetite for increased criminal enforcement or merely a unique circumstance of historically egregious conduct. That said, in November 2021, CPSC Commissioner Peter Feldman issued a public statement expressing concern that the civil penalties

authorized by the CPSA “may leave CPSC with insufficient tools to enforce against large e-commerce platforms, some of which measure their annual revenue in the hundreds of billions of dollars.”³ If other commissioners share this view, they may increasingly lean on criminal prosecution and penalties to put pressure on larger companies.

Following the Peloton and Boppy recalls, the retail industry should also be aware that injuries caused by a consumer’s disregard for even clear and explicit warnings may be reportable. This approach challenges traditional notions of reportability and should prompt all companies—even those with robust compliance programs—to look closely at how they track and evaluate product incidents.

Finally, companies should understand that increased CPSC enforcement will raise the risk of product liability litigation in 2022 and beyond. Lawsuits quickly followed Peloton’s public dispute with the CPSC. In the months since the recall, Peloton has been named in at least three personal injury suits involving injuries to children.⁴ Peloton also faced a consumer class action (which has since settled) alleging that Peloton’s advertisements falsely indicated to consumers that the product was safe to use around children.⁵ Plaintiffs’ lawyers often seek to equate a recall with proof of a defect in front of a jury—or look to characterize a company as a “bad actor” in the case of a delayed report. In short, where the CPSC goes, plaintiffs’ lawyers tend to follow as they look to capitalize on large pools of plaintiffs. ■

¹ *United States v. Walter Kidde Portable Equipment Inc.*, No. 1:20CV208 (M.D.N.C. Jan. 4, 2021).

² *In re Cybex Internat’l, Inc.*, CPSC Docket No. 21-C0001, Settlement Agreement (Feb. 11, 2021).

³ <https://www.cpsc.gov/about-cpsc/Commissioner/Peter-A-Feldman/Statement/Statement-of-Commissioner-Peter-A-Feldman-New-Penalty-Caps-May-Provide-Insufficient-Deterrence-Against-the-Largest-E-Commerce-Platforms>

⁴ See *Saadoun v. Peloton Interactive, Inc.*, No. 516118 (NY Sup. Ct. July 1, 2021); *Greene et al. v. Peloton Interactive Inc.*, No. 4:21-cv-00215 (N.D. Fla. May 25, 2021); *Williams v. Peloton Interactive, Inc.*, No. 4:21-cv-2525 (S.D. Tex. August 5, 2021).

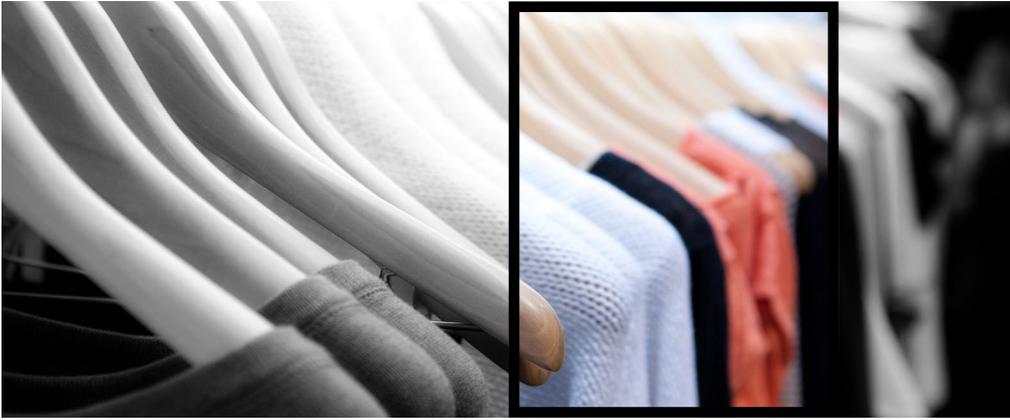
⁵ *Albright v. Peloton Interactive, Inc.*, No. 3:21-cv-02858 (N.D. Ca. April 20, 2021).



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Chasing Compliance—A Year of Uncertainty in COVID-19 Workplace Safety Law

Employers who hoped that 2021 would bring more consistent—and consistently reliable—requirements and guidance on COVID-19 risk mitigation measures than we had in 2020 were disappointed. 2021 was every bit as confounding as 2020. The first half of 2021 saw a mad rush for vaccinations, which suggested the final US vaccination percentages would be high. By fall, however, it was clear that the vaccine-reluctant would be hard to persuade to change their minds. Government and private employers tried “carrot” approaches—prizes, bonuses and health premium reductions to name a few—and “stick” approaches, primarily vaccine mandates. The “carrots” were not attractive enough and vaccine mandates caused an avalanche of religious reasonable accommodation requests overwhelming employers’ human resources departments. This set the stage for President Biden’s Executive Order 14042, “Ensuring

Adequate COVID Safety Protocols for Federal Contractors” (the EO) and the Occupational Safety and Health Administration’s COVID-19 Vaccination and Testing Emergency Temporary Standard (the ETS).

The EO and the ETS were announced as vaccine mandates. However, both included reasonable accommodation carve-outs for vaccine mandates and the ETS permitted employers to use the option of weekly testing or vaccination. Employers covered by the EO did not have to follow the ETS. All private employers with 100 or more employees who were not covered by the EO had to follow the ETS.

Employers had difficulty divining the manner in which these legal requirements would meaningfully change vaccination percentages. The ETS vaccine-or-test requirement appeared to incentivize vaccination because the ETS provided that employees would have to pay



for the cost of any COVID tests. But, employees only would be obligated to pay if no other legal requirements conflicted. Many states have potentially applicable laws that require employers to pay for mandatory medical tests. Unions were predictably unwilling to agree to employee payment requirements. And, in December, the administration announced new HHS rules that would require health plans to pay for up to eight COVID-19 tests per month, none of which could be used to comply with employer COVID-19 testing. As such, employers who sponsor self-insured plans would end up paying for 12 tests per month (eight through the health plan and then four for the weekly tests). To avoid legal risk, employers also needed to treat time spent testing as compensable under federal and state wage-and-hour laws. In the end, the employee who was supposed to be incentivized to vaccinate was going to receive free testing and additional straight time and potentially overtime pay each testing week.

The EO is mired in litigation and the Supreme Court of the United States stayed the ETS. Because an ETS can only remain in place for six months under the OSH Act, the Supreme Court stay likely kills the rule for all practical purposes. The decision sends the challengers’ case back to the Sixth Circuit for a full decision on the merits of whether the law is enforceable. That process will likely take months and cause the enforcement period for the ETS to expire. Meanwhile, some states and localities passed their own COVID-related rules both pro-vaccination and anti-vaccination. As employers enter Year three of the pandemic, the compliance landscape remains almost as murky as in Year one.

