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## Amazon Isn't Liable for Defective Marketplace Sale (No Thanks to Section 230)–Erie Insurance v. Amazon

May 23, 2019 · by Eric Goldman · in *Derivative Liability, E-Commerce*

A buyer purchased an LED headlamp in Amazon's marketplace from a third party merchant ("Dream Light") and gave it as a gift. The batteries allegedly malfunctioned and caused a fire in the gift-receiver's house. The home insurer paid \$313k+ for the loss and sought reimbursement from Amazon as the headlamp seller. The Fourth Circuit denies the claim because Amazon wasn't in fact the seller.

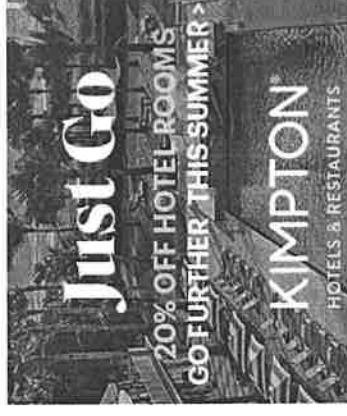
*Section 230.* The lower court ruled for Amazon on Section 230 grounds. The Fourth Circuit disagrees:

The products liability claims asserted by Erie in this case are not based on the publication of another's speech. The underpinning of Erie's claims is its contention that Amazon was the *seller* of the headlamp and therefore was liable as the seller of a defective product. There is no claim made based on the *content of speech published* by Amazon — such as a claim that Amazon had liability as the publisher of a misrepresentation of the product or of defamatory content. While the Communications Decency Act protects interactive computer service providers from liability as a *publisher of speech*, it does not protect them from liability as the seller of a defective product.

Perhaps surprisingly, I think this is right. The insurer is claiming that Amazon physically delivered a defective good. Even though the good was owned by the merchant, not Amazon, the legal question being posed is whether Amazon was also the seller of the physical good. I think the offline physicality takes the question out of Section 230; just like a print-on-demand manufacturer can't claim Section 230 for the manufactured goods, even if they were sold online.

I would feel differently if the good being delivered was purely delivered online (like an electronic file), in which case "sale" is likely a codeword for "publishing." I would also feel differently if the insurer had claimed that the merchant's on-site disclosures were incomplete or mistaken, at that point, the claim clearly reaches Amazon's publication of those disclosures. Finally, I see this as a different issue than the Airbnb cases, where holding Airbnb or HomeAway liable for processing transactions necessarily forces them to not publish unprocessable listings to prevent false advertising/bait-and-switch. The Ninth Circuit got that case wrong; the Fourth Circuit got this case right.

*Amazon Isn't the Seller.* Even without Section 230, Amazon defeats the case because it's not the "seller" under Maryland law. According to the court, sellers are "owners of personal property who transfer title to purchasers of that property for a price." Amazon never takes title to the goods sold by marketplace vendors, even when Amazon holds those goods in inventory and does the fulfillment. Instead, "Dream Light set the price for the sale of the product to purchasers, designed the product description for the website, paid Amazon for its fulfillment services, and ultimately received the purchase price paid by the purchaser. In these circumstances, as Amazon explicitly posted on its site, Dream Light was the seller....Although Amazon's services were extensive in



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facilitating the sale, they are no more meaningful to the analysis than are the services provided by UPS Ground, which delivered the headlamp..."

The insurer argued that Amazon was an "entrustee" of the good, but the court says the "entrustee" status merely allows Amazon to pass along whatever title the seller had in the good: "Amazon functioned much like an auctioneer, a broker, a consignee, or a bailee, none of whom actually possesses title but nonetheless is, if it is a merchant, authorized to effect a transfer to the buyer of title held by the owner — i.e., the seller."

A concurring judge expressed her discomfort with the law because Amazon has disrupted traditional supply chains. Amazon has a huge percentage of the e-commerce market yet isn't subject to traditional liability principles despite its extensive involvement in the transaction:

[the buyer] ordered the product from Amazon's website and paid Amazon directly. Amazon took physical possession of the product, warehoused it, packaged it, and delivered it to the carrier. Amazon even assumed the risk of credit card fraud, received payment, and remitted a portion of that payment to the manufacturer. Nearly the only thing Amazon did not do was hold title.

