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Distributor or Third-Party Logistics Provider? 3PLs Beware?

Client Alert

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Late last month, the United States Consumer Product Safety Commission ("CPSC") ruled that Amazon acted as a distributor under the Consumer Product Safety Act ("CPSA") 15 U.S.C. ch.47 § 2051 et seq., with respect to consumer products sold through its online marketplace, Amazon.com with its Fulfilled by Amazon program, and was therefore, responsible for remedial actions ordered by the Commission for the hazardous products sold through that program. Amazon was ordered to provide full refunds to consumers of certain products determined to present a substantial product hazard pursuant to 15 U.S.C. § 2064 (a).

Amazon's "Fulfilled by Amazon" program allows what Amazon refers to as "third-party sellers" to list and sell consumer products on Amazon's online marketplace, Amazon.com. These third-party sellers pay Amazon fees for a variety of services beyond just listing the products on Amazon.com. Amazon does not, however, take title to the products sold under this program, a factor found dispositive in *Amazon.com Inc. v. McMillan*, 625 S. W.3d 101 (Tex. 2021), where the Texas Supreme Court ruled that Amazon was not responsible for defective products sold through its Fulfillment Program under Texas product liability law. The CPSC notified Amazon that certain of the products being sold through its online platform posed substantial hazards. After receipt of the notices, Amazon took unilateral measures, including notifying consumers of the hazards, without CPSC involvement or input. Deeming Amazon's actions insufficient to protect and remedy affected consumers, the CPSC filed an administrative complaint against Amazon seeking a Section 15 order requiring Amazon, as a distributor of the consumer goods, to take additional remedial actions "necessary for public safety."

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In disputing responsibility under the CPSA for the hazardous products sold under this program, Amazon argued that it was not distributing the consumer goods in commerce as a distributor but rather, was a third-party logistics provider (3PL), exempt from liability as a manufacturer, distributor, or retailer of a consumer product pursuant to Section 3(b), 15 U.S.C. § 2052(b), which provides in relevant part that:

- A common carrier, contract carrier, third-party logistics provider, or freight forwarder shall not, for purposes of this Act, be deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder.

Section 3(b), 15 U.S.C. § 2052(b)

- The CPSC defines “distribution in commerce” and “distributor” as:

The terms “to distribute in commerce” and “distribution in commerce” mean to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.

15 U.S.C. § 2052(a)(7)

- The term “distributor” means a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product.

15 U.S.C. § 2052(a)(7)

- The term “third-party logistics provider” means a person who solely receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product.

15 U.S.C. § 2052(a)(16)

The Commission rejected Amazon’s argument that a transfer of title was necessary for it to be considered a distributor. Nowhere do the CPSA definitions condition the terms “deliver” or “delivery” on a passing of title or ownership. The Commission also rejected Amazon’s argument that it did not “hold the goods for sale” because it’s third-party customer actually sold the goods, not Amazon. The Court reasoned that the statute does not say that the same entity holding the goods has to actually sell the goods to “distribute in commerce.” It was enough that Amazon was holding the goods until and subject to their eventual sale.

Finally, the Commission rejected Amazon’s argument that it was “solely” a third-party logistics provider and therefore not a distributor. The Commission agreed with the Administrative Law Judge’s decision below that the services provided by Amazon and level of control exerted over the consumer

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goods far exceeded those services reasonably ancillary to one who solely receives, holds and transports a consumer product. Those services included:

- Amazon controls pricing for the goods sold on its platform through its Fair Pricing Policy
- Amazon screens the goods sold
- Amazon exclusively deals with the ultimate consumer with respect to the goods sold or returned
- Amazon determines whether a refund or credit is given to consumers for returned goods
- Amazon warehouses products until a consumer purchases the products on Amazon.com
- Amazon commingles inventory from Fulfilled by Amazon participants and moves them among distribution centers; and
- Amazon retains stock for managing returns and replacements

So, what does this mean for other online marketplaces or 3PLs? While Amazon's level of control over goods sold on its online platform may be unique, those offering online sales platforms for the sale of consumer goods will need to take a good look at their level of control or involvement in the marketing or sale of the goods to evaluate the risk of responsibility under the CPSC. More and more, logistics and 3PL companies are providing additional services to meet the needs of their customers, including fulfillment services. 3PLs also need to evaluate these additional services provided to determine whether they are truly ancillary to the warehousing and transportation of the goods or amount to distribution or sale of goods thus voiding the protections conferred upon 3PLs under the CSPA.

If you are hosting an online marketplace platform or otherwise offer products which may be affected by this ruling, please reach out to the authors of this Client Alert, or your Butzel attorney.

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