Where does that leave employers? Despite the stay, OSHA has other avenues to enforce COVID-19-related requirements in the workplace. OSHA has announced it intends to enforce COVID-19 regulations through its General Duty Clause. Under the General Duty Clause, OSHA can cite employers if they fail to provide a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm. If employers ignore or fail to follow COVID-19 guidance from OSHA or the CDC, OSHA may allege the employers failed to protect employees from the recognized hazard of COVID-19. Before the ETS, OSHA issued citations to a number of employers on just these grounds. To facilitate this end, OSHA is likely to issue new general and industry-specific COVID-19 guidance, as their current guidance is outdated in some respects.

OSHA also previously issued a National Emphasis Program (NEP) for COVID-19 that applies to certain industries, including supermarkets, discount department stores and restaurants. Under the NEP, OSHA will perform a greater number of programmed inspections at these target employers for COVID-19 violations. OSHA's basis for citation will be the same—the General Duty Clause and other applicable standards such as those for personal protective equipment. The NEP permits OSHA to conduct an inspection at any time at any NEP-covered workplace.

States and localities also will continue to fill the enforcement void left by the ETS.

Under the State Plan structure, 21 states have the ability to adopt their own workplace safety standards against private employers so long as those rules are at least as effective as the federal OSHA standards. This can be done through a state emergency temporary standard or a permanent rule. For example, the California Occupational Safety and Health Standards Board issued a California ETS that governs mask and testing standards. Similarly, the Virginia Department of Labor and Industry adopted its own permanent COVID-19 workplace safety standard, much of which goes beyond what federal OSHA has required. In addition, cities like New York, Washington, DC, Chicago and Los Angeles have enacted their own rules for employers within their borders.

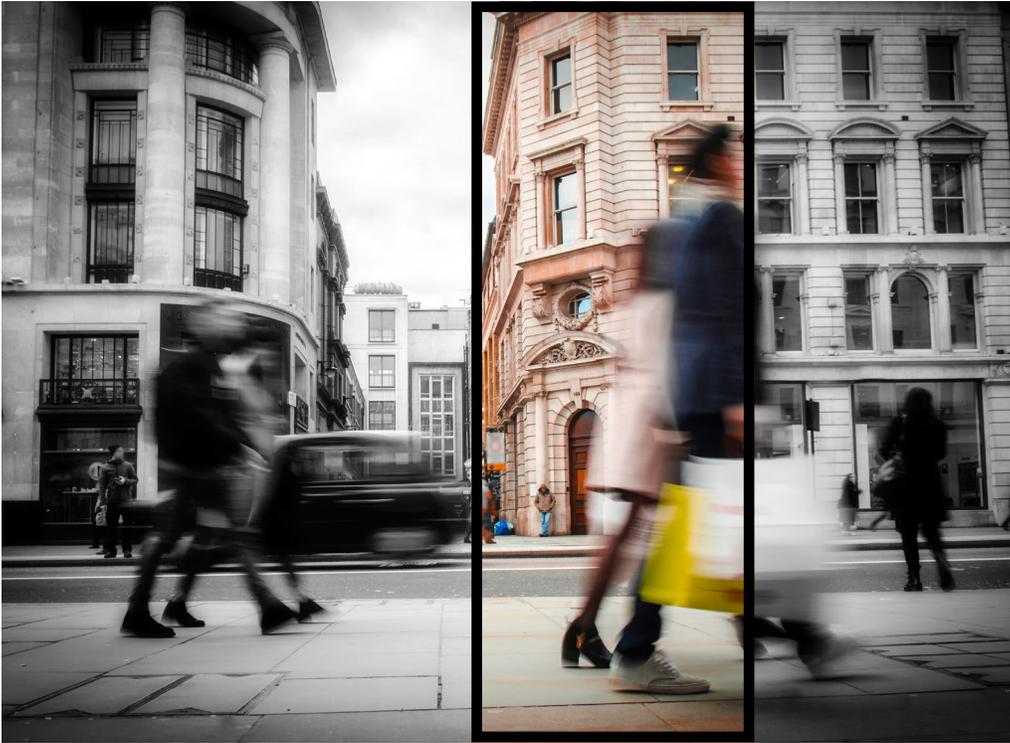
Inconsistent and constantly changing legal requirements can distract from the key focus, which remains keeping workers safe and healthy. Retail employers have been focused on that goal throughout the pandemic. And, subject to state law, employers remain free to set their own COVID-19 workplace policies including vaccination mandates, testing, distancing and face mask requirements. Employers should continue to follow OSHA and CDC updates and incorporate them into their policies. In the event of an OSHA investigation, solid compliance with these guidelines should prevent citation and, ideally, also minimize the disruption of COVID-19 to the workplace. ■



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2021 Retail M&A Year in Review

2021 represented progress in a return to “normal” after a bumpy year for retailers in 2020. Increased consumer spending in the US retail sector dovetailed with a flurry of M&A activity in the sector and the broader marketplace. Dealmakers, continuing the momentum of the second half of 2020, moved at a record pace in 2021. Global M&A activity totaled \$4.4 trillion in the first three quarters of 2021. This torrid pace represented close to twice the amount of deal volume in the first three quarters of 2020 (\$2.3 trillion) and the strongest M&A market by volume since recordkeeping began in 1980.¹

Unlike 2020 when the uncertainty resulting from the onset of the pandemic slowed deal volume across the board in the first half of the year, M&A markets were undeterred by sporadic shutdowns

and the emergence of new COVID-19 variants in 2021. The strong M&A volume was driven by an increase in average deal value (\$83 million) and the continued increase of private equity activity. Deals worth greater than \$5 billion also significantly increased, with 99 deals valued more than \$5 billion reported as of November 15, 2021, compared with only 54 deals of comparable size during all of 2020.²

In the retail sector, M&A activity was driven by private equity investors, shifting consumer preferences due to more time spent at home and a growing preference for health and sustainability-focused products. According to a report published by KPMG, through Q3 2021, there were 469 M&A deals in the consumer and retail space involving private equity. While strategic buyers still represent a larger share of the consumer and



retail M&A market, private equity deal-making increased by nearly 45% in the space as compared with the first three quarters of 2020.³

The acquisition of Stamps.com for approximately \$6.6 billion by Thoma Bravo, a US-based private equity firm, was a high-profile example of private equity acquirers finding value in legacy e-commerce brands. The deal closed in October 2021.⁴

Despite the increasing focus on e-commerce from strategic and private equity investors, brick-and-mortar retailers were not left out of the deal-making frenzy in 2021. One of the largest international M&A deals in 2021 was the acquisition of UK-based grocer Morrisons, by Clayton, Dubilier & Rice, a US-based private equity firm.⁵ Another legacy, traditional retail brand, Michaels, the arts and crafts retailer, was acquired by

