

## Online Retailers Beware: Texas Supreme Court to Consider Whether Amazon Is a “Seller”

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The Texas Supreme Court is set to determine whether Amazon can be considered a “seller,” and thus held liable, for a defective product sold through its website, in the case of *McMillan v. Amazon.com, Inc.*, No. 20-20108, 2020 WL 7417454, at \*1 (5th Cir. Dec. 18, 2020), *certified question accepted* (Jan. 8, 2021).

Amazon.com Inc. is the nation’s largest online retailer, selling and shipping millions of products every day. With the COVID-19 pandemic altering shopping habits, Amazon has become even more ubiquitous than ever. While many stores and online retailers struggled in 2020, Amazon’s sales skyrocketed 37% to a record \$96.2 billion in the third quarter of 2020. But what happens when a product purchased from Amazon harms a customer? Can Amazon be held liable even if it has no role in designing or manufacturing the product? Courts across the country are grappling with this question, which undoubtedly will impact online retailers like Amazon for years to come.

*McMillan v. Amazon.com, Inc.* involves a young girl who was severely injured after ingesting the batteries from a remote sold on Amazon. The trial court found that Amazon could be held liable for the allegedly defective remote as a seller. Amazon then 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, holding, “[g]iven the dearth of on-point caselaw and the significant potential consequences of holding online marketplaces responsible for third-party sellers’ faulty products, we certify this important question to the only court that can adjudicate it with finality: the Supreme Court of Texas.” The Fifth Circuit certified the following question of state law: “Under Texas products-liability law, is Amazon a ‘seller’ of third-party products sold on Amazon’s website when Amazon does not hold title to the product but controls the process of the transaction and delivery through Amazon’s Fulfillment by Amazon program.” The Texas Supreme Court accepted the certified question on January 8, 2021, requesting briefing on the merits. The Texas Supreme Court also set the case for oral argument.

The Fifth Circuit is not the only court to address the issue of whether an online retailer can be held liable for defects in the products it sells. Several state and federal courts across the country have

issued rulings addressing similar questions. See e.g., *Oberdorf v. Amazon.com Inc.*, 818 F. App'x 138, 143 (3d Cir.), *certified question accepted*, 237 A.3d 394 (Pa. 2020) (certifying the question of whether Amazon is a seller to the Pennsylvania Supreme Court); *Philadelphia Indem. Ins. Co. v. Amazon.com, Inc.*, 425 F. Supp. 3d 158, 163 (E.D.N.Y. 2019) (“While many courts that initially considered the issue found in Amazon’s favor, some more recent cases have reached different results, with appeals on a few of these cases still pending. Indeed, this is a developing area of law.”). For example, the Ninth Circuit recently heard a case in which an allegedly defective hoverboard injured an Amazon customer. The court ultimately sided with Amazon, affirming dismissal and concluding that Amazon is not a “seller” under the Second Restatement of Torts § 402A as adopted by Arizona state law. *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, No. 19-17149, 2020 WL 6746745, at \*3 (9th Cir. Nov. 17, 2020).

However, an intermediate California court of appeal came to the opposite conclusion, holding that Amazon could be held strictly liable for the online sale of allegedly faulty batteries. The court emphasized the critical ability Amazon has to adjust the cost of liability between itself and its third-party sellers and ultimately held that Amazon should be held liable if a product sold through its website turns out to be defective. *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 438–39 (2020). The California Supreme Court denied Amazon’s petition for review, declining to hear the case on the merits.

As e-commerce continues to dominate Americans’ shopping preferences, this area of law will continue to develop. Notably, adverse rulings against Amazon will likely encourage potential plaintiffs to file suit, given that Amazon may be considered a “deeper pocket” than the designers and manufacturers of the products it sells. Adverse rulings could also increase the prices consumers pay for products to offset the litigation burden or, alternatively, could lead to fewer available products with Amazon working to limit its liability.

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