

Is Amazon Liable for Third-Party Sellers' Products? To Date, the Answer for E-Commerce Retailers May Depend on Where They Are

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Online transactions on Amazon now account for over 50% of U.S. e-commerce. The company, already a massive corporation with enormous market share prior to the COVID-19 pandemic and the related rise in online shopping, saw its sales skyrocket 37% last year and reported revenue of \$232.9 billion for 2020.

Over 50% of Amazon's sales are generated by third-party sellers that Amazon collectively refer to as its "Amazon Marketplace," even though this is not a separate section of Amazon's website. Instead, third-party sellers' products typically appear co-mingled among all Amazon listings, with just a small line of text to indicate that Amazon itself is not the actual seller.

Third-party sellers are authorized to sell products via Amazon's website subject to the terms of Amazon's Business Solutions Agreement (BSA), which states that third-party sellers are "responsible for any non-conformity or defect in, or any public or private recall of, any of their products." Third-party sellers set the pricing for their products subject to certain Amazon parity parameters, are responsible for properly packaging their products, are responsible for ensuring compliance with applicable laws, and often ship purchases directly to buyers. Additionally, purchasers must agree to Amazon's Conditions of Use, which state that "Amazon does not assume any responsibility or liability for the actions, product, and content of all these [other businesses] and any other third parties."

This raises the important but unanswered question of whether Amazon (or any e-commerce retailer) is liable as a "seller" of third-party goods when in many instances they never take possession of those goods. This

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is a particularly important issue when the manufacturer or third-party seller is located in a foreign country and may not be subject to U.S. jurisdiction. Indeed, courts in various jurisdictions have ruled on both sides of the debate as to whether Amazon can be held liable under such circumstances, and these outcomes have often hinged on state-specific product liability statutes.

Recent Case Law

The outcomes of the following recent cases, out of four different U.S. jurisdictions, lend additional insights into these liability issues for e-commerce retailers: *Case: Oberdorf v. Amazon (2020)* Court: U.S. Court of Appeals for the Third Circuit Outcome: Amazon potentially liable Summary: In *Oberdorf*, the plaintiff purchased a dog leash on Amazon's website through a third-party seller. While she was walking her dog, the leash snapped, flung back, struck her glasses, and resulted in injuries that ultimately caused her to lose all sight in her left eye. The Third Circuit applied the Pennsylvania Supreme Court's four factor test from *Musser v. Vilsmeier Auction Co, Inc.* in considering the following questions: 1) whether Amazon is the only member of the marketing chain available to the injured plaintiff for redress; 2) whether the imposition of strict liability on Amazon serves as an incentive to safety; 3) whether Amazon is "in a better position than the consumer to prevent the circulation of defective products"; and 4) whether Amazon could distribute the cost of compensating for injuries resulting of defects by charging for it. After applying and analyzing these four factors, the Third Circuit overturned the U.S. District Court's Order granting summary judgment to Amazon and held that Amazon could be liable. Subsequently, at Amazon's request, an *en banc* (full court) review was granted. The case, however, settled before a decision was rendered, leaving open the possibility that the Third Circuit could come out differently in a subsequent case.

Case: Bolger v. Amazon (2020) Court: State of California, Court of Appeal, Fourth Appellate District Outcome: Amazon potentially liable Summary: In *Bolger*, the plaintiff purchased a replacement laptop computer battery on Amazon's website through a third-party seller, Lenoge Technology. The battery subsequently exploded, and plaintiff sustained severe burns. Plaintiff sued Amazon and several other defendants alleging various causes of action related to product liability and breach of warranty claims. The trial court granted Amazon's motion for summary judgment on the basis that the theories of liability did not apply to Amazon because it did not distribute, manufacture, or sell the product in question. In doing so, the trial court accepted Amazon's position that its website was merely an "online marketplace" and that Lenoge was the actual product seller. The Court of Appeal, however, reversed and held that Amazon placed itself between the consumers and the manufacturer/third-party seller in the chain of distribution of the product at issue. Specifically, the Court noted that Amazon: (a) accepted possession of the product from Lenoge and stored it in an Amazon warehouse (which is a distinguishing fact from cases involving self-fulfillment); (b) attracted the plaintiff to the Amazon website; (c) provided the plaintiff with a product listing for the product; (d) received plaintiff's payment for the product; and (e) shipped the product in Amazon packaging to plaintiff. Additionally, the Court noted that Amazon: (a) set the terms of its relationship with the manufacturer; (b) controlled the conditions of the manufacturer's offer for sale on Amazon; (c) limited the manufacturer's access to Amazon's customer information; (d) forced the manufacturer to communicate with customers through Amazon; and (e) demanded indemnification as

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well as substantial fees on each purchase. Ultimately, in finding that Amazon could be liable, the Court stated that “[w]hatever term we use to describe Amazon’s role, be it ‘retailer,’ ‘distributor,’ or merely ‘facilitator,’ it was pivotal in bringing the product here to the consumer.”

