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PRODUCT LIABILITY

Day Pitney attorneys James H. Rotondo, Jennifer L. Shukla, and Julia M. Sorensen examine recent court rulings finding that Amazon has no responsibility in its role as a marketplace provider for product liability claims. The authors note that while these rulings are promising for Amazon and other on-line marketplaces, the issue is far from resolved.

INSIGHT: Amazon Tests Boundaries Of What It Means to Be a Product Seller



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Changes in technology and ways of doing business disrupt what were once thought to be settled propositions of law.

No better example is Amazon, the highest-grossing online retailer in the nation, which is sparking debate over how traditional product liability law principles apply to emerging e-commerce platforms, such as digital marketplaces.

The controversy stems from Amazon's role as a marketplace provider for third-party products. On the Amazon website, purchasers can buy products sold directly by Amazon and those available on Amazon's marketplace sold by a third-party seller.

As a marketplace provider, Amazon performs some, but not all, of the tasks typically performed by a seller, retailer, or distributor. When facilitating the purchase of third-party products, Amazon performs some or all of the following functions:

- marketing, packaging, shipping, and warehousing the product;

- charging the purchaser's account;
- generating and sending receipts;
- imposing a hold on funds remitted by buyers; affixing its logo to shipping boxes and materials;
- collecting referral fees for each product sold;
- guaranteeing timely delivery and condition of product in transit;
- requiring all communications between seller and buyer to filter through its messaging platform;
- and exercising a license to use sellers' intellectual property and product information.

By contrast, Amazon does not design, manufacture, assemble, set prices, take title, provide warranties, create descriptions of or name itself as the seller of the product.

A number of courts have held recently that when Amazon operates as a marketplace provider, Amazon is not a "seller" for purposes of state product liability law, and is therefore not liable for any allegedly defective products. In those cases, courts have accepted Amazon's argument that it acts merely as a conduit for independent transactions, and rejected the arguments by consumers and their insurers that Amazon has become

something more than just a listing service by deeply embedding itself into the chain of distribution. In addition, some courts have invoked the Communications Decency Act, 47 U.S.C. §§ 230(c), (f) (CDA), to bar claims seeking to hold Amazon liable for information it posts about products and related claims.

District Courts Rule for Amazon and Plaintiffs Appeal

To date, federal district courts in Maryland, New Jersey, New York, Pennsylvania, and Tennessee have ruled that Amazon is not a product seller and/or that the CDA shields it from liability. (*McDonald v. LG Electronics USA Inc.*, 219 F. Supp. 3d 533 (D. Md. 2016) (rechargeable battery allegedly exploded while in buyer's pocket, setting him on fire); Transcript of Jan. 11, 2018, hearing, *Erie Ins. Co. v. Amazon.com Inc.*, No. 8:16-cv-02679 (D. Md. Jan. 22, 2018), ECF No. 66 (Hearing ECF 66) (defective battery-operated headlamp malfunctioned, setting fire to a home); *Allstate N.J. Ins. Co. v. Amazon.com Inc.*, No. 17-cv-2738, 2018 BL 261762 (D.N.J. July 24, 2018) (defective laptop battery caught fire, causing a home to burn down with the buyer's cats inside); *Eberhart v. Amazon.com Inc.*, No. 16-cv-8546, 2018 BL 307257 (S.D.N.Y. Aug. 27, 2018) (glass coffee-pot shattered causing nerve damage to thumb); *Oberdorf v. Amazon.com Inc.*, 295 F. Supp. 3d 496 (M.D. Pa. 2017) (permanent eye injuries from an allegedly defective retractable dog leash); *Fox v. Amazon.com Inc.*, No. 3:16-cv-03013, 2018 BL 191355 (M.D. Tenn. May 30, 2018) (family injured and their home burned down when a defective battery in a hoverboard caused a fire).)

The plaintiffs in *Oberdorf*, *Erie Insurance Co.*, and *Fox* have appealed, and the Third, Fourth, and Sixth Circuit Courts of Appeals are poised to address this question soon.

To date, the only appellate court to consider a similar issue has been the Federal Circuit Court of Appeals in *Milo & Gabby LLC v. Amazon.com Inc.*, 693 F. App'x 879 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 335 (2017). There, the court held that Amazon was not a seller for purposes of an alleged violation of copyright law arising out of "knock off" pillowcase stuffed animals sold through the marketplace. In reaching its decision, the court relied on the plain language of the Copyright Act, which requires a "sale or other transfer of ownership," as well as patent law cases, dictionary definitions of the term "sale," and state law cases interpreting Uniform Commercial Code sections. (*Id.* at 885–86.)

