Ep. 14: Retail Industry Outlook: Risks and Rewards

March 4, 2019

Jose Garriga: Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

You shop online or in a brick-and-mortar store. You receive ads for products on your phone and on your computer, and see them on your TV. And data about what, where and how you buy is compiled, analyzed, shared and stored by a host of unseen companies.

The retail sector touches people's lives in more ways than ever before, and with its growth have come new opportunities, challenges and questions for those selling products and information.

We have with us today Akin Gump partners Gregory Knopp and Meredith Slawe. Aside from defending companies in consumer class actions and commercial cases in federal and state courts and arbitration proceedings nationwide, Meredith co-chairs the firms retail industry group. Similarly, Greg serves as group co-chair while defending companies in employment class and collective actions and other complex disputes.

Greg and Meredith will discuss the current state of the retail sector, the challenges faced by the retail industry and a new Akin Gump initiative to address industry needs.

Welcome to the podcast.

Greg, Meredith, thank you for appearing on the show today. Let's start by giving listeners a sense of the U.S. retail landscape. Meredith, how would you describe the current environment in the industry?

Meredith Slawe: Thanks, Jose, happy to be here today. It's a very exciting time for the retail industry, and I know Greg and I both feel fortunate to do a lot in this space. Retail is continuing to evolve in new and exciting ways with the implementation and exploration of new technology, for example, artificial intelligence, assisted reality, increased use of biometric technology, for example facial recognition technology, and in a variety of different ways. With the demand of consumers for increased personalization, retailers have responded in full force, and it's really fascinating to watch as retailers continue to focus on the in-store experience, on increased offering through online channels, and the bridging of those two channels.

For years, there was discussion of “Is brick-and-mortar dead in retail?,” and it couldn't be further from the truth. And, in 2019, I think we're starting to already see how many retailers are focused on having both a strong and thriving physical store operation, while having robust e-commerce and mobile applications for consumers to access as well. And it's really the integration of all of those channels, and the ability of consumers to get,

essentially, anything at anytime, anywhere, that's really driving a lot of the technological innovation in retail. Really anything is possible is what we have seen in the last couple of years. It's just a tremendous opportunity for retailers that are either niche brands or are small and starting up with venture capital money, or they're established big-box, or well-recognized retailers that are continuing to find ways to innovate and grow and to respond to demand by consumers.

It really is truly an exciting time to be in retail, and I think we're going to see a lot more to come in the next few months in terms of what technology can do to change what consumers can experience through retail channels.

Jose Garriga: Thank you, Meredith. I think that's a very upbeat assessment of the industry and of its possibilities. In the introduction, I mentioned some of the flip side, some of the challenges facing retailers. Let's look at those for a bit if we can.

To start, Greg, I mentioned your practice focuses employment litigation. Can you discuss the employment litigation landscape for retailers? You're based in Los Angeles—why is there so much activity centered in California, and what sorts of things do retailers with operations in California, what should they be thinking about?

Gregory Knopp: Well to start, the main reason why employment litigation is a significant challenge for retailers is because of the availability of class, collective and representative action. These are lawsuits that can sweep in groups of employees, whether across the state or even across the country, and retailers are natural targets for lawsuits like these because they tend to have a large footprint and a large number of employees, so that makes them very attractive to plaintiff's lawyers when it comes to employment litigation.

California, in particular, is really a hotbed for these type of cases for, really, a number of reasons. To start, a lot of states don't regulate employment much at all. California does, and it tends to have fairly employee friendly laws. Beyond that, there's a very active plaintiff's bar that is quite good at coming up with new interpretations of laws—sometimes laws that have been around for decades—that would support significant claims. And in addition to all that, California has a regime that offers very lucrative damages, and sometimes civil penalties, for violating employment laws of all kinds. So, the combination of all of those factors makes employment litigation, on the plaintiff's side, very, very attractive in California, as retailers have come to learn.

