Appellate Court Rules that Amazon Cannot Avoid Prop. 65 Warning Requirement As An Internet Platform

LITIGATION, PROPOSITION 65, APPELLATE CASES, WARNINGS, PRODUCTS OF INTEREST, CHEMICALS OF INTEREST

By ROGER PEARSON, March 28, 2022

The First District Court of Appeal has held that Amazon can be sued for failing to provide a Proposition 65 warning for a product sold on its marketplace website, despite the existence of Federal law that shields internet providers from liability over third party provided information. The decision, which also ruled against the company on several Prop. 65 procedural issues, overturns a lower court decision in **Lee v. Amazon.com**[1)] .

The case involves skin-lightening creams containing mercury sold by four different producers through Amazon's "marketplace." Products sold on the Amazon site are of two types:

- products sold directly by Amazon to the consumer (either purchased by Amazon or made by the company); and

- products that are advertised on the marketplace by third party sellers, which are sold directly by the seller to the consumer. In the latter case the third party gets the advantage of Amazon's market reach and can utilize Amazon to do some of the fulfillment costs it signs up for that service.

In 2014, the plaintiff, Larry Lee, sent a Prop. 65 **60-day notice to Amazon**[2)] claiming that the company was liable under Prop. 65 for failing to warn marketplace consumers of mercury present in skin lighteners being sold on the site by the four companies, including Monsepa, Faiza and Meiyong. Lee's attorneys—James Birkelund of the Law Offices of James Birkelund and Rachel Doughty with Greenfire Law—filed a lawsuit based on the notice in late 2014 in Alameda Superior Court. Lee subsequently performed tests on five of the individual products made by the four companies that showed excessive mercury levels in each product tested.

Lee's original complaint covered 27 separate products from the four companies advertised on the Amazon site. Prior to trial Lee narrowed his lawsuit to cover eleven products, which he claimed were the same products that he had tested, although some of them were given a different product number by the Amazon website.

In 2019, Judge Robert McGuiness rejected the suit on several grounds. The Court agreed with

Amazon that a positive test result on one sample of the product cannot be used to represent a similar result for a different lot of the same product. The court also ruled that Lee failed to show that Amazon had actual notice of the presence of mercury in each of the products tested, and that Lee failed to show that anyone had consumed any of those products. Finally, the judge agreed with Amazon that it could not be liable under **Section 230 of the federal Communications Decency Act**[3] , because it is not responsible for the content of communications posted by third parties on its internet portal.

The First District Decision

The First District decision overturning the trial court is a detailed 80 pages.

Use of Test Results to Represent More Than One Sample of the Same Product

The experts provided by both sides generally agreed that a test of one sample of a particular product cannot be used as a proxy for the same results in another unit of that product, absent certain information about the different units that Lee did not provide. However, Lee's experts pointed to the excessive level of mercury found in of each of the samples tested as evidence that mercury had to have been intentionally added by the manufacturer as an ingredient to the product instead of simply being present as an unintended contaminant. The First District agreed with these experts that mercury added intentionally to one sample tested constitutes evidence that the substance was likely to have been added to all of the units as an ingredient.

Actual vs. Constructive Notice

The trial court judge ruled that Lee had failed to show that Amazon had actual knowledge that mercury had been added to each product. The First District first holds that the knowledge requirement of Proposition 65 can be satisfied by "constructive notice" as well as "actual notice." Lee can satisfy this requirement by showing that Amazon had information that should have alerted it to the presence of the mercury.

Arguing against this position, Amazon pointed to the 2016 amendments to the Proposition 65 safe harbor warning regulations that require that "retailers" must have actual notice of the presence of a listed chemical in a product in order to trigger the warning requirement. In response the First District first points out that Prop. 65 applies to anyone exposing a consumer to a listed product "in the course of doing business" and that Amazon was in the distribution chain of these products. Given that the company did not fit any other description within this chain it was likely that it could claim the status as a retailer and thus presumably could take advantage of the new regulations. However, the Court points out that consumers used these particular products long before the 2018 effective date of the new regulations, and that OEHHA apparently did not intend that the regulations would have a retroactive effective date.

Besides, as the First District notes, Lee could probably show actual knowledge for three of the covered products; one because of the 60-day notice provided by Lee and two others that had been covered by a **European Union RAPEX alerts**[4] , which Amazon’s compliance chief had testified were routinely reviewed by Amazon compliance personnel before accepting a product for the company's marketplace.

Actual Use of Product

The trial court held that Lee had failed to show that any consumer was actually "exposed" to mercury, because he failed to show that any purchaser had actually used the product. The First District disposes of this argument with a lengthy description of why almost everyone who purchases a

product actually uses it.

Section 230 of the CDA

Section 230 of the federal Communications Decency Act[5] (CDA) bars a state-law plaintiff from holding an interactive computer service provider legally responsible as a publisher for relying on information created and developed by a third party information content provider. The trial court judge ruled that Amazon proved all of the elements necessary for the Section 230 defense:

- it is an interactive communications provider;

- it relied on information provided to it by a third party information provider (i.e., the companies selling the mercury containing face creams), and

- Lee was improperly seeking to hold Amazon liable as a "publisher" of that information. The First District agreed with Lee that he was not seeking to hold Amazon liable as a publisher of the information. Instead, Lee is simply trying to hold Amazon accountable for violation of its own independent obligation as part of the distribution chain of the face cream products.

Conclusion

The First District returns this case to the trial court with instructions to process the case in accordance with the opinion including deciding whether the eleven products at issue are the same as those five that were actually tested by Lee. The trial court should then assess penalties in accordance with Proposition 65.

Judge J. Anthony Kline wrote the opinion and judges James A Richman and Theresa M. Stewart concurred.

Attorney for Plaintiff was Jonathan Weissglass of the Law Office of Jonathan Weissglass and Rachel S. Doughty and Jessica L. Blome with Greenfire Law.

Attorneys for Amazon were Gregory L. Doll, Brett H. Oberst, Jamie O. Kendall and Lloyd Vu with Doll Amir & Eley.

Resources for this article

1. Lee v. Amazon.com
https://prop65clearinghouse.com/cases/3630

2. 60-day notice to Amazon
https://prop65clearinghouse.com/ag-number/2014-00463

3. Section 230 of the federal Communications Decency Act
https://prop65clearinghouse.com/documents/74408

4. European Union RAPEX alerts
https://ec.europa.eu/safety-gate-alerts/screen/webReport