



E-COMMERCE LIABILITY IN CALIFORNIA APPLIES TO THIRD-PARTY SELLERS

By the Firm's IP and Tort Practice Groups

In law, “strict liability” is an interesting concept. It provides that any company that places a consumer product in the stream of commerce (i.e., is part of the distribution process such as manufacturer, retailer or other seller) may be liable for injuries caused by the product as the result of a manufacturing or design defect, provided the product is used as intended. (*Soule v. GM Corp.* (1994) 8 Cal.4th 548, 560.) Broadly speaking, it means that you are responsible even though you weren’t negligent. There doesn’t have to be any evidence they did anything wrong.

For years, whether a strict liability might apply to an online retailer like Amazon was not decided in California. That changed in 2020, with the decision in *Bolger v. Amazon.com, LLC* (2020) 53 Cal.App.5th 431, which held, in an issue of first impression, that Amazon could be potentially liable as it is “an ‘integral part of the overall producing and marketing enterprise that should be the cost of injuries resulting from defective products.’” (*Id.*, at 453.)

Once *Bolger* was decided by the Fourth District, it was unknown whether it would be followed by other courts. This was done recently by the Second Appellate District holding in *Loomis v. Amazon.com LLC* (April 26, 2021) ___ Cal.App.5th ___. There, the court found *Bolger* was properly decided and Amazon could be held so liable. The decision has important ramifications for anyone running a California-based e-commerce business.

In *Loomis v. Amazon*, Kisha Loomis purchased a hoverboard for her son on Amazon. A hoverboard, by the way, is a kind of two-wheeled sideways skateboard popular with kids and balanced by gyroscopic gears.

Four weeks later, the hoverboard’s battery exploded and started a fire, which spread to Loomis’ bed. She was injured putting it out and sued Amazon, claiming they sold her a dangerous product. Amazon filed a motion for summary judgment, contending that the hoverboard was sold by a third-party company based in China using Amazon’s platform, and because Amazon didn’t manufacture, sell or ship the hoverboard, they should not be held liable. They claimed the service they provided was basically logistics and an online mall, which didn’t have much to do with the actual product. In short, they were a mere service provider. The trial court agreed and granted the motion. Loomis appealed.

By the time of the appeal, *Bolger* was decided. Loomis relied on *Bolger* to seek reversal. The appeals court agreed and reversed. The pivotal point in *Loomis* was that although, yes, Amazon didn’t manufacture the battery, they had enough to do with the transaction that liability made

sense. The notion they were an online shopping mall/logistics company was rejected. As the *Loomis* court wrote:

“Owners of malls typically do not serve as conduits for payment and communication in each transaction between a buyer and a seller. Moreover, they do not typically charge a per-item fee rather than a fixed amount to rent their storefronts. Instead, these actions – 1) interacting with the customer, 2) taking the order, 3) processing the order to the third party seller, 4) collecting the money, and 5) being paid a percentage of the sale – are consistent with a retailer or a distributor of consumer goods.”

This is where it gets interesting. Amazon unquestionably was deeply involved in the transaction itself, as the *Loomis* court noted, but that doesn't mean they had much to do with the problems in the hoverboard. How could they have known it was dangerous? Why should they have?

Because it makes sense as a public policy. Courts take product safety very seriously. Having dangerous products bought and sold, and thereby injuring trusting consumers, is believed to be a major public issue, so as the law has evolved, the way courts think about the issue has moved away from “if you make a defective product, you're liable” and towards a “if a consumer is injured, someone involved needs to compensate them” theory. In this case, that someone was Amazon.

In a previous opinion, the court described the goals of strict product liability as “enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among the defendants.” There are various ways to slice the legal salami of how much a defendant has to do with a dangerous product, but the bottom line is that if you were involved and can help compensate an injured plaintiff, for the second time (*Bolger, Loomis*), a California court will find you responsible.

Loomis has real implications for anyone either selling products in California through Amazon's third-party program, or selling someone else's products through their own e-commerce operation. Significantly, California's cases in this area differ from those of many other states, whose courts have held differently. Nevertheless, the bottom line is that liability in California for injured consumers who bought products online works differently here, and the operator of the e-commerce platform may share the risk.

If you have questions, contact Sherrie Flynn, head of our IP Practice Group, at sflynn@ch-law.com or David Weiland at dweiland@ch-law.com or (559) 248-4820.

© Coleman & Horowitz, LLP, 2021

About the Firm:

Established in 1994, Coleman & Horowitz is a state-wide law firm focused on delivering responsive and value-driven service and preventive law. The Firm represents businesses and their owners in matters involving transactions, litigation, agriculture & environmental regulation and litigation, intellectual property, real estate, estate planning and probate.

The Firm has been recognized as a “Top Law Firm” (Martindale Hubbell) and a “Go-To” Law Firm (Corporate Counsel). From six offices in California, and the Firm’s membership in Primerus, a national and international society of highly rated law firms (www.primerus.com), the Firm has helped individuals and businesses solve their most difficult legal problems. For more information, see www.ch-law.com and www.Primerus.com.

Disclaimer: This article is intended to provide the reader with general information regarding current legal issues. It is not to be construed as specific legal advice or as a substitute for the need to seek competent legal advice on specific legal matters. This publication is not meant to serve as a solicitation of business. To the extent that this may be considered as advertising, then it is expressly identified as such.