Texas Supreme Court Rejects Strict Product Liability for Participants in Sales Transactions that Do Not Transfer Title

July 2, 2021 Michelle Jacobs

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The Texas Supreme Court recently determined that a defendant involved in a sales transaction cannot be liable as a "seller" under the Texas Products Liability Act ("TPLA") unless it held and relinquished title to the product at some point in the distribution chain. The Court's decision, issued in response to a question certified by the Fifth Circuit, shields operators of online marketplaces from product liability under Texas law and resolves important questions relating to the scope of the TPLA as to online sales.

Background

The TPLA governs any action against a manufacturer or seller for personal injury or property damage caused by a defective product. "Seller" is defined to include any person "engaged in the business of distributing or otherwise placing" a product "in the stream of commerce," even if that person did not design or manufacture the product. But only in limited circumstances, such as when the manufacturer is insolvent or not subject to the court's jurisdiction, does the TPLA impose liability on a non-manufacturing seller.

While product liability laws vary from state to state, many jurisdictions follow a similar regime with respect to non-manufacturing sellers. And for traditional distribution and brick-and-mortar retail outlets, the application of product liability law is well-established and straightforward. The emergence of e-commerce, however, has raised new product liability questions that courts must now address. One such question is whether online marketplaces, like Amazon, E-Bay, and Etsy, should be considered "sellers" under state product liability laws like the TPLA.

In *Amazon.com v. McMillan*, the Texas Supreme Court joined the majority of courts across the country to have addressed this issue by determining that Amazon cannot be considered a seller of a product in a sales transaction if it does not hold or relinquish title to the product at any point in the distribution chain—even if Amazon exercises considerable control over the sale of the product or offers logistics solutions or other services that play a significant role in distribution. This is true even though a sale on Amazon by a third-party manufacturer or merchant to a retail customer may be practically indiscernible from a purchase made by a customer directly from Amazon, with the only noticeable difference to the customer being a "short line of text under the 'buy' button identifying the seller." According to the Court, title — not process, possession, or control — is dispositive.

Takeaways

Amazon.com v. McMillan provides clarity regarding product liability exposure for entities that play a role in e-commerce and should reduce protracted discovery and litigation about whether such an entity should be considered a seller under the TPLA. And with the added clarity, entities involved in

e-commerce can better understand and thereby minimize product liability exposure by not assuming title of products sold through their platforms. However, such actions may not fully insulate these entities everywhere given other jurisdictions, such as California, have rejected a bright-line approach or not yet addressed the issue. The decision also serves as an important reminder to traditional brick-and-mortar and online distribution and retail outlets that assume title in the sales process to protect against product liability exposure and to perform appropriate due diligence with respect manufacturers, distributors, and other suppliers (particularly those outside the United States or that may not have assets or insurance to cover a product liability judgment).