Beyond all of that, the legal landscape in California is constantly evolving. The courts of appeal, and the California Supreme Court even, is often taking up employment cases that have concerned issues with really broad impact. Just in the past year or two, there have been a number, and predictably they've been decided in ways that tend to benefit the employees. There was a case that our firm handled regrading whether small increments of time spent in a retail store after clocking out, whether it's just simply shutting down the store or turning on the alarm or whatever, whether that is compensable. The California Supreme Court ruled that time that's regularly being incurred of that nature can't be ignored by the employer just because it's difficult to capture and just because it's small.

Just the other day, there was a court of appeal decision in California ruling that reporting time pay obligations are triggered merely by calling into a store to find out whether somebody needed to show up for work. And another example is suitable seating litigation that a lot of retailers are dealing with now that concern whether employers must provide seats to employees while they're performing their job duties.

That's sort of a quintessential example of what happens in California. There is a wave of litigation based on a requirement in a wage order that's been around for decades that

nobody ever thought much of until some clever plaintiff's lawyers focused on it and developed a theory about how it ought to be applied, and the California Supreme Court, several years later, issued a ruling that's somewhat favorable to employees, and so, lo and behold, we have retailers fighting these cases really up and down the state.

Jose Garriga: Thank you, Greg. Well Meredith, from your standpoint, is California a comparable hotbed of activity relative to what Greg was describing, and, if so, what types of issues would be the focus?

Meredith Slawe: Sure, Jose. We refer to it in the consumer class action space as "the Wild West" out in California for a reason. Because it really is a hotbed of litigation activity in the consumer space. For reasons that Greg highlighted, there's a well-organized plaintiff class action bar focused on consumer litigation. There are a host of statutes that have been used primarily because of the availability of statutory damages that are uncapped in many instances, as well as courts that have been issuing some rulings favorable to plaintiffs that reinforce and incentivize folks to bring those cases in California, both in state and federal courts.

We've seen a number of lawsuits targeting the retail industry, but I'd say, in addition to the lawsuits that are publicly reported on and docketed, there are also hosts of pre-suit demand letters sent by lawyers in California to retailers, threatening class action litigation in the absence of settlement. And those letters tend to be mailed out en masse. Sometimes they're so sloppy that it'll be directed to a retailer and then three paragraphs down is the wrong retailer's name, because the person sending it just didn't catch to replace that name when it was sending out dozens of letters on a given day.

Many of these cases that we see in the consumer space are lawyer driven, and they're contrived. You'll often find a named plaintiff who's related to the lawyer or who is a professional litigant filing dozens of cases against retailers. For example, we saw a number of cases against retailers in California where a plaintiff would elect to sign up for a retailer's marketing text message program, and then, knowing that they're signing up and the platform is automated, they would seek, disingenuously, to revoke their consent by not following the "reply 'stop' to stop" mechanism and instruction that's expressly spelled out when they signed up, but, instead, would look to circumvent it, and would reply, "I wish to cease receiving text messages," to which they'd get a response that said, "I don't understand your message. Reply 'stop' to stop, or 'help' for help." And they'd continue to do that and then allow the texts to pile up and then sue on the basis that they did not provide consent and, in fact, had revoked it.

And retailers took those cases to the mat, I'm proud to say, and won some favorable rulings. But it took some protracted and costly litigation to shut down a line of cases and a line of claims that had been threatened against numerous retailers, some of whom felt compelled to settle, notwithstanding their principled positions on the issues.

We've seen, out in California, a number of claims recently brought under the Americans With Disabilities Act, challenging websites and mobile apps for allegedly failing to comply with guidelines that actually were promulgated by a private entity, and not by the DOJ [*Department of Justice*], which has authority in that space. But, nevertheless, those claims have been brought against retailers, seeking injunctive relief and fees in connection with that litigation. There have been cases involving reference pricing, primarily focused on outlet stores or discount stores. The gist of those types of allegations are that a higher MSRP [*manufacturer's suggested retail price*] or original price is not a bona fide price. And those cases have been brought, and, again, where the cases have been filed, the demand letters follow as well.

