



# ***Bolger v. Amazon***

## Strict products liability catches up with the digital age

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One of the emerging areas of law for plaintiffs' attorneys concerns whether and to what extent online marketplaces such as Amazon.com can be held liable for products sold on their websites by third parties. This is an issue of particular importance because third-party sellers and manufacturers are often located abroad in countries such as China where they are effectively judgment proof. As explained below, the court of appeal in *Bolger v. Amazon* applied well-established principles of strict products liability and concluded that, under the facts of the case, Amazon could be held strictly liable for defective products sold by third parties on its website.

***Bolger v. Amazon* (2020) 53  
Cal.App.5th 431**

In *Bolger v. Amazon*, the Court of Appeal addressed whether Amazon could be strictly liable for defective products offered on its website by third-party sellers. The plaintiff in *Bolger* had bought a replacement laptop battery from a third-party seller on Amazon and she alleged that it exploded after several months, causing her to be severely burned and hospitalized. She filed several causes of action, including strict liability, against Amazon and the third-party seller.

Amazon moved for summary judgment, arguing that the doctrine of strict products liability did not apply to it because it did not distribute, manufacture, or sell the laptop battery. After the submission of expert declarations and the

presentation of arguments, the trial court agreed with Amazon, granted its motion, and entered judgment accordingly.

The Court of Appeal reversed and held that Amazon could be strictly liable for the defective laptop battery that the plaintiff had purchased from a third-party seller on Amazon. The Court observed that although the nature of the precise transaction at issue in the case was a novel one, strict liability in California had long before been extended by the judiciary not only to retailers but also to those involved in the vertical distribution of consumer goods. (53 Cal.App.5th at pp. 447-448, citing *Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 773.)

Analogizing the facts of the case before it to two prior decisions, in particular – *Canifax v. Hercules Powder Co.* (1965) 237 Cal.App.2d 44 and



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*Barth v. B. F. Goodrich Tire Co.* (1968) 265 Cal.App.2d 228 – the Court concluded that even if Amazon was not a seller as commonly understood, it was certainly an intermediary between the supplier and consumer and a critical link in the chain of distribution. Thus, the relevant precedents supported the application of strict liability to the transaction at issue.

The Court went further, concluding that “Amazon played an even more meaningful role in this transaction than the defendant in either of those earlier cases.” (*Bolger, supra*, at p. 452.) In support of this conclusion, the court observed:

As a factual and legal matter, Amazon placed itself between [the seller] and Bolger in the chain of distribution of the product at issue here. Amazon accepted possession of the product from [the seller], stored it in an Amazon warehouse, attracted Bolger to the Amazon website, provided her with a product listing for [the seller’s] product, received her payment for the product, and shipped the product in Amazon packaging to her. Amazon set the terms of its relationship with [the seller], controlled the conditions of [the seller’s] offer for sale on Amazon, limited [the seller’s] access to Amazon’s customer information, forced [the seller] to communicate with customers through Amazon, and demanded indemnification as well as substantial fees on each purchase. (*Bolger, supra*, at p. 438.)

The Court therefore concluded that “[w]hatever term [it] use[d] to describe Amazon’s role, be it ‘retailer,’ ‘distributor,’ or merely ‘facilitator,’ it was pivotal in bringing the product here to the consumer.” (*Ibid.*) The Court therefore held that Amazon was an “integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.” (*Id.* at p. 453, quoting *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262 (*Vandermark*)).

### The Court finds further support in public policy

The Court found further support for this conclusion in the public policies underlying strict products liability. (*Bolger, supra*, at p. 453.) First, the Court concluded that Amazon would often be the only entity in the chain of distribution available to an injured plaintiff, particularly given that the website enables manufacturers and sellers who have little presence in the United States to sell products to customers here. (*Ibid.*) The Court pointed out that “The dilemma for an injured plaintiff is illustrated by this litigation, where two defendants have been served and failed to appear, and a third defendant can only be served in China [which in itself would take two to three years].” (*Ibid.*; see also *Fox v. Amazon.com, Inc.* (6th Cir. 2019) 930 F.3d 415, 424.)

Second, the Court concluded that, like conventional retailers, Amazon was in a position “to play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer’s strict liability thus serves as an added incentive to safety.” (*Bolger, supra*, at p. 454, quoting *Vandermark, supra*, 61 Cal.2d at p. 262.) The Court pointed out that Amazon had a “a robust and active process” to monitor, track, and log consumer complaints, that it required sellers to comply with applicable laws, that it had the power to demand proof of such compliance or of additional certifications, and that it had the power to suspend sales of certain products or block a third-party seller from offering products for sale – as it did in this case. (*Bolger, supra*, at p. 454.) In short, “[j]ust like a conventional retailer, Amazon can use its power as a gatekeeper between an upstream supplier and the consumer to exert pressure on those upstream suppliers (here, third party sellers) to enhance safety.” (*Ibid.*)

Third, the Court concluded that Amazon had the capacity to adjust the cost of compensating injured plaintiffs between itself and the third-party sellers in the

course of their ongoing relationship. (*Bolger, supra*, at pp. 454-455, citing *Vandermark, supra*, 61 Cal.2d at p. 263.) The Court pointed out that Amazon already imposed contractual duties on third-party sellers, including a requirement that third-party sellers broadly indemnify Amazon, and that it had the power to delay or withhold payments to a third-party seller if it determined that the seller’s actions or performance could result in customer disputes, chargebacks, or other claims. (*Bolger, supra*, at p. 455.) The Court noted that although the application of strict liability did not depend on these provisions, they clearly demonstrated that Amazon had the power to distribute any cost of compensating injured plaintiffs with third-party sellers. (*Ibid.*)

