

## NY Ruling On Amazon's Seller Liability Is Good For Plaintiffs

By **Thomas Kurland** (January 4, 2021, 5:35 PM EST)

Last month, a New York trial court addressed for the first time whether Amazon.com Inc. can be strictly liable under New York law for injuries caused by an allegedly defective product offered on its website by a third-party vendor. Finding liability attached, the court joined only a handful of other courts nationwide that have addressed this issue head-on.

Though the opinion — in *State Farm Fire and Casualty Co. v. Amazon.com Services Inc.*[1] — isn't binding on other New York courts, and leaves open the possibility of a defense on the merits or an appeal, its reasoned expansion of strict tort liability is likely to resonate with both plaintiffs seeking alternative means of recovery for hard-to-sue sellers, and e-commerce defendants looking to minimize the risk of facing similar suits.



Thomas Kurland

Under traditional formulations of product liability law, manufacturers, distributors and sellers have long been considered strictly liable for harms caused by defective products. The theory underpinning this common-law doctrine — which exists in some form in all 50 states — is that the injured end user of a product should not be burdened with figuring out who specifically to sue for damages at the time those damages arise.

Rather, they can elect to sue anyone in the chain of distribution of the allegedly defective product — and whomever is sued will be better positioned to seek indemnity from the truly responsible actor. This lowers the bar to bringing such suits, particularly for products that have a less-than-transparent distribution chain, or where the truly responsible party may not be subject to jurisdiction in the injured person's chosen forum, or is otherwise out of privity with the injured person under a traditional contract analysis.

This approach, embodied in Restatement (Second) of Torts Section 402A, has been recognized in New York for decades.[2] Of course, simple as it seems, it has resulted in extensive litigation at the margins, particularly when it comes to what constitutes a seller for purposes of attaching strict liability. While regular sellers of a product would certainly fall within the gamut of the rule, casual or occasional ones often do not.[3]

As the world of e-commerce has come to increasingly dominate our lives, defining "sellers" has become all the more complicated — and nowhere more so, perhaps, than when it comes to Amazon. While it

has not been particularly controversial that Amazon itself is a seller of certain products, other products available on its website are actually sold by third-party merchants that contract with Amazon to list products, process payments and fulfill orders.

When Amazon has been named as a seller in product liability suits involving this latter category of products, it has consistently asserted it is not in fact a seller under governing law. The few courts across the country that have addressed this issue so far have reached mixed results.

For example, in California, an intermediate appellate court recently concluded that Amazon was a seller of the products in its third-party marketplace, and the California Supreme Court declined review.[4] In contrast, the Ohio Supreme Court reached the opposite result in October.[5] And cases remain pending elsewhere.[6]

In *State Farm*, Justice Gerard Neri of the New York Supreme Court in Onondaga County issued a decision denying Amazon's motion for summary judgment in a case concerning a thermostat alleged to be the cause of a house fire.[7] The thermostat was sold by a third party through Amazon's "Fulfillment By Amazon" logistics service, but Amazon itself admittedly warehoused and shipped it.[8]

Amazon argued it was not a seller under New York law, because it never took title to the thermostat. Rather, title was retained by the third party that had contracted with Amazon to use its fulfillment services.[9] The court rejected this argument, finding that title was not dispositive under New York law, and Amazon's "characterization minimizes [its] role in the transaction":

There is no question that e-commerce, and specific to this instance Amazon, has revolutionized the way New Yorkers and Americans generally shop. E-commerce has displaced brick and mortar storefronts. The consumer goes to Amazon's website to look for a product in the same manner one would walk into a Lowe's, Home Depot, or a neighborhood True Value, or order from one of those entities' website. Amazon by its actions has charted its own course. The product is virtually, and in cases such as a Fulfillment by Amazon transaction, physically on an Amazon shelf. While Amazon has disclaimed title, it certainly maintains possession of the subject product. It is an Amazon employee who handles the product once the consumer makes the decision to purchase. It is Amazon who sets the rules of the transaction to which the consumer purchases the item. If a consumer has a problem with a product, it is Amazon who they contact. It is Amazon who demands indemnification in their services agreement. Amazon seeks to have all the benefits of the traditional brick and mortar storefront without any of the responsibilities.[10]

The trial court granted leave for Amazon to initiate a third-party action against the other entity involved in the transaction, but otherwise allowed the case to proceed to trial on the merits.[11] It remains to be seen whether Amazon takes the issue up on appeal, though based on its conduct in other states, that outcome certainly seems likely.

While not binding on any other New York court, Justice Neri's analysis of — and conclusions based on — the history of strict seller liability in New York is likely to be persuasive in similar cases. This is particularly true if taking the opposite approach would leave an injured New York purchaser without a remedy: for example, when — as is the case with many products sold via Amazon's fulfillment service and by other similar websites — all other parties in the distributive chain are beyond the reach of New York's jurisdiction.

As New York's highest court noted in its 1986 ruling in *Sukljian v. Ross Son Co.*:

Where products are sold in the normal course of business, sellers, by reason of their continuing relationships with manufacturers, are most often in a position to exert pressure for the improved safety of products and can recover increased costs within their commercial dealings, or through contribution or indemnification in litigation; additionally, by marketing the products as a regular part of their business such sellers may be said to have assumed a special responsibility to the public, which has come to expect them to stand behind their goods.[12]

Finding Amazon and similarly situated websites to be sellers of the products that they offer on their sites is consistent with these policy considerations.

Thus, at least for now, this decision provides another path for injured product purchasers in New York to seek redress. In addition, it sends a message to operators of web-based marketplaces such as Amazon — i.e., those that provide a front end for other merchants — to be prepared to face strict seller liability, even if they do not sell products directly.

However, as the New York Court of Appeals has repeatedly observed, there are many steps that sellers can take — from insurance to indemnification agreements to carefully curating the products that they sell — which can help them mitigate that risk.

---

*Thomas P. Kurland is counsel at Patterson Belknap Webb & Tyler LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] See *State Farm Fire and Casualty Co. v. Amazon Services Inc.*, No. 008550/2019, Decision and Order, NYSCEF Dkt. No. 28 (Sup. Ct., Onondaga Cty., Dec. 7, 2020).

[2] See generally *Voss v. Black & Decker*, 59 N.Y.2d 102, 463 N.Y.S.2d 398, 450 N.E.2d 204 (N.Y. 1983).

[3] See, e.g., *Sukljian v. Ross Son Co.*, 69 N.Y.2d 89, 511 N.Y.S.2d 821, 503 N.E.2d 1358 (N.Y. 1986).

[4] See *Bolger v. Amazon.com LLC*, 53 Cal. App. 5th 431, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020), rev. denied, *Bolger v. Amazon.com LLC*, No. S264607 (Cal. Nov. 18, 2020).

[5] See *Stiner v. Amazon.com Inc.*, 2020-Ohio-4632 (Oh. 2020).

[6] See, e.g., *McMillan v. Amazon.com Inc.*, 5th Cir., No. 20-20108.

[7] See *State Farm*, note 1 *supra*, at 1.

[8] *Id.* at 2.

[9] *Id.*

[10] *Id.* at 8-9.

[11] *Id.* at 9.

[12] See Sukljan, note 3 *supra*, at 95.