We've seen numerous cases involving text messaging programs, both marketing and informational-type messaging, against retailers, leveraging a statute known as the Telephone Consumer Protection Act, because it provides for $500 up to $1500 per text or call, with no cap. So, many plaintiff's lawyers have really leveraged the class action device and leveraged the statutory damages provision to seek what really is crushing levels of exposure for a company of any size for what, in many instances, if there's any type of violation, it's a purely technical violation, and no one was actually harmed.

We've seen cases in California involving gift cards, particularly a cash redemption requirement in California, where if a gift card falls below a threshold, the consumer can get a cash refund for that difference rather than the balance remaining on the gift card. That's been a challenge for retailers because there's a patchwork of state laws, all of which have different thresholds, and, so, oftentimes, a retailer will have perfectly compliant policies and practices, but a given sales associate in the store will make a mistake. And that innocent mistake will then be seized upon and leveraged into a punitive class action, and it can, in some instances, take some time for the retailer to demonstrate to a court that it does not, in fact, have a pervasive policy of violating the law, and it was just an innocent transgression.

We've seen cases under the Song-Beverly [*Consumer Warranty*] Act, which is a California statue that governs credit card transactions. Years ago, there had been a line of cases against retailers for the collection of zip codes during credit card transactions in-store where the courts found that zip codes constitute personal identifying information, and that if a consumer was asked for the zip code before the transaction was completed, it could mislead a consumer into thinking that provision of that zip code is a condition of the credit card sale, and, therefore, it should be only asked for after the sale is completed. Retailers again still, where they are compliant, where they are very vigilant about talking and training their sales associates, there are mistakes that happen, and, all too often, those are what lead to class action litigation, particularly when the plaintiff's bar, as we see it, is really out there in the stores shopping for lawsuits.

There's a very active plaintiff's class action bar in California. They are well organized, they're coordinated; many of them are connected to each other, referring cases, partnering with each other to bring cases in certain instances. We actually have a web of how the plaintiff lawyers in California are connected to each other, and there's really just some fascinating background there that can be useful when you see a complaint filed by a given firm or a given couple of firms.

I'll say the landscape out there is very challenging; it can be a minefield of litigation risk. And one of the things that my team really focuses on is not really being reactive, but being very proactive. Seeing how old laws are being exploited and anticipating what the next waves of litigation might be, using old laws. The TCPA was a 1991 statute that really started being exploited by the plaintiff's bar in 2013. Similarly, in Illinois, there's a statue now, passed in 2008, that's just starting to lead to an uptick in class action litigation. So, we follow those types of situations and try to really get in front of the issues and see around the corner and anticipate the risk areas, rather than just wait for a complaint to be filed and respond that way.

The reality is, California is an extremely important market for any retailer with national operations, and, so, it is not an option to just say, "Well, you know, we'll exclude California in some way. We're doing a new pilot program—we're going to carve that state out, or we're going to simply not focus on expansion in that market." And the objective, from our standpoint, is to help navigate the minefield of risk and to look for ways old statutes are being used or will be used, but also following new laws that are being passed, such as the California Consumer Privacy Act.

Our team is at the forefront of lobbying efforts of helping to try to ensure that that statute is understood and is navigable by our clients before it goes into effect in January of 2020. That's a statute that the plaintiff's bar has its eyes all over, and, beginning in January, when the private right of action as of now will be implemented, and six months later the government enforcement aspect of it will be active. It is an area that we are keenly focused on. We are trying to help shape it to the best we can, and it's going to be yet another tool in the toolbox of the plaintiff's class action bar in California.