Apollo Global Management in a deal worth approximately \$3.3 billion. Apollo’s acquisition took Michaels private at a 47% premium per share against its stock price prior to the deal’s announcement.⁶

Looking Ahead to 2022

Despite a record year of M&A in 2021, the year ahead may prove to be just as active. Aggressive valuations, low interest rates and a surplus of dry powder at private equity firms provide reason to believe that 2022 will come close to matching, or exceeding, 2021 in M&A activity. 80% of executives surveyed by KPMG said they expect target valuations to continue to rise in 2022. In the same survey, only 7% of executives felt that there would be a decrease in M&A activity in their industry sector in 2022.⁷

We expect private equity to continue to play a leading role in driving M&A volume both generally and in the retail space. As of November 2021, private equity funds had raised \$714 billion in committed capital in 2021 alone.⁸ These funds will likely continue the trend of go private deals by acquiring publicly traded, legacy brands or seek to bolster prior acquisitions with complementary add-on acquisitions.

E-commerce and digital platforms will also remain a significant area of focus for strategic and private equity acquirers in 2022. The prevalence of WFH employees and continued threats from COVID-19 variants have sustained and increased the attractiveness of retailers who have thrived in a digital, stay-at-home environment. Fitness companies, healthier food brands and pet supply businesses have all been newsmakers in the past year, and further interest in these sectors is to be expected.

Despite minor headwinds such as potential interest rate rises and continued uncertainty around the pandemic's conclusion, we expect deal-making activity to remain strong in 2022, led by e-commerce and investors seeking to unlock value in legacy brands. ■

¹ <https://www.spglobal.com/marketintelligence/en/insights/global-ma-infographic-q3-2021>

² <https://www.refinitiv.com/global-ma-soars-as-acquirers-make-up-for-lost-time/>

³ <https://advisory.kpmg.us/articles/2021/consumer-retail-ma-trends-q3-21.html>

⁴ <https://www.thombravo.com/press-releases/thoma-bravo-acquisition-of-stamps.com>

⁵ <https://www.nasdaq.com/articles/cdr-wins-auction-take-over-wm-morrison-supermarkets>

⁶ <https://www.nytimes.com/2021/03/03/business/michaels-will-be-acquired-by-a-private-equity-firm-in-a-5-billion-deal.html>

⁷ <https://advisory.kpmg.us/articles/2021/blowout-year-global-ma.html>

⁸ <https://www.fnlonon.com/articles/private-equity-firms-714bn-set-to-surgehigher-in-2022>



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FTC Studying Supply Chain Disruption, With Orders to Nine

Supply chain disruptions have been front-page news throughout the COVID-19 pandemic. From the beginning when Americans began stockpiling basic items like sanitizer and toilet paper, to current shortages caused by increased consumer products spending and shipping delays, retailers have been faced with an environment that is constantly changing and requires nimble response. Now, the issue is getting formal treatment from the Federal Trade Commission (FTC), which is conducting a study to “shed light on the causes behind ongoing supply chain disruptions and how these disruptions are causing serious and ongoing hardships for consumers and harming competition in the US economy.” But looming behind that topical mission statement is a deep dive into the commercial strategies of large retailers and their suppliers

that could have wide impacts on future FTC policy and priorities in the retail space.

In November 2021, the FTC voted 4-0 to use its authority under Section 6(b) of the FTC Act to order a study compiling information on the impact of competition in the ongoing supply chain disruptions. The FTC issued Special Orders to nine companies (three each) in the retail, wholesale and supply chain sectors, requiring them to provide answers to a broad array of questions covering supply chain disruptions. The orders seek detailed information aimed to uncover the cause of disruptions and to identify strategies employed by key competitors to maintain their market position in challenging times. In addition, the FTC is soliciting voluntary comments from market participants regarding their views on how supply chain issues

are affecting competition in consumer goods markets. The announced purpose of the study is to explore whether supply chain disruptions caused by the pandemic have led to bottlenecks, shortages, anticompetitive conduct or higher prices for consumers.

The FTC's vote to conduct the study comes on the heels of an extended lobbying campaign by a number of interests calling for a comprehensive investigation of dominant retailers (and in some cases, dominant suppliers) and advocating aggressive related enforcement actions. In February 2021, the Center for Science in the Public Interest (CSPI) sent the FTC a lengthy letter requesting an investigation of trade promotion, category captain and online retail practices in the grocery retail industry. The CSPI letter complained that these practices drive up entry costs, put leading brands in control of retail decisions conferring greater advantages and ultimately limit customer choice on

what products to buy. In March 2021, the National Grocers Association (NGA) held a press conference and released a white paper calling for a crackdown on so-called "power buyers" in grocery retail. The NGA stated that small food retailers are being squeezed by big retailers that allegedly use their scale to command more favorable supply terms, lower pricing, special product package sizes and first call on high-demand items. The NGA added that the disparity was especially pronounced during the COVID-19 pandemic, as independent grocers were often unable to stock their shelves and forced to pass on higher prices for essential products to customers, whereas increasing consolidation gave large competitors an advantage. The NGA reiterated its concerns in July 2021 at the FTC's Open Commission meeting and in testimony before a US Senate Judiciary Committee hearing on competition in the food industry.

Subsequently, in October 2021, a coalition of independent grocers, pharmacies, restaurants, convenience stores and farmers formed the Main Street Competition Coalition (MSCC) "to encourage enforcement of the Robinson-Patman Act against anti-competitive tactics by dominant firms across industries." The Robinson-Patman Act is a law prohibiting price discrimination by a seller among competing buyers for the same commodity, which is seldom enforced by the government. MSCC members include the NGA, National Community Pharmacists Association, American Beverage Licensees, National Association of Convenience Stores, Energy Marketers of America, Protect Our Restaurants, Organic Farmers Association, National Association of Truck Stop Operators, Western Growers Association and the National Beer Wholesalers Association. Eight members of the MSCC sent a letter to the FTC

Client Resource

Hunton Retail Law Resource

Written by members of our firm's experienced team of lawyers who serve retailers from factory floor, to retail outlet, to online store, the Hunton Retail Law Resource Blog helps you stay abreast of the legal and regulatory issues facing your company and helps you minimize risk in this highly competitive and ever-changing industry. With a regular digest of breaking legal news and information delivered to your desktop, our blog reports cover topics including corporate law, FTC and SEC consumer protection and antitrust matters, labor law, litigation, retail class actions, and privacy and cybersecurity.