### The Court rejects Amazon’s arguments

The Court, in turn, rejected Amazon’s arguments as to why strict liability should not apply to it. First, the Court rejected Amazon’s argument that strict liability could not be applied to it because it did not meet the dictionary definition of “seller” or “distributor.” (*Bolger, supra*, at p. 455-456.) The Court noted that “[t]he doctrine of strict liability in California was intended to cut through such technicalities and compensate plaintiffs for injuries caused by defective products.” (*Id.* at p. 456, citing *Price v. Shell Oil Co.*, 2 Cal.3d 245, 251; *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 733.) In a parenthetical, the Court cited *Kaminski v. Western MacArthur Co.* (1985) 175 Cal.App.3d 445 for the proposition that “[t]he constant theme of strict tort liability has been to elevate justice and equity above the exact contours of a mathematical equation.” (*Bolger, supra*, at p. 456.)

Second, the Court rejected Amazon’s claim that it was not a seller because it did not have control over the product at issue. (*Bolger, supra*, at p. 456.) The Court pointed out that Amazon “constructed the Amazon website, accepted [the seller] as a third-party seller, marketed [the



seller's] offer for sale, took possession of the replacement battery, accepted Bolger's order for the battery, billed her for the purchase price, and shipped her the battery in Amazon-branded packaging." (*Ibid.*) Since the plaintiff would not have been injured but for Amazon's own acts, it was Amazon's own acts and its control over the product in question that formed the basis of its liability. (*Ibid.*)

Third, the Court rejected Amazon's claim that it could not be strictly liable because it did not choose to offer the particular product for sale. (*Bolger, supra*, at p. 457.) The Court rejected the factual basis of this claim, pointing out that Amazon was "no mere bystander to the vast digital and physical apparatus it designed and controls" and that it was Amazon's own choices which led to the transaction and its control over and shipment of the product. (*Ibid.*) In any case, Amazon clearly was a critical link in the chain of distribution even if it did not consciously select the particular battery at issue. (*Ibid.*)

Fourth, the Court rejected Amazon's various attempts to analogize itself to an auctioneer, finance lessor, shopping mall landlord, a credit card issuer, a trucking company, an Internet search provider, or a newspaper running classified advertisements. (*Bolger, supra*, at pp. 457-458, p. 459, fn. 8.) Finding these analogies inapt, the Court pointed out that unlike an auctioneer or finance lessor, Amazon has a continuing relationship with the third-party sellers and others in the chain of distribution. (*Id.* at p. 458.) The Court relegated its analysis of the remaining entities to a footnote, stating that Amazon had not supported its attempt to analogize itself to them "with any legal argument, and the obvious differences between Amazon and those entities do not need to be elucidated here." (*Id.* at p. 459, fn. 8.)

Fifth, the Court rejected Amazon's reliance upon the Restatement Third of Torts and its claim that the Legislature, not the judiciary, should resolve the issue of whether it could be strictly liable for products sold by third parties. (*Bolger,*

*supra*, at p. 459) The Court observed that both claims ran counter to well-established California precedent that the contours of strict liability were to be defined by the judiciary, not the Legislature, much less the authors of the restatement. (*Ibid.*)

Finally, the Court rejected Amazon's claim that it was immune from liability under 47 United States Code section 230 (section 230). This section provides, in relevant part, that, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230(c)(1).) It goes on to provide that, "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (*Id.*, § 230(e)(3).)

The Court pointed out that federal courts had declined to apply section 230 to strict products liability claims, as products liability suits were not based on the publication of another's speech. (*Bolger, supra*, at p. 464, citing *Erie Insurance Co. v. Amazon.com, Inc.* (4th Cir. 2019) 925 F.3d 135, 139-140; *State Farm Fire & Casualty Co. v. Amazon.com, Inc.* (W.D.Wis. 2019) 390 F.Supp.3d 964, 972; *State Farm Fire & Casualty Co. v. Amazon.com, Inc.* (W.D.Wis. 2019) 390 F.Supp.3d 964, 973-974.) The Court in *Bolger* agreed with these federal decisions and concluded that the plaintiff's product liability claim was predicated on Amazon's role in the distribution of goods – not the publication of the content of the third-party seller's product listing – and section 230 did not provide immunity to Amazon. (*Bolger, supra*, at p. 464.)

### Conclusion

The decision in *Bolger* represents an important victory for consumer protection and the rule of law in the digital age. The Court's quotation from *Kriegler v. Eichler Homes, Inc.* is most apt:

Law, as an instrument of justice, has infinite capacity for growth to meet

changing needs and mores. Nowhere is this better illustrated than in the recent developments in the field of products liability. The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping legal principles abreast of the times. Ancient distinctions that make no sense in today's society and that tend to discredit the law should be readily rejected as they were step by step in *Greenman* and *Vandermark*.

(*Bolger, supra*, at p. 462, quoting *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 227.)

Going forward, plaintiffs' attorneys should be aware that *Bolger* did not broadly hold that Amazon is liable for all third-party products sold on its website. To the contrary, it explicitly pointed out that it was basing its decision on the particular facts before it and that in a different case it could possibly hold that Amazon was not strictly liable for defective products sold on its website. Plaintiffs' attorneys should therefore develop a strong record in evidence such as expert declarations establishing the degree of control that Amazon exercises over third-party sellers and the specific relationship that it had with the particular third-party seller in the case.



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