Jose Garriga: Both you and Greg have mentioned the plaintiff's bar as being a formidable opponent in this, and just now you were discussing consumer privacy. To what extent is consumer privacy a focus of the plaintiff's bar, Meredith? I had mentioned in my introduction the notion of—and I think people have become quite sensitized to the idea—how their personal information is being collected and shared in ways of which they may not be aware. To what extent, then, is the plaintiff's bar focusing on this, both in California and elsewhere?

Meredith Slawe: It is without question the primary focus of the plaintiff's bar. All you have to do is go on the Twitter account of any active plaintiff's lawyer, and you will see post after post related to privacy. The Illinois Biometric Information Privacy Act is a perfect example of what's now playing out in the courts, or starting to in significant ways. Just two weeks ago, the Illinois Supreme Court ruled, contrary to 7th Circuit precedent, contrary to courts throughout the country in other analogous contexts, that a consumer does not need to show actual harm, or concrete injury, in order to have an actionable claim under the statute. And that law puts some pretty onerous requirements on businesses that capture or obtain biometric information from individuals. Biometric information includes things like eye scans, fingerprints, facial geometry, voiceprints, things of that nature that are unique biometric identifiers associated with a given individual.

And now what's happened, because there's no actual harm requirement, the floodgates have opened, and we have already seen in a two-week period, not only a significant number of new litigation matters being filed in the Illinois state courts, but we've also seen actions refiled that had been previously dismissed in the federal courts in Illinois because the federal courts had found that you needed to show such an injury to have Article III standing. And now, with no commensurate requirement in the Illinois state courts, we're now seeing a robust wave of litigation and a number of companies that are facing potentially remarkable damages, at $5000 per violation with no cap and the availability of attorney's fees.

One of the things that strikes me repeatedly, and that gets lost in the plaintiff's bar's constant crying out of how they're consumer-focused, is the fact that the retail industry is vigilant with respect to compliance issues. Retailers want to have positive interactions with consumers, and they want to satisfy their consumers—they don't want to burden them, they don't want to alienate them. And they demand, in order to succeed as a retailer, having customers return and have positive experiences and associations with their companies.

And, so, retailers are doing their best to navigate a very tricky landscape of privacy laws. Both again, like I said before, laws that are older that are on the books that are being used in ways that they were never ever anticipated—the TCPA being a prime example of that—and also new laws that are being lobbied for very hard by the plaintiff's bar, and many times, those laws look as though they were drafted by the plaintiff's bar.

And, so, it's incredibly important to reset the playing field here, because the plaintiff's bar is, in many instances, focused on filing litigation and using the class action device to generate fees for themselves. And it's not about the class, and it's not about an

individual who's been aggrieved in any way, and the retailers get a bad rep. But it's an incredibly difficult struggle to function as a national retailer with a host of different state laws, and good-faith compliance not being enough in many contexts to prevail in litigation. And you're going to see those cases as a retailer no matter what, because the more visible that you become, the more you're out there in front of the industry trying to do good things, trying to improve the customer experience, trying to give consumers what they affirmatively covet and value, the more at risk you are to be a target of the plaintiff's bar.

Jose Garriga: Well, both you and Greg, as I mentioned, have laid out a fairly daunting landscape. Greg, what solutions, then, would you see most effectively addressing these challenges for retailers, as someone who has years of experience in defense of precisely these sorts of lawsuits?

Gregory Knopp: Well, first and foremost, there's no silver bullet, but, as Meredith mentioned, really vigilant compliance is the cornerstone of avoiding too much trouble in terms of litigation. And that means really just staying on top of these developments in the law, and it's ever changing, but being really in tune with how things are changing, what sorts of issues are supporting litigation against similar companies, and understanding how best to mitigate risk in those regards. And it's fine to have good policies, but with your typical retail company, the operations are going to be very diffuse. And, so, it's one thing to adopt policies, but there needs to be education and implementation probably in the field, and that can be challenging.