The court also stated that, although there are "some situations in which a court might consider a party to be a seller even when it does not hold and transfer title," "we will not today depart from an insistence that *Milo & Gabby* show that Amazon obtained title to the goods at issue and transferred that title to the third-party purchasers before we will find Amazon liable as a seller . . ." for copyright purposes. (*Id.* at 887, 890.)

Two of the district courts that have concluded Amazon is not a product seller for state product liability purposes examined the analysis in *Milo & Gabby LLC*. (*Allstate N.J. Ins. Co.*, 2018 BL 261762 at *12–13; *Eberhart*, 2018 BL 307257 at *5.)

Buyers have pointed out that Amazon's marketplace may provide the only link the buyer has to the product,

(*see Allstate N.J. Ins. Co.*, 2018 BL 261762 at *13), and at least in cases where the products are included in its Prime subscription service, Amazon also displays its Prime logo on those same product pages. Plaintiffs argue that this overlap of services should result in Amazon being subject to product liability claims. (*E.g.*, *id.*; *Fox*, 2018 BL 191355 at *8–9.)

Despite this overlap, however, no court has imputed "seller" status to Amazon for its marketplace transactions, using a number of different rationales to support their conclusions.

Courts Refuse to Deem Amazon a Seller Under State Product Liability Laws

Some courts have concluded that Amazon is not a seller because it never takes title to products, even if it warehouses them. One court reasoned that "regardless of what attributes are necessary to place an entity within the chain of distribution, the failure to take title to a product places that entity on the outside." (*Eberhart*, 2018 BL 307257 at *3.) Another court stated that "Amazon does not take title to the products for which it offers [fulfillment] service," and thus "performing those services does not transform Amazon into the 'seller' of the product." (*Fox*, 2018 BL 191355 at *8.)

Other courts have declined to use title as a litmus test, reasoning "that holding title is merely a metric that a court can use to evaluate whether [a] party has control over a product." (*Allstate N.J. Ins. Co.*, 2018 BL 261762, at *10–11.) Despite a broad statutory definition of a product seller, the *Allstate* court concluded that although Amazon "may have technically been a part of the chain of distribution," it "never exercised control over the product sufficient to make it a 'product seller' . . ." (*Id.* at *9.)

Other courts have applied the same type of reasoning, but used different language to explain their decisions. In *Fox* (2018 BL 191355 at *7), for example, the court held that Amazon was not a seller because it was "merely a third-party vendor's means of marketing," similar to the function of an auction service. (*See also Oberdorf*, 295 F. Supp. 3d at 500–01 (concluding that Amazon is not a seller because it acts more like a listing service, such as a newspaper classified ad section); *McDonald*, 219 F. Supp. at 541–42 (concluding that the marketplace was similar to an auction service, and refusing to impose liability because Amazon did not breach its duty to facilitate the transaction between buyer and seller).)

In another case, the court rejected as "outrageous" plaintiff's argument "that the same product purchased from Home Depot would make Home Depot liable as a seller but not Amazon." (Hearing ECF 66 at 30.) In the court's view, a retailer incurs "the responsibilities and the liabilities associated with [being] the seller," whereas Amazon is simply "allowing a seller to utilize its services to store [the product] and then to send it to whoever this purchaser asks it to be sent to." (*Id.* at 31.) In short, it concluded that "Amazon did not manufacture, sell, deliver, or offer this for sale . . ." (*Id.* at 32.)

Similarly, other courts pointed to the omission of certain key selling functions to guide their decision on Amazon's seller status. For example, one court pointed to the fact that "Amazon has 'no role in the selection of

goods to be sold,’ ” (*Oberdorf*, 295 F. Supp. 3d at 501), while another noted that Amazon did not set the price of the product. (*Fox*, 2018 BL 191355 at *8.) Many of the opinions also noted that so far, other courts have universally refused to impute seller status to Amazon for its marketplace function. (Hearing ECF 66 at 32–33; *Fox*, 2018 BL 191355 at *8–9; *Allstate N.J. Ins. Co.*, 2018 BL 261762 at *13–14; *Eberhart*, 2018 BL 307257 at *4–5.)

Courts Disagree on Precisely How the Communications Decency Act Applies

Several courts also have held that certain product liability claims were barred by the CDA, which protects internet speech by broadly immunizing websites that host third-party content. (47 U.S.C §§ 230(c)(1), (f)(2); *Hinton v. Amazon.com LLC*, 72 F. Supp. 3d 685, 688–91 (S.D. Miss. 2014).)

