

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

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 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:

### 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.