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seeking assistance “in addressing the anticompetitive effects of economic discrimination,” and requested that the FTC order a study and “look beyond price effect to include other dimensions of competition, including impacts on quality, service and convenience as a result of economic discrimination and increasing consolidation.” As part of this inquiry, the MSCC asked the FTC to investigate arrangements between dominant retailers and suppliers to determine whether these arrangements result in economic discrimination that harms smaller rivals, including whether so-called “channels of trade” distinctions are being used to evade laws against economic discrimination; and examine whether economic discrimination and buyer power have led to concentration throughout supply chains, especially in the food and agriculture sector.

Although the FTC’s study is premised on supply chain disruptions related to the COVID-19 pandemic, many of the grievances aired by small retailers are not unique to the current circumstances. Thus the information sought by the Special Orders is much more encompassing than the simple remit laid out in the FTC’s resolution to conduct the study. For example, the model Special Orders specifically include requests related to company strategies that preexisted the pandemic, as well as general questions about the Order recipients that will be relevant after present disruptions subside, such as inventory, product pricing and allocation, trade promotions, category captains, suppliers, logistics and future

business plans. The study therefore provides the FTC with a process to develop a deeper understanding of how the retail supply chain functions in the most successful companies and how those companies employ the business practices complained of by smaller competitors. By allowing the FTC to gather substantial information and documents through compulsory process outside the law enforcement context, this study can play a key role in how the FTC identifies and analyzes emerging competition trends and issues in the retail sector. The FTC previously held workshops on practices in the retail industry such as slotting allowances and category captains but those workshops and ensuing reports have not resulted in FTC enforcement. The FTC’s new leadership has indicated the agency will enforce the antitrust laws more aggressively; whether or not the FTC pursues enforcement action based on its findings in the current 6b study is an issue worth monitoring for all players in the retail industry. ■



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Virginia and Colorado Add to the Evolving US Privacy Landscape

While Congress failed to advance a federal privacy bill in 2021, Colorado and Virginia passed legislation that added to the emerging patchwork of privacy laws at the state level. The Virginia Consumer Data Protection Act (VCDPA) becomes effective January 1, 2023, and the Colorado Privacy Act (CPA) will take effect six months later on July 1, 2023. Both the CPA and VCDPA draw, in part, on the California Consumer Privacy Act of 2018 (CCPA) (as amended by the California Privacy Rights Act of 2020 (CPRA)) and the EU General Data Protection Regulation (GDPR), but neither entirely mirrors these existing privacy laws.

Given the incremental obligations and the manner in which these laws apply to businesses, retailers in particular are ramping up in the new year to ensure they are ready for next year's effective dates.

Applicability

Both the CPA and VCDPA apply to “controllers” and “processors” of personal data, borrowing these terms from the GDPR, and outline duties for both. The CPA applies to controllers that conduct business in Colorado or sell products or services that are intentionally targeted to residents of Colorado, and meet either of the following thresholds: (i) control or process personal data of 100,000 or more consumers during a calendar year or (ii) derive revenue or receive discounts from the sale of personal data and control or process the personal data of at least 25,000 consumers. The applicability of the VCDPA is very similar to the CPA, but the VCDPA also requires that businesses must derive over 50% of their gross revenue from the sale of personal data in the context of meeting the second of the two criteria set forth above. Both laws



also apply directly to processors that process personal data on behalf of controllers subject to each law.

Because both the CPA and VCDPA differ from the CCPA's applicability requirements, retailers that are not subject to the CCPA may nonetheless be subject to these new laws. While the new laws include exceptions applicable in other industries, large retailers doing business in Colorado and Virginia should carefully evaluate the news to determine applicability.

Consumer Rights

Both the CPA and VCDPA provide the following rights to consumers in each state:

- right to confirm that a controller is processing personal data about the consumer and access that data;
- right to correct inaccurate personal data;
- right to data portability;
- right to opt out of the processing of personal data for purposes of (i) targeted advertising, (ii) the sale of personal data and (iii) profiling in furtherance of decisions that produce legal or similarly significant effects concerning the consumer; and
- right to appeal the business's denial of a consumer's rights request.

One key difference between the CPA and VCDPA is the definition of “sale.” The VCDPA is friendlier to merchants and limits the opt-out of sale right to the exchange of personal data for *monetary consideration*, while the CPA adopts the CCPA's more expansive definition of “sale,” to mean the exchange of personal data for monetary or *other valuable consideration*. As with the CCPA, the

disclosure of personal information to third parties in the ad tech context therefore may similarly qualify as a “sale” under the CPA, from which Colorado consumers would have the right to opt out.

Borrowing heavily from Europe and the GDPR, each of the new laws also requires controllers to obtain prior opt-in consent to process “sensitive data,” which includes personal data elements such as race, religion, health condition, sexual orientation, citizenship status, genetic or biometric data and data from a known child (under 13 years of age). This requirement differs from the right to limit the use or disclosure of a consumer’s sensitive personal information in California. Retailers that process this type of sensitive data will need to update their compliance programs to obtain consent in compliance with each law’s requirements, a process that is expected to be cumbersome and onerous.

Because the CCPA, CPA and VCDPA offer similar but somewhat differing rights, retailers will need to decide whether to offer these rights only to the residents of each relevant state or to more broadly offer them to all consumers, regardless of residence. As consumer interfaces and backend procedures will need to be updated, retailers have begun thinking about how to comply with these disparate consumer rights obligations.

Controller Duties

Both the CPA and VCDPA impose a number of data protection obligations on controllers, including the following:

- **Transparency:** controllers must provide consumers with a privacy notice containing certain information;
- **Purpose Specification:** controllers must specify the express purposes for which personal data is collected and processed;
- **Data Minimization:** controllers’ collection of personal data must be

adequate, relevant and limited to what is reasonably necessary in relation to the specified purposes for which the data is processed;

- **Secondary Use:** under the CPA only, controllers may not process personal data for purposes that are not reasonably necessary to or compatible with the specified purposes for which the data is processed unless consent is obtained;
- **Data Security:** controllers must implement reasonable measures to secure personal data;
- **Discrimination:** controllers are prohibited from processing personal data in violation of state or federal laws that prohibit discrimination;
- **Data Protection Assessment:** controllers must conduct a data protection assessment for processing activities that present a heightened risk of harm, such as processing personal data for targeted advertising, profiling, sale or processing sensitive data;
- **Vendor Contracts:** controllers must enter into agreements imposing certain restrictions and obligations on processors that process personal data on their behalf; and
- **Training:** controllers should ensure that all relevant personnel are trained on the relevant obligations of each law.

While certain of these obligations are reflected in the CCPA, others, such as the data protection assessment and secondary use restrictions, are not. Retailers subject to all three laws therefore will need to strategize to ensure their compliance programs meet the disparate requirements of each state law.

Processor Duties

Both the CPA and VCDPA require controllers to enter into agreements with processors that impose certain restrictions and requirements on the processor. A processor must adhere to the controller’s instructions and assist the controller in



“They are smart, experienced attorneys from a variety of backgrounds that enable them to provide high-quality legal services,” says another source.