I think the last sentence is overly dramatic. In addition to not holding title, Amazon doesn't buy the good from an upstream supplier, set that purchase price, doesn't set the sales price in the marketplace, and doesn't bear any inventory risk.

This result is consistent with numerous other cases holding that Amazon isn't the seller of marketplace goods, including the virtually identical *McDonald v. IG* case also interpreting Maryland law. The result is also consistent with the Federal Circuit's *Milo & Gabby* rulings, which now establishes the Amazon-isn't-seller rule in two federal circuits. Perhaps, as the concurrence suggests, the legislatures will get involved in this matter. Until then, the rule appears to be solidifying in Amazon's favor.

Case citation: *Erie Insurance Company v. Amazon.com, Inc.*, 2019 WL 2195146 (4th Cir. May 22, 2019)

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I don't know whether it happened in this case, but Amazon commingles inventory from different sellers. If you order an item from an Amazon seller, and a second seller has the same item at a closer warehouse, they'll ship the second seller's item. This is a huge problem because a lot of those second sellers have counterfeit products, and the first seller who had the real product gets blamed.

Would that change the analysis? Nominally the inventory belongs to the two sellers, but if Amazon can substitute them without asking, who really owns it? Fraud problem described here, Amazon's weak response here.

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# Dispute Over 'Flaming Headlamp' Lands in Fourth Circuit

BRAD KUTNER March 21, 2019




RICHMOND, Va. (CN) – Does retail giant Amazon bear responsibility when a third-party seller's product malfunctions and burns down a family's house? That was the question before a Fourth Circuit panel Thursday in what one attorney called "the flaming headlamp case."




(AP Photo/Ted S. Warren, File)

The attorney for the family's insurance company tried to persuade a three-judge panel of the Richmond, Virginia-based federal appeals court to overturn a district court ruling dismissing the

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insurer's negligence and product liability claims.

Representing Erie Insurance Company, John Weston of the Philadelphia-based firm Sacks Weston and Diamond opened with what could best be considered a joke in the usually stuffy appeals court: "This is the 'flaming headlamp case,'" he said.

Back in 2014, Minh and Anh Nguyen received a battery-operated headlamp, purchased from Amazon, from a friend as a gift. The trouble started once the Nguyens began using the headlamp – it malfunctioned and caught fire, burning their house to the ground.

After filing a claim with Erie, the Nguyens received over \$300,000 for the fire damage. The insurer then set out to reclaim that hefty sum.

That effort led Erie to Amazon and the third-party seller of the headlamp, China-based Dream Light. Claiming negligence, breach of warranty, and strict liability, Erie aimed to keep Amazon as a defendant in the suit despite the retailer's claim that Dream Light was responsible as a third-party seller using its website.

Erie said Amazon was directly involved in the sale. It argued that while the headlamp at issue was purchased through the retailer's platform, Amazon also warehoused the product, which gave it ownership.

But a federal judge in Maryland was not convinced. U.S. District Judge Roger Titus dismissed the claim last year, finding that Amazon was not the seller and could not be held liable as such. Amazon was also insulated from the lawsuit by the Communications Decency Act, which service providers like Amazon from liability for content created by a third party.

During oral arguments Thursday, Weston said the lower court got it wrong. Instead, he argued, Maryland state law, including its Uniform Commercial Code, defines sellers as "a person who sells or contracts to sell goods," which should include Amazon considering its platform was used in the transaction and the product was warehoused at an Amazon facility.

"The Commercial Code definition is a passing of title. Amazon has power to transfer that title," West said, noting that transfer of ownership from Dream Light to Amazon to the Nguyens holds the online retailer responsible. "That section exists to avoid hidden interests."

But Brendan Murphy, an attorney with the Seattle-based Perkins Coie representing Amazon, said the broader nature of these kinds of complaints against Amazon were new at the federal appeals level, but not so new at the state level. He said a number of state courts have sided with the retailer in part thanks to disclaimers on Amazon's website.

"Every court that has considered this issue, Amazon's liability, has found they are not," Murphy said, noting the third-party seller relationship is clear in who is responsible for what.



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"The offer is written, price is set, and title is set by the seller," he added. "Fulfillment by Amazon just means we warehouse the product... Title doesn't go to Amazon."