Thus, the CDA shields Amazon from claims founded on, for example, allegedly defective product descriptions generated by sellers but hosted by Amazon, such as claims that the product information fails to warn users. (*Hinton*, 72 F. Supp. 3d at 689–91 (CDA bars plaintiff’s claims for negligence, breach of implied warranty of merchantability, failure to warn, and breach of the duty of good faith and fair dealing, among others).) Implicit in such claims is the assumption that Amazon has a duty to either “edit and filter content posted by third parties” or “speak alongside content posted by third parties.” (*McDonald*, 219 F. Supp. 3d at 538 (dismissing negligent failure to warn claims).)

These courts have refused to hold Amazon liable for hosting third-party content, viewing it as an attempt to treat Amazon as the publisher or speaker of information provided by the independent seller. (*Oberdorf*, 295 F. Supp. 3d at 502–03 (dismissing negligence and negligent undertaking claims).) Most of the cases have relied on the CDA as a ground for dismissing claims related to failure to warn or misrepresentation, but *Erie* relied on the CDA as a separate and independent ground on which to grant summary judgment on plaintiff’s claims for negligence, breach of warranty, and strict liability. (Hearing ECF 66 at 34–35.)

McDonald recognized limitations on the preemptive effect of the CDA, holding for purposes of ruling on a motion to dismiss that the plaintiff’s negligence claim “do[es] not necessarily seek to hold Amazon liable as a ‘publisher or speaker,’ and [is] therefore not automatically barred under Section 230.” (*McDonald*, 219 F. Supp. 3d at 537.) It reasoned that “Section 230 does not immunize defendants from all products liability claims,” such that there may be liability when defendants play “a direct role in tortious conduct” (*Id.* (emphasis in original).)

Public Policy Implications

With one exception, the courts in these cases have reached their conclusions without conducting an in-depth analysis of potential public policy implications. Generally, the policy behind product liability law is to

promote public safety by distributing injury costs to producers who are thus incentivized to invest in creating safer products. (James A. Henderson Jr., *Judicial Reliance on Public Policy: an Empirical Analysis of Products Liability Decisions*, 59 Geo. Wash. L. Rev. 1570, 1575–79 (1991).) The result in these cases seems to be inconsistent with this policy.

In *Allstate*, the court concluded that finding Amazon to be a product seller would conflict with the spirit of its state product liability regime that seeks to “limit the expansion of products-liability law.” (*Allstate N.J. Ins. Co.*, 2018 BL 261762 at *7 (quoting *Zaza v. Marques and Nell Inc.*, 144 N.J. 34, 47 (1996)).) In reaching that conclusion, the court noted that Amazon largely “lacks control over the product[s] at issue, making it, ultimately, unable to manage the risks posed by the allegedly defective product.” (*Allstate N.J. Ins. Co.*, 2018 BL 261762 at *14.) The court observed that “no contract exists between Amazon and the manufacturer,” which makes Amazon powerless “to exert pressure to ensure the safety of the product.” (*Id.*) Amazon’s contract with sellers, however, “relate[s] mainly to the relationship between the two parties, not to Amazon’s control over [the seller’s] product.” (*Id.*) As a result, the court concluded Amazon is not able to “recapture the expense of an occasional defective product by an increase in the cost of the product.” (*Id.*) (Quoting *Oscar Mayer Corp. v. Mincing Trading Corp.*, 744 F. Supp. 79, 84 (D.N.J. 1990).)

Amazon’s ultimate success in avoiding liability may depend on the availability of other defendants to respond to claims. Sellers and manufacturers who sell on the Amazon marketplace and are not subject to jurisdiction in the United States, for example, might make it more appealing for a court to hold Amazon liable because injured buyers may otherwise be left without a remedy. (See, e.g., *Fox*, 2018 BL 191355 at *3 (identity of the manufacturer was unknown, narrowing the pool of actors in the chain of distribution who can be held responsible); (*Allstate N. J. Ins. Co.*, 2018 BL 261762 at *2–3 (no party identified the manufacturer, and it was unclear whether the foreign seller was subject to process in the United States)).)

Conclusion

The resolution of these Amazon cases will have consequences for other current and future digital and service-based marketplaces that serve as a link between third-party products and consumers, as well as product manufacturers and distributors. The initial trend that Amazon has no responsibility in its role as a marketplace provider for product liability claims is promising for Amazon and other on-line marketplaces, but the issue is far from resolved.

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