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## TEXAS SUPREME COURT HOLDS AMAZON NOT A “SELLER” OF THIRD PARTY PRODUCTS

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On June 25, 2021, Texas joined a number of jurisdictions holding that Amazon is not a “seller” for purposes of Texas product liability law when it delivers third party goods using its Fulfillment by Amazon Program. This is a significant decision as it has sweeping implications for potential liability of online marketplaces that operate in Texas. The Court also clarified that one of two types of analyses is applicable to determining “seller” status under Chapter 82 of the Texas Civil Practice and Remedies Code (“Texas Product Liability Act”), distinguishing between “ordinary sales” and “non-sale commercial transactions” (e.g., bailments or leases). In cases involving ordinary sales, the Court held that an entity must hold or relinquish title to the product at some point in the distribution chain to be considered a “seller” under Texas law.

### FIFTH CIRCUIT CERTIFIES QUESTION OF AMAZON’S SELLER STATUS TO TEXAS SUPREME COURT

The issue came before the Texas Supreme Court as a certified question from the Fifth Circuit Court of Appeals in *McMillan v. Amazon.com LLC*. In *McMillan*, the Plaintiff’s infant daughter swallowed a battery from a remote control, resulting in its surgical removal and caustic burns to the child’s throat. The Plaintiff had purchased the remote control on Amazon’s website from a third-party seller, Hu Xi Jie (a Chinese person or entity—no one could confirm). Hu Xi Jie had participated in Amazon’s Fulfillment by Amazon (“FBA”) program, meaning that Amazon stored and shipped Hu Xi Jie’s goods to the Plaintiff in exchange for a service fee.

As a threshold issue, nonmanufacturing sellers like Amazon are generally not liable for alleged defective products; however, the Texas Product Liability Act carves out an exception when the product’s manufacturer is “not subject to the jurisdiction of the court.”<sup>1</sup> In *McMillan*, the Plaintiff sued both Amazon and Hu Xi Jie for strict liability, negligence, gross negligence, and breach of warranty; however, Hu Xi Jie never answered or appeared in the case. The district court found that the Plaintiff had satisfied its burden for serving the manufacturer. The burden then shifted to the “seller” to secure personal jurisdiction over Hu Xi Jie.<sup>2</sup> Amazon moved for summary judgment, arguing it was not a “seller” under the Texas Product Liability Act. Given the “dearth of on-point case law” and the “sweeping implications” of potential liability for online marketplaces, the Fifth Circuit certified the question to the Texas Supreme Court.<sup>3</sup>

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<sup>1</sup> Tex. Civ. Prac. & Rem. Code Ann. § 82.003(a)(7)(B).

<sup>2</sup> See *id.* § 82.003(c).

<sup>3</sup> *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 196 (5th Cir. 2020), *certified question accepted* (Jan. 8, 2021).

## TEXAS SUPREME COURT'S DECISION & ANALYSIS

The precise question before the Texas Supreme Court was “whether Amazon is a ‘seller’ under Texas law when it does not hold title to third party products sold on its website, but controls the process of the transaction and delivery.”<sup>4</sup> In a 5–2 ruling, the Court answered that Amazon was not a seller because it never held title to the third party goods delivered under the FBA program.<sup>5</sup>

Under the Texas Product Liability Act, a seller is a “person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any part thereof.”<sup>6</sup>

In briefing and oral argument before the Court, counsel for both parties focused on whether Amazon “placed” the product into the stream of commerce through its conduct. Amazon contended that it did not “place” products into the stream of commerce but merely “facilitated” the stream through its online marketplace service. Plaintiff asserted that Amazon’s control of the sale and distribution process rendered Amazon a “seller.”

The Court’s opinion, authored by Justice Brett Busby, identified two distinct lines of precedent concerning determining “seller” status: one involving ordinary sales, and the other involving commercial non-sale transactions. The Court noted that the statute defines seller as “a person engaged in the business of distributing *or* otherwise placing” a product into the stream of commerce. The Court emphasized that the two types of transactions should not be conflated under the Texas Product Liability Act, stating: “The ‘or’ conjunction in ‘distributing or otherwise placing’ suggests that a person or entity may become a ‘seller’ by engaging in one of the transaction types, but not both.”<sup>7</sup>

As to cases involving ordinary sale transactions, the Court noted it had never held that a seller could be “anyone other than the person or entity who relinquishes title.”<sup>8</sup> With regard to commercial non-sale transactions (for example, those involving bailors or lessors), the Court likewise found that prior case law required the “seller” to have at least *held* title, although liability could be imposed absent a “transfer” of such title.<sup>9</sup>

Ultimately, the Court concluded that in the products liability context, “sellers are those who have relinquished title to the allegedly defective product at some point in the chain of distribution.”<sup>10</sup> In the instant case, because Amazon never held or relinquished title to the third-party vendor’s remote control, it was not a “seller” under Texas products liability law. Based on the Texas Supreme Court’s decision, the

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<sup>4</sup> *Amazon.com, Inc. v. McMillan*, No. 20-0979, slip op. at 2 (Tex. June 25, 2021).

<sup>5</sup> *Id.*

<sup>6</sup> Tex. Civ. Prac. & Rem. Code § 82.001(3).

<sup>7</sup> *Amazon.com, Inc. v. McMillan*, No. 20-0979, slip op. at 13 (Tex. June 25, 2021).

<sup>8</sup> *Id.* at 11.

<sup>9</sup> *Id.* at 13, 15.

<sup>10</sup> *Id.* at 15.

Fifth Circuit Court of Appeals reversed the district court's conclusion that Amazon was a seller, providing instructions to grant Amazon's motion for summary judgment.<sup>11</sup>

## IMPLICATIONS FOR TEXAS PRODUCTS LIABILITY LAW

The Texas Supreme Court's decision is consistent with the trend in Texas law limiting liability for non-manufacturing sellers. As the Court observed, although common law provided that sellers of allegedly defective products could be held strictly liable, the Texas Product Liability Act curtails strict liability.<sup>12</sup> The general rule provides that non-manufacturing sellers are *not* liable unless a statutory exception applies.<sup>13</sup>

In addition, the Court's holding marks a welcome simplification of Texas products liability law by settling what it means to be a "seller." The requirement of relinquishment of title by the "seller" in ordinary sales cases provides a bright-line rule for whether retailers—particularly online retailers who deal in third-party goods—will be considered a "seller" for products liability purposes. The holding also avoids a fact-dependent inquiry of the alleged seller's control over the product in favor of a clear-cut test that can be consistently and predictably applied by lower courts in assessing seller status.

If you have any questions about the information contained in this Client Alert, please contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed below.

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<sup>11</sup> *McMillan v. Amazon*, No. 20-20108, slip. op. at 1–2 (5th Cir. June 29, 2021).

<sup>12</sup> *Amazon.com, Inc. v. McMillan*, No. 20-0979, slip op. at 11 (Tex. June 25, 2021).

<sup>13</sup> Tex. Civ. Prac. & Rem. Code § 82.003(a).