Chambers USA

meeting its obligations under each law (such as responding to consumer rights requests, ensuring personal data is securely processed, notifying individuals of data breaches (under each state's data breach notification law) and conducting data protection impact assessments).

Under both laws, processors also must ensure that each processor enters into a written contract with each subprocessor that requires the subprocessor to meet the processor's obligations with respect to the personal data processed. Similar to the GDPR, under the CPA (but not the VCDPA) controllers have the right to object to a processor's use of any subprocessor.

Retailers that have already entered into CCPA-compliant contracts with vendors will need to once again strategize regarding enhancements to those contracts to comply with the content requirements of the CPA and VCDPA (as well as the new vendor contract requirements set forth in the CPRA). As this contracting process can be lengthy and require significant resources, retailers are well advised to begin planning to make these updates now.

Exemptions

Unlike the CCPA or GDPR, both the CPA and the VCDPA fully exempt from application personal data obtained in the HR context (e.g., employees, applicants) and B2B context (e.g., B2B customers, vendors). Also unlike the CCPA and GDPR, each law contains certain entity-level exemptions. For example, both laws exempt from application financial institutions subject to the Gramm-Leach-Bliley Act, and the VCDPA exempts from application HIPAA-covered entities and business associates (but the CPA exempts only protected health information governed by HIPAA). Each law also exempts from application certain data, such as children's data governed by the Children's Online

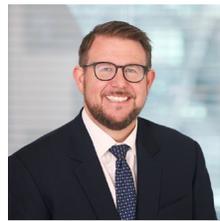
Privacy Protection Act (in the CPA), deidentified data and publicly available data. The laws also contain exemptions for a number of processing activities, such as performing internal operations, protecting a consumer's vital interests, preventing and detecting fraud or other malicious, deceptive or illegal activity, and conducting internal research to improve, repair or develop products. Certain of these exemptions are broader than the exemptions under the CCPA, which will be helpful to retailers in determining which entities, data and processing activities are in scope for purposes of CPA and VCDPA compliance.

Enforcement

Both the CPA and the VCDPA will be enforced by each state's attorney general, and neither law provides for a private right of action. Violations of each law can bring steep penalties. For uncured violations of the VCDPA, the attorney general may seek \$7,500 per violation. Under the VCDPA, a violation of the

law would constitute a deceptive trade practice, with penalties of up to \$20,000 per violation (and if the consumer is elderly, \$50,000 per violation). Under the VCDPA, the attorney general would need to provide 30 days' notice of any violation and allow an opportunity to cure. The CPA also provides a 60-day right to cure for potential violations. Both the CPA and VCDPA are more generous than the CPRA in this respect, which eliminates the CCPA's existing guaranteed 30-day cure period and makes it discretionary.

We expect to see more states propose and pass comprehensive data privacy bills in 2022, lending more support to the need for an omnibus federal privacy bill in the near future. The odds of such a bill passing, however, are low. Retailers therefore should be prepared to comply with multiple complementary, but sometimes conflicting, state privacy law requirements and thoughtfully build their compliance programs accordingly. ■



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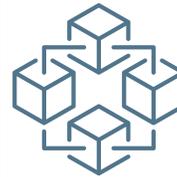
How Retailers Can Make the Blockchain Work for Them in the IP Space

The intersection of retail and blockchain technologies is a current “hot” topic. But what does this actually mean for retailers? Is the time and money needed to invest in new technology worth the cost? What intellectual property (IP) protection is available?

First, a non-fungible token (NFT) is a unique and non-interchangeable unit of data stored on a blockchain, a form of digital ledger. NFTs can be associated with reproducible digital files, such as photos, videos, and audio. NFTs use a digital ledger to provide a public certificate of authenticity or proof of ownership, but do not restrict the sharing or copying of the underlying digital files. The lack of interchangeability (fungibility) distinguishes NFTs from blockchain cryptocurrencies, such as Bitcoin.¹

NFTs are composed of a software code known as a “smart contract”. A smart contract is a self-executing contract with the terms of the agreement between buyer and seller directly written into lines of code. The code and agreements contained therein exist across a distributed, decentralized blockchain network. The code controls the execution, and transactions are trackable and irreversible.²

Importantly, NFTs often involve the display and/or transfer of various forms of IP, and raise the same types of—e.g., trademark, copyright, and right-of-publicity—concerns as any other commercial endeavor using potentially protected content, including issues related to clearance, registration, licensing, transfer, and enforcement.



The immutable nature of blockchain provides a history of ownership and creation that cannot be tampered with. This is imperative to an IP owner—such as a retailer with a portfolio of patents, trademarks, and copyrights protecting its brand—as it prevents another person or entity from contesting a claim to ownership.

Smart contracts with blockchain technology add a layer of security and can be used by retailers to provide licenses or obtain royalties to IP. Indeed, the addition of smart contracts has increased the utility of implementing blockchain to protect one’s IP. Smart contracts live on the blockchain and perform actions, such as allowing access to the information stored on the block, when certain conditions are met.³ By using this functionality, a retailer IP owner can grant licenses to users who want to access the IP by accepting that user’s digital signature.⁴ Smart contracts can also be utilized to collect royalties from people who are using and accessing IP by establishing a contract.⁵

In addition, blockchain and decentralized systems can help retailers drive efficiency with supply chain and inventory management. Many companies use the blockchain to authenticate, track, and/or maintain ownership and repair records for their physical products. Blockchain technology can provide retailers with other benefits, too, including reduced costs, increased transparency, and faster transactions. And it can result in improved security by reducing counterfeiting and fraud, issues that commonly arise in trademark litigation.⁶

NFTs serve as a very real opportunity for brands and retailers.

A brand—or trademark—is a word, name, symbol, design, or phrase used to identify and distinguish a product or service, and to indicate the source of the product or service. While NFTs can represent many things, ranging from trading cards to plots of virtual land, many recent headlines relate to digital art being sold for astronomical prices. Brands like Pringles and Taco Bell have already issued and sold NFTs as a way to promote their brands and products to younger audiences.⁷ More recently, General Mills auctioned ten digital artworks as NFTs to promote the return of its chocolate-flavored Dunkaroos, a popular snack brand that was discontinued in 2012 in the US.⁸

NFT applications range from authenticating tangible goods to reducing friction in e-commerce to generating new revenue

through virtual sales—the possibilities are endless. NFTs have come so far that they are now making their way into physical stores, for example, an NFT gallery with digital wall displays, and physical and digital products for sale. Dolce & Gabbana staged an NFT installation in one of its flagship stores, and Rebecca Minkoff held an NFT exhibition for New York Fashion Week.⁹

Ultimately, as cryptocurrency and NFTs become more and more popular, retailer use of the blockchain will likely become the rule, rather than the exception. Venturing into these new technologies presents issues regarding IP protection. For example, creating an NFT does not itself establish copyright protection in a particular piece of IP. Instead, it provides a verifiable ownership claim to that version

or copy. Similarly, companies should consider whether their current IP, e.g., trademarks, cover their brand usage in NFTs. It may be that a retailer will need to file for additional trademarks to claim the relevant classes of goods and services involved with such usage.

