

Product Liability & Toxics Law News

Walmart Likely to Settle After Sanction for Destroying Evidence

By Martina Barash

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- Settlements typically follow retailer's sanctions for missing video footage and other important evidence
 - Federal court in Puerto Rico, in latest case, finds retailer intentionally destroyed allegedly defective swing and store report in wrongful death suit
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Walmart Inc. is likely to settle a suit in Puerto Rico alleging a display swing collapsed and caused a customer to drop "like a breadfruit" after a federal judge recently sanctioned the retailer for intentionally destroying important evidence.

That's a tough pill for the retailer to swallow as it has a reputation as a hard-charging litigator that hates to strike out-of-court deals.

But the sanction in this case—which includes telling jurors they can assume the worst from the missing evidence—is far from the first levied against Walmart for losing key pieces of evidence in negligence and other cases.

And a review of 18 other cases cited by the judge in Puerto Rico shows Walmart not only has an unusual pattern of being sanctioned over missing evidence, but also shows a recent trend of settling those suits.

Walmart didn't respond to Bloomberg Law's requests for comment about either the Puerto Rico case or the prior suits in which it has been sanctioned.

A Sanctioning in Puerto Rico

The most recent sanction comes in a case in which Roberto Eric Rivera-Mojica, 49, allegedly fell from a patio swing in a Sam's Club store in July 2015.

Rivera-Mojica allegedly told his mother, who was with him at the store but didn't see the accident, that the swing's backrest threw him backwards and that he fell "like a breadfruit."

Employees said the man had a red welt at the back of his head, limped, and was dizzy and slow of speech after the fall. After he returned home, Rivera-Mojica's condition worsened. He died two days later in a hospital from a cerebral hemorrhage, according to the court.

In preparation for trial, attorneys for Rivera-Mojica's daughter asked for evidence surrounding the accident including, among other things, access to the swing.

After the company failed to produce the swing, the daughter moved for sanctions on that ground. She also wanted Walmart punished for not producing a store manager's report written shortly after the accident and video that might have shown Rivera-Mojica leaving the store after his fall.

The court granted the sanctions after finding the company intentionally destroyed the swing and the store report. Bad faith could also be inferred from the missing video footage, the court said.

"The swing's relevance is glaringly obvious," Judge Aida M. Delgado-Colon of the U.S. District Court for the District of Puerto Rico said.

And Walmart's assertion that an assistant manager "coincidentally decommissioned the swing within a month of Roberto's fall and death is fairly inconceivable," the court said.

"The unavailability of so much evidence that was exclusively in Wal-Mart's control" suggests the loss of evidence was on purpose, especially because it all bears on the issue of what caused the accident, it held.

The court's sanction against the company includes an instruction that, if the case goes to trial, the jury can infer that the evidence would have been damaging to Walmart's defense.

That's a very difficult hurdle to surmount and something that typically "brings about a resolution of the case" via a settlement, said Greg Gold, a plaintiffs' attorney in Denver who's litigated against Walmart.

In court filings in the Puerto Rico case, the company offered a variety of explanations for the missing evidence. They included that the retailer didn't preserve the swing and video because it hadn't received notice of the potential litigation. Also, no camera view of the incident existed.

Walmart also disputed the swing's relevance as speculative, and said no investigation ever occurred.

Both Unsettling, and Settling, Pattern

Settlement is especially likely given the retailer's history in many of the recent cases where it's been sanctioned. Bloomberg Law's analysis of those cases showed that, of the seven other cases in which sanctions were imposed over the last five years, all but one settled.

A federal judge in Nevada in 2016 stopped short of finding a clear intent in the retailer's loss of evidence in a case against Walmart, one of many she has overseen.

Nonetheless, Magistrate Judge Peggy A. Leen of the U.S. District Court for the District of Nevada found a pattern in those cases unsettling, and in her view, the retailer's practice of factoring settlements or jury award payments into an individual store's "bottom line" might be at fault.

The company has "produced video evidence when it is favorable to Wal-Mart," Leen said. But in other instances it "has explained its failure to preserve video by claiming the incident was not captured on camera."

That system could be resulting in an incentive for employees to misplace videos and other evidence when they don't favor Walmart because a court loss could eat into store profits, and even employees' own bonuses, Leen said.

Decentralized, Tough Litigator

Other attorneys who talked to Bloomberg Law about Walmart's sanctions in the prior cases cited by the Puerto Rico court downplayed the retailer's mishandling of evidence. But they acknowledged Walmart's reputation as a tough litigator.

They said that rather than illustrating a worrisome trend of intentional destruction, the cases instead demonstrate the difficulties large, decentralized companies face when having to litigate cases far from their home states.

"What this case shows is how difficult it is for large companies that are serial litigants to execute a defensible preservation strategy in every case," said Philip Favro, an electronic-discovery and data-management consultant at Driven Inc. in Los Angeles.

"With Walmart having so many stores spread out in so many locations, it is very difficult to carry out the preservation process flawlessly every time," he said.

Favro said other big companies have also been sanctioned for lost evidence, though he could only name one sanctioned more than once.

Bob Lynch is a Nashville attorney who represented the plaintiff in one of the prior slip-and-fall cases where sanctions were imposed. He said that, despite an adverse-inference instruction in his client's favor, he ultimately went to trial against Walmart and lost.

"I don't think Walmart is going to give you any breaks" in litigation, he said. But he didn't think the company deliberately destroyed evidence either in his suit when it failed to preserve a liquid on the floor where his client slipped.

The case is *Rivera v. Sam's Club Humacao*, D.P.R., 16-2307 (ADC), 9/28/18.

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