But being really vigilant in terms of what's happening, what's changing, and how does that impact our operations? And adapting to the changing landscape is number one. Beyond that, something a lot of retail companies have moved to, or are considering moving to, is an arbitration program that would preclude class claims and require either consumers or employees to assert claims in their individual capacity only. The U.S. Supreme Court has been very supportive of arbitration, and, right now, the legal landscape is very favorable for companies that want to adopt arbitration in hopes of avoiding class or collective litigation. Those agreements tend to be enforceable. There are circumstances where they're not, but the law is very good right now.

Not every company is interested in that, especially on the employment side. There are cultural aspects to asking employees to agree to arbitrate, and there are costs that come along with it, so, it's not right for every company, but for many companies it's something worth considering as a way to forestall class litigation.

There's a caveat in California in terms of employment litigation. There's a statute called the Private Attorneys General Act that allows plaintiffs to seek to enforce California employment laws on a representative basis by trying to recover civil penalties that ordinarily would be recoverable by the state if the state brought an enforcement action. The California Supreme Court has held that those claims are more akin to qui tam claims and are not claims that can be compelled into arbitration on an individual basis.

There's some important differences between a lawsuit of that nature and a class action. Some of those distinctions are actually good for employers. So. generally. speaking, and employer would rather be battling a Private Attorneys General Act claim than a class claim in California. But those two species are similar enough that the arbitration program is not a foolproof way to avoid class-type litigation all together in California anyway. In addition to that, we think it's really important to make yourself a hard target. So, when you do get litigation, obviously you want to be prudent about how you try to resolve the matter, but making yourself a hard target and fighting when you think you're right and making it difficult for a plaintiff's lawyer to extract a lot of money from you when you

believe in your case, we think, goes a long way in the long run in terms of scaring potential plaintiffs away.

If you make it too easy, even if it's from a dollars and cents perspective, might save money in the end to resolve a matter early. It could just invite more claims in the future. So, in addition to being vigilant about compliance, we like to advise our clients to make themselves hard targets in litigation.

Jose Garriga: Thank you, Greg. A reminder, listeners, that we're here today with Akin Gump partners Greg Knopp and Meredith Slawe discussing the workings of the retail industry.

Moving, then, to another topic, Akin Gump recently launched a multidisciplinary retail initiative that features practices that a lot of people would very readily associate with retail matters, corporate and litigation among them. But it also includes areas that people might not necessarily think about as affecting the retail industry.

So, I'll pose this question to both of you, and maybe Greg, you could start off talking about some of these practices and the role that they play in the retail space, and then, Meredith, maybe you can speak a bit about the partnerships that are very much a part of this initiative.

So, Greg, could you lead off please?

Gregory Knopp: Sure. So, the thinking behind the initiative is that if you look around our firm, there are, in many different offices and in many different practice areas, some really deep and valuable experience in representing retail companies. So, what we're doing with this initiative is really bringing all of that experience under one tent and make sure that we are coordinating with one another so that we can offer our clients really a wide range of expertise. And as you know, there are some practices where our work in the retail space might be self-evident, such as the litigation we've been talking about and maybe corporate practices. But the firm is fortunate to have really strong practitioners in some other areas where it might be less evident, the value that they can offer retail clients.

I'll name a few. One is, we have a really strong international trade practice that advises clients, including retail clients, on compliance with laws that govern importing and exporting of goods and services, which is something that many retail companies do, and I'm sure that they could benefit from our expertise in that area. And then another that I'd like to mention is, we are one of the leading firms in terms of public law and policy practice, and we assist clients in many sectors of the economy in navigating complex regulatory and policy matters and in government relations.

Jose Garriga: Meredith, if you could pick up from there in terms of, as I mentioned, some of the partnerships that you all forged as part of this initiative.