Overall, retailers would be wise to begin investing in these technologies, but should be aware that they present questions for brand owners to consider and potentially discuss with counsel prior to taking action. ■



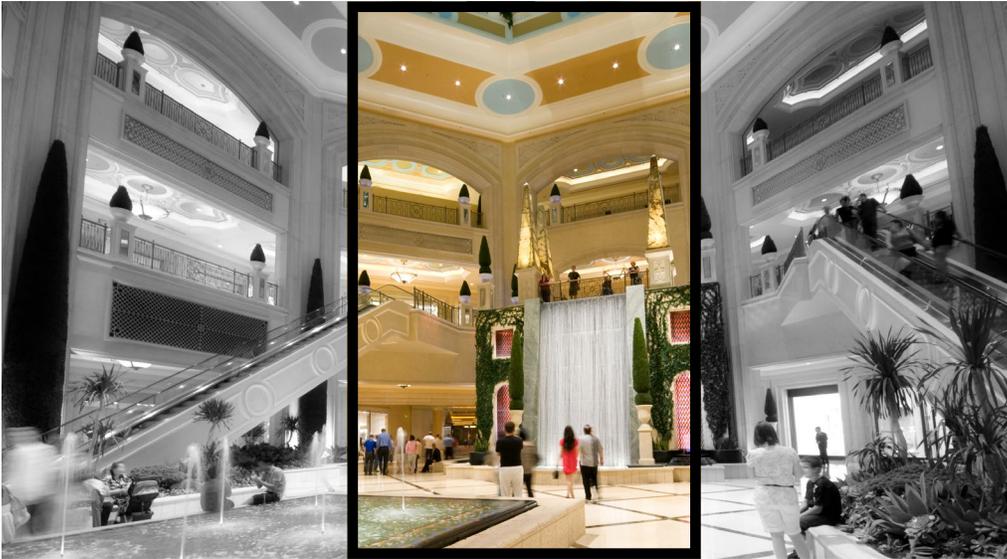
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¹ Sam Dean, *\$69 million for digital art? The NFT craze, explained*, L.A. TIMES (Mar. 11, 2021), <https://www.latimes.com/business/technology/story/2021-03-11/nft-explainer-crypto-trading-collectible>.
² Jake Frankenfield, *Smart Contracts*, Investopedia (May 26, 2021), <https://www.investopedia.com/terms/s/smart-contracts.asp>.
³ Gonenc Gurkaynak, *Intellectual Property Law and Practice in the Blockchain Realm*, SSRN, (Dec. 12, 2018), <https://papers.ssrn.com/sol3/papers.cfm>.
⁴ *Id.*
⁵ *Id.*
⁶ Sharon Edelson, *Blockchain Could Transform Retail, From Supply Chain And Inventory Management To Product Provenance*, Forbes (May 3, 2021, 11:00 AM), <https://www.forbes.com/sites/sharonedelson/2021/05/03/esg-investing-blockchain-cryptocurrency-decoded/?sh=67fef6841c2f>.
⁷ *Id.*
⁸ *Id.*
⁹ Liz Flora, *NFTs are making their way into physical retail*, Glossy (Dec. 17, 2021), <https://www.glossy.co/fashion/nfts-making-their-way-to-physical-retail/>



Intellectual Asset Management recognizes Hunton Andrews Kurth in 2021 edition of IAM Patent 1000



Retail Giant Drops Arbitration Clause—Is This the Right Move for Your Agreement?

After facing more than 75,000 individual arbitration demands over the last two years, in 2021 Amazon removed the mandatory arbitration provision and class action waiver from its consumer online terms of service. What remains to be seen is whether Amazon’s move will trigger a larger movement by retail industry defendants to stem the tide of costly mass arbitration demands.

Corporate defendants have long relied upon arbitration clauses in consumer and employment agreements to keep disputes out of court and avoid class actions. Arbitration clauses are often paired with class or collective action waivers, which require plaintiffs to forgo class or collective actions and file individual demands. Arbitration often can be less expensive and more efficient than traditional litigation. Recently,

however, plaintiffs’ attorneys have circumvented the intent behind arbitration clauses and class action waivers by amassing thousands of people to file individual arbitration demands simultaneously.

While a single arbitration may be less expensive than litigating a class action, the mandatory filing fees, case management fees and arbitrator compensation for a single arbitration can exceed several thousand dollars. Multiply that by 75,000 arbitration demands, and these fees easily expand into the hundreds of millions.

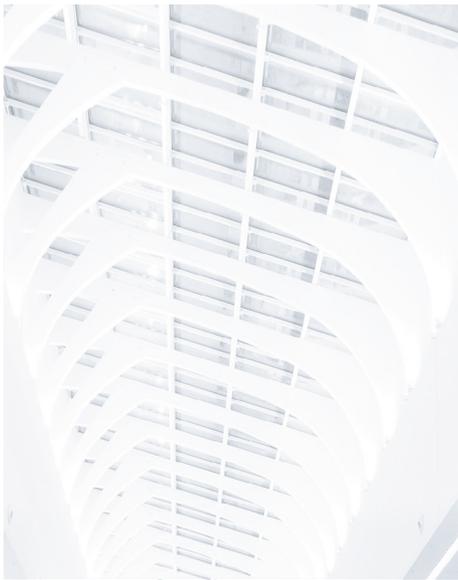
At least a dozen major mass arbitration cases have been initiated in the United States over the past two years. As just a few examples, TurboTax developer [Intuit](#) faced more than 40,000 arbitration demands last year, education technology company [Chegg](#) faced



15,107 demands, [Uber](#) faced more than 12,500 demands, [Postmates](#) faced 5,257 demands in one case and 200 in another and [DoorDash](#) faced 5,010 demands. Keller Lenkner, the plaintiffs’ firm behind the majority of these cases, reports that they have secured more than \$375 million in related settlements.

Since the Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*, [563 U.S. 333](#) (2011), lower courts increasingly are willing to enforce arbitration clauses and grant motions to compel arbitration. Courts are also less than sympathetic to the plight of corporate defendants seeking to avoid arbitration and the mandatory arbitration fees. A federal court in California [ordered](#) DoorDash to “immediately commence” arbitration with each of the 5,010 petitioners, putting the company on the hook for nearly \$12 million in arbitration fees. In a particularly scathing opinion, the judge wrote, “[n]o doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.” *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1067–68 (N.D. Cal. 2020).

