

Court Split On Amazon's Seller Liability Could Be Moot

By **Thomas Kurland** (December 20, 2021, 4:39 PM EST)

Last month, in *Wallace v. Amazon.com LLC*, New York's Appellate Division for the First Judicial Department, covering Manhattan, affirmed the dismissal of a personal injury lawsuit brought against e-commerce giant Amazon by an individual whose electric bike fell apart while he was riding it.[1]

The bike, the suit alleged, was purchased from Amazon's marketplace of third-party sellers, and improperly assembled by one of Amazon's services contractors.[2] With claims sounding in negligence and breach of warranty, the crux of the plaintiff's complaint was that his injury was caused by Amazon's failure to properly vet the assembly services it offered for sale on its site.



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The trial court disagreed, granting Amazon summary judgment.[3] The appellate court affirmed largely on contractual grounds, holding that Amazon — which indisputably did not sell, distribute or manufacture the bike in question — was not a seller within the meaning of New York's Uniform Commercial Code, and that the plaintiff was not a party to any agreement between Amazon and its service provider that could give rise to a claim.[4]

Moreover, citing federal cases that had applied New York law in similar circumstances, the appellate court rejected the plaintiff's invitation to grant him equitable relief against Amazon,[5] finding that such an approach "would unjustifiably contradict settled New York law limiting liability for breach of warranty to sellers and parties within the manufacturing, selling, or distribution chain," because "Amazon is neither [when] it merely provided the website [the plaintiff] used to purchase the bicycle from an independent third-party seller and have it assembled by an independent third-party assembler." [6]

Key to this analysis was the fact that Amazon never obtained title to the products in question. Rather, the court found, the Amazon third-party marketplace "is better characterized as a provider of services." [7] But at least before this decision came down, it was not apparent that New York law was that clear.

Less than a year ago a New York court reached the opposite result.[8] In *State Farm Fire & Casualty Co. v. Amazon.com Services Inc.*, the New York Supreme Court, Onondaga County, denied Amazon's summary judgment motion in a similar personal injury case, characterizing Amazon's position as "seek[ing] to have all the benefits of the traditional brick and mortar storefront without any of the responsibilities." [9] That case is proceeding to trial in early 2022.[10]

Granted, the specific facts and claims in these two cases are slightly different. The former involved only contract and warranty claims; the latter also included claims for strict liability. But in both cases, the core question was the same: When Amazon provides a virtual storefront for other merchants, does it have seller liability for injuries caused by the products sold there?

With Amazon's tremendous sales growth, this issue has come to a head, and courts across the country continue to be split on the issue. Amazon has successfully deflected seller liability in a number of high-profile suits in certain states,[11] and scored a big victory in June when the Texas Supreme Court ruled definitively in its favor under Texas law in *Amazon.com Inc. v. McMillan*.[12]

But California's intermediate appellate courts have reached the opposite result under California law — for example, the state's Fourth Circuit Court of Appeal, in *Bolger v. Amazon.com LLC* in 2020. And California's Supreme Court has thus far declined to review those decisions.[13]

Considering this range of outcomes, the internal conflict among New York courts is less surprising — and New York's highest court has yet to weigh in. But for Amazon, and other nationwide e-commerce businesses that follow a similar virtual marketplace model, the lack of legal clarity surrounding where seller liability starts and ends in different jurisdictions undoubtedly makes cost-effective litigation risk management a daunting proposition.

While *McMillan*, and now *Wallace*, may represent a turning of the tide in Amazon's and other online marketplace operators' favor, if the history of strict product liability law is any guide, this outcome seems unlikely. It has seldom been the case that the universe of potential product liability defendants has contracted rather than expanded over time.

It is therefore unsurprising that, in response to its evolving potential liability, Amazon appears to be changing its strategy. In addition to just pushing back against the imposition of seller liability in the courts, Amazon revised its policies, effective Sept. 1, to require third-party marketplace vendors to purchase product liability insurance for themselves through an insurance marketplace that Amazon has created.[14]

Also, Amazon will now directly compensate customers injured by products purchased from its marketplace up to \$1,000 per claim.[15] According to Amazon, these sub-\$1,000 claims comprise over 80% of claims against it.[16]

Some may argue that the net effect of this evolution of the common law of product liability is that it passes increased costs on to consumers — i.e., prices on Amazon's marketplace will inevitably rise if sellers must also include the cost of insurance in their cost of goods. Others will say this is exactly the point.

Indeed, as California Supreme Court Justice Roger Traynor put it over 75 years ago: "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[17]

Other online retailers who have attempted to duplicate Amazon's marketplace model by offering goods and services from third-party partners in their virtual stores alongside their own wares should watch these developments closely.

As the law currently stands, unless such sellers only operate in a place like Texas — where third-party seller liability has been definitively rejected by the courts — they too should consider following Amazon's lead by requiring their third-party partners to maintain adequate levels of product liability insurance coverage. If this comes to pass, then it may no longer much matter how courts ultimately resolve the seller liability issue after all.

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[1] Memorandum Decision, *Wallace v. Amazon.com LLC*, No. 2020-04820 (1st Dept. N.Y., Nov. 30, 2021).

[2] *Id.* at 1.

[3] *Id.*

[4] *Id.* at 2-3.

[5] Amazon was the only remaining defendant. Though the assembler had been named in the complaint, it was ultimately dismissed. While it had failed to appear, the plaintiff failed to timely move for default. *Id.* at 2, fn. 1.

[6] *Id.* at 5.

[7] *Id.*

[8] See <https://www.law360.com/articles/1340417/ny-ruling-on-amazon-s-seller-liability-is-good-for-plaintiffs>.

[9] *State Farm Fire & Casualty Co. v. Amazon.com Services Inc.*, 2020 NY Slip Op. 20326 (N.Y. Sup. Ct., Onondaga Cty., Dec. 8, 2020).

[10] See Dkt. No. 008550/2019 (N.Y. Sup. Ct., Onondaga Cty.).

[11] See, e.g., *Stiner v Amazon.com Inc.*, 162 Ohio St 3d 128, 128, 164 NE3d 394, 395, 2020-Ohio-4632 (Oh. 2020)

[12] *Amazon.com Inc. v. McMillan*, 625 SW3d 101, 103 (Tex. 2021)

[13] 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); see also *Loomis v. Amazon.com LLC*, 63 Cal. App. 5th 466 (Cal. Ct. App. 2021).

[14] See <https://www.aboutamazon.com/news/how-amazon-works/new-a-to-z-guarantee-better-protects-amazon-customers-and-sellers>

[15] Id.

[16] Id.

[17] *Escola v Coca Cola Bottling Co.*, 24 Cal 2d 453, 462, 150 P2d 436, 440-441 (Cal. 1944).