SCOT Holds Amazon Not Liable for Defective Products It Markets for Other Vendors

June 25, 2021

Amazon.com, Inc. v. McMillan

Supreme Court of Texas, No. 20-0979 (June 25, 2021)

Opinion by Justice Busby (linked here)

Dissent by Justice Boyd (linked here)

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Answering a question certified by the Fifth Circuit, the Texas Supreme Court held Amazon is not a "seller" under Texas product liability law when it does not hold title to the product but controls the process of the transaction and delivery through the "Fulfillment by Amazon" program.

As discussed in a previous *Sua Sponte* post, the *McMillan* plaintiffs allege injuries to a 19-month-old child who swallowed a battery from a TV remote purchased on Amazon's website. The listed seller was "USA Shopping 7693," which Amazon traced to a vendor account owned by Hu Xi Jie—an individual or company that neither Amazon nor plaintiffs have been able to contact or serve. Amazon's potential liability for the child's injuries turns on whether it is a "seller" of the product under the Texas Products Liability Act, chapter 82 of the Civil Practice and Remedies Code. A federal district court held Amazon was a seller, i.e., "engaged in the business of distributing or otherwise placing" the product in the stream of commerce. The court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b), and the Fifth Circuit submitted the issue to the Texas Supreme Court in January 2021.

Fifth Circuit Judge (and former Texas Supreme Court Justice) Don Willett authored the opinion certifying the question, noting the Supreme Court's "track record of resolving cases promptly." Justice Busby's opinion acknowledges the Fifth Circuit's comment and responds in a footnote, "Challenge accepted."

The case focuses on a specific (albeit large) subset of Amazon transactions—products listed on the product-description and order-confirmation pages as "sold by" a vendor other than Amazon and delivered from Amazon warehouses through the "Fulfillment by Amazon" (FBA) program. These transactions differ from other purchases,

including products listed as “sold by” and delivered by Amazon, products listed as “sold by” third parties and shipped directly to customers by the vendor, and products sold through other websites or stores and delivered through the FBA program.

The Supreme Court’s construction of the Product Liability Act’s definition of “seller” is grounded in the presumption that “the Legislature uses statutory language with complete knowledge of the existing law and with reference to it.” (Quotation omitted.) Because the statutory definition is virtually identical to that of section 402A of the Second Restatement of Torts and Texas cases applying it, the Court concludes the statute “does not expand liability for those not considered sellers under common law.” Accordingly, the Court holds “Amazon is not a ‘seller’ under Texas law when it does not hold or relinquish title to an allegedly defective product.” It cannot, therefore, be liable as a non-manufacturing seller under the Product Liability Act.

Justice Boyd, joined by Justice Devine, dissented, and would have answered the certified question “by holding that Amazon.com is a seller under [the statute] when it ‘controls the process of the transaction and delivery’ of a product through its FBA program, regardless of whether it ever holds title to the product.” This construction is compelled, said the dissent, by the plain meaning of the statute’s language when it was enacted in 1993. The dissent acknowledged the presumption that the Legislature was aware of case law when enacting a similar definition, but insisted “we may not presume that it was aware of what we would hold twenty-eight years later.”

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