

Litigation Alert: Are Third-Party E-commerce sites, such as Amazon, “Seller” in Products Liability Cases? Texas Supreme Court to decide!

Products Liability, Litigation Update, Articles / March 23, 2021 / Kathryn G. Laflin

Currently, the Texas Products Liability Act defines a “seller” as “a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.”¹ The Texas Supreme Court is set to determine whether (1) Amazon is a “seller” under Texas products-liability law and (2) if Amazon “could potentially liable for injuries caused by unsafe products sold on its website”², in the case of *McMillan v. Amazon.com, Inc.*, No. 20-20108, 2020 WL 7417454, (5th Cir. Dec. 18, 2020), *certified question accepted* (Jan. 8, 2021).

The case is currently set to be heard on March 25, 2021.

The underlying case, pending in Federal Court, involves a young girl who was injured when she ingested batteries from a remote purchased on Amazon.³ The remote itself was placed into the stream of commerce and sold by a third-party seller.⁴ McMillan argues that the remote in question had a design defect that allowed for easy access to the battery that led to her daughter’s alleged injuries. In particular, McMillan argues that the remote failed to comply with the industry standard that requires manufacturers to design battery compartments so that button batteries may only be accessed by using a tool or multiple simultaneous maneuvers.⁵ In addition, McMillan alleges that Amazon failed to provide an adequate warning or instruction that advised consumers of the grave dangers posed by the remote.⁶

The United States District Court for the Southern District of Texas, submitted the following certified question of state law to the Texas Supreme Court:

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?⁷

Amazon argues that Texas State law limits “seller” liability to entities that actually place the product in the stream of commerce, and that Amazon is not the “seller” of products offered by third-parties.⁸ In addition, Amazon argues that expanding the definition of “seller” would go against Texas’ policy against the judicial expansion of tort liability, and would not serve the goals of products liability law.⁹

McMillan argues that Texas law does not provide special treatment for online sales, nor does it support Amazon’s theory of facilitating vs. selling products, and that Amazon did not provide a service.¹⁰ In addition, McMillan argues that because Amazon exercised control over the warning, that Amazon knew of the alleged defect, and that the third-party seller was a Chinese based entity and was not subject to the jurisdiction of the court, Amazon, as a seller, may be held liable for a

product it did not manufacture under the Texas Product Liability Act.¹¹ Further, McMillan argues that Amazon's public policy argument has been rejected by the District Court, and that Amazon could have sought indemnity from the third-party seller.¹² In addition, McMillan notes that similar cases have been decided by other states. For example, in *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 438–39 (2020), an intermediate California court of appeal, held that Amazon could be held strictly liable for the online sale of allegedly faulty batteries, and that Amazon's public policy argument was contradictory.¹³

While other circuits and states (such as the 9th Circuit, 3rd Circuit, California, and Pennsylvania) have addressed this issue, it is the first time the Texas Supreme Court will do so. It is clear that ecommerce platforms have evolved, and continue to expand, and tort law is starting to catch up. However, this area will continue to develop. If the Texas Supreme Court answers the certified question that Amazon is a "seller" under these facts, the ruling will likely lead to significantly more lawsuits in Texas against Amazon and other third-party ecommerce platforms, and could change the Texas Products Liability law for all involved. Ecommerce sellers, platforms, suppliers, and hosts are all anxiously awaiting this ruling as a result.

Kane Russell Coleman Logan PC handles tort and products liability cases.

¹ See Certified Question filed by the Fifth Circuit Court of Appeals, in *McMillan v. Amazon.com, Inc.*, No. 20-0979, *certified question accepted* (Jan. 8, 2021) (citing Tex. Civ. Prac. & Rem. Code Ann. § 82.001(3)).

² See Certified Question.

³ See Appellant's Brief on the Merits, on file in *McMillan v. Amazon.com, Inc.*, No. 20-0979, *certified question accepted* (Jan. 8, 2021).

⁴ *Id.*

⁵ See Plaintiff's Original Complaint, on file among the papers of Case 4:18-cv-02242, in the Southern District of Texas.

⁶ *Id.*

⁷ See Certified Question.

⁸ See Appellant's Brief on the Merits.

⁹ *Id.*

¹⁰ See Appellee's Brief on the Merits, on file in *McMillan v. Amazon.com, Inc.*, No. 20-0979, *certified question accepted* (Jan. 8, 2021).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* citing *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 438–39 (2020).

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