In 2019, Keller Lenkner served approximately 75,000 arbitration demands on Amazon, alleging that the company’s Alexa devices recorded customers without their consent. Some of these demands were resolved in Amazon’s favor, and others proceeded to arbitration. In July of 2021, [Amazon](#) announced the removal of the mandatory



Named to
*The National
Law Journal's*
Appellate Hot
List for the 3rd
consecutive year



arbitration and class action waiver provisions from its consumer terms of service. Uber, Postmates (which was later acquired by Uber), DoorDash and Chegg also took responsive actions to mitigate the risks of mass arbitrations, although considerably less extreme than Amazon's approach. Instead, these companies retained their mandatory arbitration and class action waivers, but modified their terms of use expressly to permit class settlements, established specific procedures for adjudicating mass arbitrations or made other changes to their obligations in the event of consumer disputes. In addition to the approaches adopted by the companies discussed above, there are several other potential strategies to avoid the draconian outcomes that have occurred during the last two years, including the following:

- 1. Require informal dispute resolution prior to arbitration** – Companies may choose to require mediation or another conciliation process prior to arbitration, which may lead to early settlement and avoid mandatory filing fees.
- 2. Request individualized information in arbitration demands** – Many mass arbitration demands merely duplicate the same information for thousands of demand letters, with little to no individualized information for each claimant. Companies may require claimants to provide more detailed information about their claims when filing an arbitration demand, deterring the “mail merge” approach of mass demands.
- 3. Contractually prohibit mass arbitration** – Agreements may be drafted to try to prohibit the simultaneous, coordinated filing of numerous, identical claims.

Whether a court would ultimately enforce such a provision is less than certain. Any contractual language should be carefully drafted and approved by counsel.

4. Withdraw offers to pay claimants' filing fees – Many companies agree to pay the arbitration filing fees of consumers, employees or other claimants. Removing these provisions could greatly reduce the filing fees for which a company may be responsible.

5. Purchase additional insurance – Retailers may purchase additional insurance policies or enhance their existing coverage to mitigate financial risk associated with unavoidable expenses associated with dispute resolution.

Each of the strategies discussed above comes with potential benefits and risks. Companies should work with experienced counsel to draft agreements that serve the company's individual needs, guard against present risks and comply with the laws of the relevant jurisdiction(s). ■



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When Retailers Collaborate: What You Need to Know About Allocation of Intellectual Property Rights

Intellectual property (IP) rights and contracts regarding IP rights can be complicated.

As an example, consider the potential IP rights in a simple hypothetical toy skateboard called BLADEBLAST. First, there are the trademark rights in the name BLADEBLAST. Second, there are potential utility patent rights in inventive aspects of the skateboard, such as a novel polymer that makes up the wheels that lead to more skateboard speed. Third, there may be ornamental aspects, like a unique trapezoid-shaped board, which design patents could protect. Fourth, there may be copyrights related to the marketing material or a jingle in a commercial advertising the skateboard. Lastly, there may be confidential or trade secret information related to the

skateboard, such as manufacturing techniques, pricing, or competitor information.

Given this landscape, retailers should consider their current and future IP rights and obligations before entering an agreement that may implicate those rights. This article discusses how IP rights can potentially be allocated in an agreement with a manufacturer, distributor, promoter, advertiser, or another retailer.

Joint Ownership

A retailer may combine forces with another party to develop new IP. While joint ownership may offer both parties a strategic position, it is important to understand the risks associated with such an arrangement. Without an



express agreement addressing the rights of each party in a joint ownership agreement, it can be difficult to discern who has rights to, for example, product improvements, which can lead to costly disagreements. To avoid confusion, one should understand how joint ownership is generally defined for patents, copyrights, and trademarks.

Patents can be jointly owned by multiple parties.¹ Each joint owner of a patent enjoys an undivided interest in the entire patent. This means that individual claims or aspects of a patent cannot be assigned or contracted—rather, parties must assign the whole patent or none of it.² Furthermore, a joint owner can assign only the interest that she holds. That is, a joint owner cannot unilaterally assign the entirety of the patent by herself.³ If a party is considering a joint ownership agreement for a patent, it is important to know how many joint owners are involved and what, if any, restrictions on assignments would be beneficial. Patent enforcement rights should also be considered: a patent joint owner cannot sue for patent infringement unless all joint owners join as plaintiffs in the suit.⁴ Thus, a joint owner can impede another joint owner's attempt to enforce the patent against a third-party infringer by not suing or, worse, by granting a license to the third-party infringer without consent from the other owner.⁵ Finally, improvements in the invention should be considered such that there is certainty about who owns rights in future inventions and variations.

Copyright has similar rules to patents on joint ownership: assigning rights is all or nothing.⁶



Trademarks, however, are slightly different. While the general rule is that trademark rights are lost if the mark is not used, joint trademark ownership includes a lower burden of maintenance. That is, if just one joint owner continues to use the mark in commerce, each owner retains his rights in the mark.⁷ In regard to suing infringers on a registered mark, the law states that only the named trademark registrant has standing to bring an infringement act to protect his mark.⁸

Other Exploitation Considerations

Unless specified in an agreement, joint owners generally can exploit IP without restriction. However, exploitation of the IP may be restricted according to an agreement. Restrictions can include field of use, territory, and distribution channel. Joint owners may also agree that transfer of the jointly owned rights may be transferred only if certain conditions are met, such as unanimous consent.

Regarding trademarks, it is especially important to agree on quality control. Trademarks designate the source of goods, so it is particularly frustrating when a joint owner uses the trademark on inferior products and damages consumer perception of the brand. Therefore, retailers collaborating on a product may want to consider forming a joint venture to streamline production and commercialization. At minimum, it may be necessary to require the parties' mutual approval of any licensees or alternative uses of the brand.

Finally, it is important to note that different countries offer different protections. Before

entering a foreign market, be sure to engage with local IP counsel to understand local default rules and protections.