Meredith Slawe: Absolutely. I mean, what's pretty amazing is that when this initiative was launched, the response internally among Akin lawyers of all levels, across all offices, was pretty incredible. The amount of enthusiasm and the amount of experience, as Greg said, across practices, with retailers from all different segments of the industry. And, so, part of our objective in formalizing this initiative is to bring our lawyers a full 360 picture of what's happening in the industry, because we believe that in order to be really strong business partners to our retail clients, we have to understand the pressures, the competitive pressure, the day-to-day operations, that they are working on in addition to all of the legal and compliance challenges that we're aware of, and knee deep in, in the context of our work for them.

So, a key part of this initiative is our partnership with the Retail Industry Leaders Association and the Retail Litigation Center. We were really proud to be selected as the

go-to firm for class actions by the RLC, and that endeavor launched with them to help retail members of the RLC really see around the corner and proactively address litigation risk before it evolves into active litigation. And, so, we're working very closely with them to help share information and to help anticipate areas of risk.

But this initiative is really exciting. Through it, we've identified about two dozen areas that we expect to see evolve into significant areas of risk for our retail clients. And our goal is to get in front of them; our goal is to help our clients meaningful address issues, often in ways that are very minor in terms of tweaking disclosures, in terms of creating or revising a policy—and that small measure can preempt considerable litigation risk. And, so, that piece of it is extremely gratifying because we feel as though we're immediately adding value without disrupting the business, and ensuring that our clients are not burdened by the realities of class action litigation.

I've been thrilled to see the response to this initiative. As Greg said, there are so many practices across the firm, our restructuring practice, our policy group, our trade group, our IP group, our investigations group, that is really just extraordinary in terms of their ear to the ground on different areas of risk in the investigation space. Our privacy compliance group is outstanding, and, so, now we're bringing all of those folks together, sharing resources, learning together. We'll have a presence at conferences like Shop Talk coming up. We were at the NRS Expo talking to technology vendors and seeing what our retail clients are seeing so that we can advise them, but also look through their lens so that we have a better partnership, a more informed partnership, and that will help us going forward provide full service to our retail clients.

Jose Garriga: Thank you, Meredith. So, let's just wrap up. What would you say, then, and I'll ask you, Meredith, if you could field this one, what would you say are the big takeaways then? We've covered a lot of ground here, particularly talking about some of the challenges—and they are considerable ones—facing retailers in this evolving landscape. What are the big takeaways you would say for the retail sector in 2019?

Meredith Slawe: Well, first, we have said some things that may sound a little bit scary for retailers, particularly with respect to the landscape in California. That said, it is an incredibly exciting time to be a retailer, and there are so many innovations that are happening that are changing the way retailers communicate with, and interact with, their customers in terms of an increased focus on the customer experience, and customer lifetime value being a real priority. There are many, many exciting things to come for retail, and, as Greg said—I'll circle back on a key point he made—compliance is key. Compliance and understanding of what is a real risk and how to mitigate that risk—those are really important areas of focus for retailers.

Retail continues to evolve, and as partners to the retail industry, we continue to evolve as well, and that's a key for us. We know how much is changing, we're very educated on the industry, and, so, as there's an increased pressure to market, increased pressure to respond to consumer demand, to employee demand, as there's increased globalization and changes in the supply chain, as all of these things continue to evolve, retailers should be mindful of the compliance challenges and ensure that they are mitigating risk to the extent that they can. But I think we'd be remiss if we suggested anything, to wrap up, other than it's an exciting time to be in the retail space, we're excited to partner with our retail clients, and we're excited to see what's to come in 2019 and beyond.

Jose Garriga: Thank you. Listeners, you've been listening to Akin Gump partners Greg Knopp and Meredith Slawe. Thank you both for sharing your thoughts and insights into this key sector. As you mentioned, some pitfalls, but certainly some amazing prospects as well.

And thank you, listeners, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, YouTube and Spotify.

To learn more about Akin Gump and the firm's work in, and thinking on, the retail industry, look for "retail" on the Experience or Insights & News sections on akingump.com.

Until next time.