Case: *Loomis v. Amazon* (2021) **Court:** State of California, Court of Appeal, Second Appellate District **Outcome:** Amazon potentially liable **Summary:** In *Loomis*, the plaintiff purchased a hoverboard on Amazon’s website through a third-party seller. Plaintiff alleged that the hoverboard was defective and caused a fire that partially burned down plaintiff’s house after it was plugged in. Relying in part on the ruling in *Bolger*, the Court of Appeal reversed the Superior Court of Los Angeles and held that Amazon could be liable and characterized as a seller. Significantly, the Court found that Amazon could be liable even though Amazon had not fulfilled the order directly as it had in *Bolger*. Instead, the hoverboard shipped directly from the overseas third-party vendor and was never actually in the possession of Amazon. In finding that Amazon could be liable, the Court relied largely on the fact that Amazon was in the “vertical chain of distribution” for the product, meaning that Amazon (a) interacted with plaintiff and responded to plaintiff’s question regarding shipping time; (b) took the order; (c) processed the order; (d) collected payment; and (e) received a percentage of the sale. The Court also took note that the third-party seller was not allowed to communicate with plaintiff directly and that if plaintiff had wanted to return the hoverboard, the return would have been routed through Amazon. It is important to note that the Court did not definitively state that Amazon is or should be liable. Rather, the Court held that there are triable issues of fact that preclude summary judgment in Amazon’s favor.

Case: *McMillan v. Amazon* (2021) **Court:** U.S. District Court for the Fifth Circuit/ U.S. Court of Appeals for the Fifth Circuit/Supreme Court of Texas **Outcome:** Amazon not potentially liable **Summary:** *McMillan* involved a young girl who was severely injured after ingesting the batteries from a remote sold by a third-party seller on Amazon’s website. The District Court held that Amazon could be held liable for the allegedly defective remote as a seller. Amazon appealed to the Fifth Circuit, arguing that it was not a seller, but rather only facilitated the sale of the product. The Fifth Circuit declined to hear arguments on the merits and stated that “[g]iven the dearth of on-point caselaw and the significant potential consequences of holding online marketplaces responsible for third-party sellers’ faulty products make this a question that only the Supreme Court of Texas can answer.” In a 5-2 decision, the Supreme Court held that the Texas Products Liability Act’s definition of “seller” does not extend to Amazon in the context of third-party seller products. The Act defines a seller as a “person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.” Notably, the Supreme Court stated that “sellers are those who have relinquished title to the allegedly defective product at some point.”

Case: *Great Northern Insurance Company a/s/o Perper v. Amazon* (2021) **Court:** U.S. District Court for the Northern District of Illinois **Outcome:** Amazon not potentially liable **Summary:** In *Great Northern Insurance Company*, a suit was filed by Great Northern on behalf of its insureds, Dan and Danielle Perper, against Amazon and two Chinese companies that manufactured and shipped allegedly defective hoverboards. The Perpers’ home sustained damage in a fire that they claim was caused by a defective

lithium-ion battery in at least one of two hoverboards that the Perpers purchased from third-party sellers on the Amazon website. Plaintiff argued that Amazon was a seller because it played an integral role in marketing and distribution by allowing the products to be sold on its online marketplace. Plaintiff argued that, while Amazon never exercised *physical* control over the products, Amazon's BSA granted Amazon "overall control" over third-party sellers' "interaction[s] with a customer" by virtue of its ability to remove content uploaded by third-party sellers, issue refunds, and withhold remittance payments while investigating customer complaints. Under Illinois state law, strict liability applies to entities in the supply chain who (a) create the risk of harm by participating in the manufacture, marketing and distribution of unsafe products; (b) derive economic benefit from placing them in the stream of commerce; and (c) are in a position to eliminate the unsafe character of the product and prevent the loss." In ruling in favor of Amazon, the Court admonished plaintiff for failing to properly apply these factors and noted that federal courts should not expand state tort liability beyond the bounds established by state courts.

Key Takeaways for E-Commerce Retailers

The issue of strict liability for e-commerce retailers in circumstances involving the sale of products by third-party sellers or manufacturers, continues to evolve in both state and federal courts across the country. This question will almost certainly continue to be addressed as a matter of first impression in a variety of jurisdictions and the analysis in these cases will almost certainly involve the application of state-specific product liability statutes. Therefore, it is imperative that both plaintiffs and defendants facing such claims not unduly rely on case law from outside jurisdictions that fail to address material state law distinctions related to product liability. Ultimately, this may result in legislative changes to address the liability of e-commerce sellers more clearly in the future, but for now the issue is an open one in most jurisdictions.

While Amazon had initially been quite successful in defending lawsuits in multiple jurisdictions involving products sold on its website by third-party sellers, the recent decisions in *Bolger* and *Loomis* demonstrate that e-commerce platforms face an increased risk of liability. All online retailers who operate their own e-commerce website and sell any third-party products may be held strictly liable for product defect claims arising from products of which they never actually took possession.

For all e-commerce retailers offering the sale of products from third-party sellers, the importance of having supply chain contracts with an appropriate indemnification provision is clear. Of equal importance, however, is having adequate insurance requirements and ownership of appropriate insurance policies in place for further protection, especially if the indemnitor cannot be found or does not have the financial wherewithal to indemnify, defend and hold the retailer harmless. Additionally, it is important that e-commerce website terms and conditions include appropriate disclaimers and disclosures. Having a product liability attorney review all contracts, insurance policies, and an e-commerce website's terms and conditions could help avoid liability in the future.

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