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## Products Liability in the Era of the Online Marketplace

by Meryl E. Poulin, Esq. and Taylor A. Asen, Esq.

Several years ago, our firm received a phone call from a mom whose 3-year-old son had swallowed a button-sized lithium battery that fell out of his toddler drawing tablet. When mom discovered her son had swallowed the battery, she rushed him to the nearest hospital. Multiple efforts were made to retrieve the battery from the child's stomach. Those efforts were too late to prevent the battery from eroding in the child's stomach and causing serious gastrointestinal burns.

The toddler drawing tablet had been purchased on Amazon.com from a third-party vendor located in China. It arrived at mom's house in a defective state -- the tablet did not have the tiny screw which secures the battery tray inside the tablet. When the child was playing with it, the battery tray and battery slid out. Lo and behold, the 3-year-old did what 3-year-olds do, and he put the battery in his mouth and swallowed it.

It was immediately clear to us that the absence of a screw protecting the battery was unreasonably dangerous. The problem was figuring out who was responsible for the sale and distribution of this dangerous product. Was Amazon responsible, or was the only responsible party a Chinese manufacturer that would be extremely difficult to sue, assuming it was even solvent?

Generally, in Maine, a manufacturer, seller, or supplier is strictly liable for the distribution of a defective product. 14 M.R.S.A. § 221; see also *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 940 (Me. 1982) (noting that "[t]he Legislature formulated our strict liability statute ... directly from section 402A of the *Restatement (Second) of Torts*"). Thus, the liability of an online marketplace, such as Amazon.com, hinges on whether Amazon constitutes a "seller" under Maine law and the *Restatement (2d) of Torts*.

One might think that online platforms like Amazon constitute a digital marketplace and, therefore, the law ought to treat them as a seller, not different from a brick-and-mortar store like Home Depot or Walmart. However, Amazon has taken the position that it is often simply a platform for third-party sellers to execute their sales. And until recently, courts have largely agreed.

For example, in *Garber v. Amazon.com*, a plaintiff brought a product liability claim against Amazon concerning a defective hoverboard manufactured by a Chinese company and purchased through Amazon's online marketplace. The hoverboard self-ignited, causing a fire that damaged plaintiff's home. Amazon moved for summary judgment, arguing that "it did not manufacture or sell the defective hoverboard, and instead merely provided the service of its online marketplace to match third-party buyers and sellers, and so it cannot be

strictly liable under Illinois law." *Garber v. Amazon.com, Inc.*, 380 F. Supp. 3d 766, 775 (N.D. Ill. 2019).

The Court agreed with Amazon, noting that "the facts before the Court reveal that Shenzhen [the Chinese manufacturer], not Amazon, owned the hoverboard, sourced it and listed it for sale on Amazon's marketplace, and sold and shipped it directly to the Garbers." *Id.* at 777; see also *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 400 (S.D.N.Y. 2018) (holding that Amazon owed no duty to plaintiff because it "did not manufacture, sell, or otherwise distribute" the third-party coffeemaker that shattered causing the plaintiff an injury).

Recently, however, courts have become increasingly skeptical of Amazon's argument that it is a "marketplace" rather than a seller. A leading case against Amazon is *Bolger v. Amazon.com, LLC* (2020) 53 Cal.App.5th 431, which was decided by California's 4th District Court of Appeals.

In *Bolger*, a consumer in California sued Amazon for severe burns suffered from a laptop battery that caught fire which had been purchased from a third-party seller on the Amazon platform. The trial court granted summary judgment in Amazon's favor on the basis that Amazon did not manufacture or sell the battery. However, the California Court of Appeals reversed the decision, declaring that "[a]s a factual and legal matter, Amazon placed itself between [the manufacturer] and Bolger in the chain of distribution of the product at issue here. ..." Whatever term we use to describe Amazon's role, be it retailer, distributor, or merely facilitator, it was pivotal in bringing the product here to the consumer." *Id.* at 438.

Likewise, in 2019, a three-judge panel in the Third Circuit held that Amazon.com constituted a seller under Pennsylvania law. *Oberdorf v. Amazon.com Inc.* 930 F.3d 136 (3d Cir. 2019). That decision was subsequently taken up by the Third Circuit *en banc*, which certified the question



to the Pennsylvania Supreme Court. *Oberdorf v. Amazon.com Inc.*, 818 Fed. Appx. 138, 139 (3d Cir. 2020). Apparently, the case settled before the Supreme Court could answer the Third Circuit's question.

Perhaps not surprisingly, we are heartened by the recent cases suggesting that online "marketplaces" like Amazon.com and eBay have some responsibility to sell safe products. In many cases, a rule to the contrary eviscerates the ability of victims to have any recourse for their injuries. Moreover, in our view, society is better off providing Amazon and other marketplaces with a strong financial incentive to police its platforms to ensure they are selling safe products.

In any event, questions about the liability of websites like Amazon.com are not going away. On the contrary, they will only become more important, as an increasingly large percent of American shopping is done online.

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### Tree Trimming Rights Clarified by Law Court

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Adamses. The Atkinses appealed to the Law Court, claiming error in the court's granting of summary judgment by not recognizing a duty of care owed to them; specifically, whether it was reasonable for the Adamses to trim the tree if cutting the leader could result in killing it.

The Law Court had not previously been called upon to answer the question, but found many other jurisdictions and precedents that had, including the U.S. Supreme Court in *U.S. v. Causby*, 328 U.S. 256, 262 (1946). The Law Court found a longstanding constitutional protection of private property that permits property owners to remove physical invasions such as encroaching vegetation. On that basis, it upheld the Superior Court's decision, finding that the Adamses were entitled to a judgment declaring they may remove any part of the tree that encroaches onto their property, regardless of how that trimming impacts the overall health of the tree.

Highlighting that the law may define the

rights between property owners, but that there's more to being neighbors, the Law Court closed its opinion with Lord Chancellor Herschell's 1895 commentary on neighborly relations, to caution that it's generally "a very unneighbourly act" to cut down encroaching tree branches "unless they are really doing some substantial harm."

On appeal, Appellants were represented by Andrew W. Sparks and William J. Kennedy of Drummond & Drummond, LLP in Portland. Appellees were represented by Daniel P. Keenan, a solo practitioner in South Portland.

A summary of the Law Court's decision in *Atkins, et al. v. Adams, et al.*, MLR #178-23, appears on page 5 of this issue.

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