U.S. Circuit Judge Paul Niemeyer, a Ronald Reagan appointee, seemed more sympathetic to Amazon's argument, calling its third-party retail service more of a "consignment shop" than a business deal between seller which could carry with it changes in product ownership.

He said Amazon merely "participates in the sale," before clarifying the product was sold by Dream Light with the manufacturer as the final seller.

Meanwhile, U.S. Circuit Judge Diana Gribbon Motz, a Bill Clinton appointee, wondered if the case was even appropriate for a federal appeals court. She asked both parties if the case would be better certified to the Maryland Supreme Court "instead of federal judges guessing" on how to interpret the state law.

Both Amazon and Erie seemed open to the idea, but also stressed the appeals court could solve the problem as well. Murphy said that even if state courts did rule one way or the other, a decision from the Fourth Circuit could help guide the lower courts.

Chief U.S. Circuit Judge Roger Gregory was also on Thursday's panel. The judges did not indicate when they will issue a ruling in the case.



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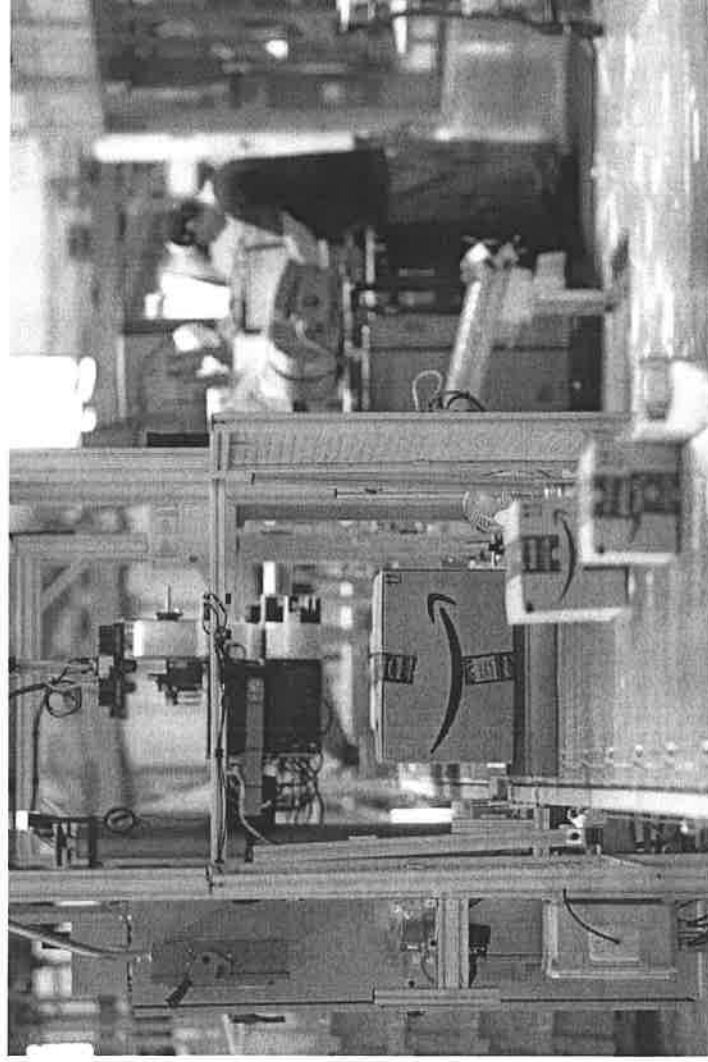
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# Amazon Ducks Liability for Defective Third-Party Products

BRAD KUTNER May 23, 2019



RICHMOND, Va. (CN) – In a case centered on a headlamp that caught fire and burned a family’s house to the ground, the Fourth Circuit ruled Wednesday that online retail giant Amazon is not liable for defective products sold on its website by third parties.



(AP Photo/Patrick Semansky, File)

Back in 2014, Minh and Anh Nguyen received a battery-operated headlamp, purchased from Amazon, from a friend as a gift. The trouble started once the Nguyens began using the headlamp

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After filing a claim with their home insurer, Erie Insurance Company, the Nguyens received over \$300,000 for the fire damage. The insurer then set out to reclaim that hefty sum.