Conclusion

In any collaboration involving a retailer, it is necessary for each party to outline their rights and obligations in the IP. One should be wary of agreeing to share IP rights before fully understanding the other party's expectations, rights, and obligations. A cautious, well-drafted agreement that considers current and future IP rights and obligations can avoid a headache for all involved. ■

- ¹ Note that joint ownership is not the same as joint inventorship. Generally, joint inventorship is a relationship between a patent and multiple inventors, not necessarily the owners. Absent an agreement, if a patentable invention is made by two or more joint inventors, each joint inventor owns an equal undivided interest in the entire resulting patent. See *Univ. of Pittsburgh v. Hedrick*, 573 F.3d 1290, 1297-98 (Fed. Cir. 2009).
- ² See *Lucent Techs., Inc. v. Gateway, Inc.*, 543 F.3d 710, 721 (Fed. Cir. 2008) citing *Pope Mfg. Co. v. Gormully & Jeffery Mfg. Co.*, 144 U.S. 248, 252 (1892).
- ³ Manual of Patent Examining Procedure § 301: Ownership/Assignability of Patent and Applications.
- ⁴ *Israel Bio-Eng'g Project v. Amgen, Inc.*, 475 F.3d 1256, 1263 (Fed. Cir. 2007).
- ⁵ See *Schering Corp. v. Roussel-UCLAF SA*, 104 F.3d 341, 345 (Fed. Cir. 1997).
- ⁶ 17 U.S.C. § 201(a).
- ⁷ See *Mears v. Montgomery*, 2006 WL 1084347 at *8-10 (S.D.N.Y. Apr. 24, 2006), *aff'd in part on other grounds*, 535 F. App'x 37 (2d Cir. 2013).
- ⁸ The Lanham Act § 32(1).



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The EEOC & Artificial Intelligence: A Brief Primer for Retailers

In October 2021, the Equal Employment Opportunity Commission (EEOC) announced an initiative to ensure that artificial intelligence (AI) used in the workplace does not lead to violations of the nation's anti-discrimination laws. The EEOC, through an internal working group, plans to gather information about the design, adoption and impact of hiring and employment-related technologies, launch listening sessions with key stakeholders and issue technical assistance to provide guidance on algorithmic fairness and the use of AI in employment decisions. The EEOC's press release announcing the initiative can be found [here](#).

The announcement should come as no surprise to those monitoring the EEOC's movements. Indeed, the EEOC's interest in AI can be traced back to an October 2016 public EEOC [meeting](#) discussing the use of big data in the workplace.

Employment lawyers, EEOC commissioners and computer scientists at that meeting agreed that AI should not be viewed as a panacea for employment discrimination. The technology, if not carefully implemented and monitored, can introduce and even exacerbate unlawful bias. This is because algorithms generally rely on a set of human inputs, such as resumés of high-performing employees. If those inputs lack diversity, the algorithm may reinforce existing institutional bias at breakneck speed.

Recently, EEOC commissioners have remarked that the agency is wary of undisciplined AI implementation that may perpetuate or accelerate bias in the workplace. As a result, the EEOC may consider the use of commissioner charges—agency-initiated investigations unconnected to an employee's charge of discrimination—to ensure employers are not using AI in an



unlawful manner that violates Title VII of the Civil Rights Act (Title VII) or the Americans with Disabilities Act (ADA).

Given the EEOC's brightening spotlight on AI, retailers using such technologies should take steps to minimize the risks and maximize the benefits. This article will offer an overview of the merits and potential pitfalls of employment-related AI technologies, provide a refresher course on commissioner charges and propose actions that retailers can take to reduce the risk of becoming the target of EEOC investigations.

Benefits of AI for Retailers

The landscape of AI technology is continually growing. Some retailers use automated candidate sourcing technology to search social media profiles to determine which job postings should be advertised to particular candidates. Others use video interview software to analyze facial expressions, body language and tone to assess whether a candidate exhibits preferred traits. The use, however, is not limited to the hiring process. Some retailers utilize AI software for workforce optimization—allowing AI to create employee schedules, taking into account a multitude of variables such as employee availability, local or regional pay and timekeeping laws, as well as business initiatives and seasonal fluctuations.

Regardless of the precise tool, AI is marketed to retailers as a technological breakthrough that provides simplicity, enhances the quality of candidates, promotes efficiency and improves diversity.

AI software, the EEOC may rely upon commissioner charges as an important tool to uncover unlawful bias under Title VII and the ADA, most likely under the rubric of disparate impact discrimination.

42 U.S.C. § 2000e-5(b) authorizes the EEOC to investigate possible discrimination “filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission.” (emphasis added). Unlike employee-initiated charges, commissioner charges can be proposed by “any person or organization.” Indeed, it is the origin that distinguishes commissioner charges from employee-initiated ones.

The EEOC has explained that commissioner charges generally come about if 1) a field office learns of possible discrimination from local community leaders, direct observation or a state-run fair employment office; 2) a field office learns of a possible pattern or practice of discrimination during its investigation of an employee charge; or 3) a commissioner learns about discrimination and asks a field office to perform an investigation.

Regional EEOC field offices refer proposed requests for commissioner charges to the EEOC’s Executive Secretariat, who then distributes such requests to the commissioners on a rotating basis. A commissioner then determines whether to sign a proposed charge, authorizing the field office to perform an investigation. Commissioners, however, can bypass this referral procedure and file a charge directly with a regional field office.

Once filed, commissioner charges follow the same procedure as employee-initiated charges. The respondent is notified of the charge and the EEOC requests documents and/or interviews with company personnel. If needed, the agency can utilize its administrative subpoena power and seek judicial enforcement. The EEOC’s regulations provide that the commissioner who signed the charge must abstain from making a determination in the case.

If the agency ultimately determines that there is reasonable cause to believe discrimination occurred, the EEOC will generally attempt conciliation with the employer. The same remedies available under Title VII disparate impact claims—equitable relief in the form of back pay and/or injunctive relief—are available to aggrieved individuals.

Steps to Mitigate Discrimination Risks

Retailers should be mindful of the EEOC’s awareness on this topic and the availability of commissioner charges to uncover disparate impacts without the need for an employee charge. To avoid being the target of such investigations, retailers should consider the following steps:

First, those considering an AI tool should demand that AI vendors disclose sufficient information to explain how the software makes employment decisions. Vendors often do not want to disclose proprietary information relating to how their tools function and interpret data. Retailers may ultimately be liable for their results, however, so it is important that they understand how candidates are selected. At minimum, a retailer should obtain strong indemnity rights.

Second, even after obtaining assurances and indemnification, retailers should consider auditing the AI tool before relying upon it for decisions. To do this, retailers need to be able to identify the candidates that the tool rejected, not just those who were accepted. Thus, retailers should verify with vendors that data is preserved so that they can properly audit the tool and examine results to determine whether there was a negative impact on individuals in protected classes. This auditing should occur regularly—not solely at initial implementation.

Third and perhaps most critically, retailers should ensure that the input or training data upon which the tool relies (e.g., resumés of model employees) does not reflect a homogenous group. If the input data reflects a diverse workforce, a properly functioning algorithm should, in theory, replicate or enhance that diversity.

Finally, as this is an emerging field, retailers need to stay abreast of developments in the law. When in doubt, companies should consult with employment counsel when deciding whether and how to use AI to improve the productivity, diversity and capability of their workforce. ■



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