That effort led Erie to Amazon and the third-party seller of the headlamp, China-based Dream Light. Claiming negligence, breach of warranty and strict liability, Erie aimed to keep Amazon as a defendant in the suit despite the retailer's claim that Dream Light was responsible as a third-party seller using its website.

Erie said Amazon was directly involved in the sale. It argued that while the headlamp at issue was purchased through the retailer's platform, Amazon also warehoused the product, which gave it title, or ownership.

But a federal judge in Maryland was not convinced. U.S. District Judge Roger Titus dismissed the claim last year, finding that Amazon was not the seller and could not be held liable as such. He also ruled Amazon was insulated from the lawsuit by the Communications Decency Act, which limits the liability of a website's publisher for content posted by third parties.

A three-judge panel of the Fourth Circuit on Wednesday affirmed the lower court's ruling in part, disagreeing on the Communications Decency Act protections but still finding Amazon free from liability for the defective headlamp.

"Amazon was not the 'seller' of the headlamp and therefore did not have liability under Maryland law for products liability claims asserted by reason of the product's defective condition," U.S. Circuit Judge Paul Niemeyer wrote, noting the laws around a product's change of title are central to the case.

"No one has presented evidence to dispute that when Dream Light shipped its headlamp to Amazon's warehouse in Virginia, it was the owner of — i.e., it had title to — the headlamp," he wrote. "And when it transferred possession of the headlamp to Amazon, without Amazon's payment of the headlamp's price or an agreement transferring title to it, Amazon did not, by that simple transfer, receive title."

Niemeyer was joined on the panel by Chief U.S. Circuit Judge Roger Gregory and U.S. Circuit Judge Diana Gribbon Motz.

In a concurring opinion, Motz agreed with the majority opinion but questioned whether the laws as they currently exist are fairly treating people like the Nguyens who are seeking pre-internet justice in a post-internet world.

"By design, Amazon's business model cuts out the middlemen between manufacturers and



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consumers, reducing the friction that might keep foreign (or otherwise judgment-proof) manufacturers from putting dangerous products on the market,” she wrote, noting the online retailer dominates the digital marketplace with almost 50 percent of all online retail flowing through its doors.

“Nothing in today’s holding prevents Maryland’s own courts or legislators from taking up and resolving these difficult, fast-changing, and cutting-edge issues differently,” Motz added. “To be sure, Amazon’s strategy of removing nearly every products liability case to federal court has complicated this endeavor and arguably stunted the development of state law.”

In a phone interview, John Weston with the Philadelphia-based firm Sacks Weston Diamond, which represented Erie Insurance Company at oral arguments in March, said Motz hit on an important distinction: the nature of liability in a rapidly evolving, digital marketplace.

He pointed to 70 years of consumer protection laws that started as “buyer beware” and are now “what you get better meet certain standards.” He said Amazon is now skirting those laws through their third-party marketplace.

“Because of the contract Amazon has, where Amazon doesn’t retain title, they use old, pre-internet law to get around that notion,” Weston said. “Based on this reasoning, Home Depot could put up a sign in their fertilizer department that said ‘sold by CertainFeed’ and they would be free from any liability, if the title is the critical thing.”

“It’s one of those ‘it walks like a duck, it quacks like a duck, but because it doesn’t have fully webbed feet, it’s not a duck,” he added.

Weston said he was unsure if his client will seek an en banc rehearing or appeal to the U.S. Supreme Court.

Attempts to reach Brendan Murphy, an attorney with the Seattle-based Perkins Coie who represented Amazon in the case, were not immediately returned Thursday.

Notably, the Fourth Circuit disagreed with the lower court’s finding that Amazon was protected from liability by the Communications Decency Act. The federal law was designed to protect online companies from third-party content passively hosted on their website, such as comments and reviews.

While Amazon has succeeded in arguing for such protections in the past, including in this case at the district court level, Judge Niemeyer said the product liability claim here was not based on speech, but rather the company’s role as the seller.

“While the Communications Decency Act protects interactive computer service providers from liability as a publisher of speech, it does not protect them from liability as the seller of a defective

product," he wrote. "Accordingly, we reverse the district court's ruling applying the Communications Decency Act's immunity to this case."

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