

From Cart to Claim: Addressing Product Liability in Online Marketplaces

By Becca Trate | June 24, 2024

When a defective popcorn machine catches on fire and burns down a house, the homeowner’s first call will be to their lawyer, asking who is liable for the damages. But even if they can demonstrate the harm and prove what caused the fire, the homeowner might be left out in the cold, depending on how they purchased their popcorn machine. State product liability laws traditionally hold manufacturers, distributors, and sellers strictly liable for defective products they bring to market. As consumers increasingly make purchases from online marketplaces—platforms that aggregate products from multiple third-party sellers—new questions arise about how to best protect them from defective products that pose a risk to health and safety. State product liability laws generally do not hold online marketplaces liable for defective products that cause harm, because the marketplace is only an intermediary that connects buyers and sellers. Moreover, third-party sellers on online marketplaces may not respond to a consumer’s complaints, disappear after selling a defective product, or ignore any legal action taken against them if they are outside the authority of U.S. courts.

Some policymakers want to make online marketplaces legally liable for harmful products sold on their platforms. Under existing law, several factors may determine whether an online marketplace is liable for defective products, such as how a platform fulfills a product, if it ever takes

possession of the product, and its role in facilitating the sale. Future court cases may also change if and how an online marketplace bears liability under state law.

As policymakers debate the future of product liability laws and their applicability to online marketplaces, they should consider how existing efforts by online marketplaces already address consumer risks and harms. A number of online marketplaces have created their own policies and practices that exceed their legal obligations to address potential consumer harm. Indeed, one way that online marketplaces compete against one another is by offering additional levels of protection for buyers and sellers.

This report compares these efforts across popular online marketplaces in the United States. It finds that most marketplaces maintain consumer-centric policies to remedy typical issues on behalf of the buyer, including specific policies for damaged and defective goods. These policies allow consumers to navigate refunds and return unsafe products quickly and easily.

While maintaining these policies is important, it is necessary to understand how effective policies are in practice. Anecdotal data from the Better Business Bureau (BBB) indicates that consumers are significantly more satisfied with issue resolution when purchasing from U.S.-based marketplaces. These companies see fewer complaints and secure higher ratings, whereas China-based marketplaces have significantly worse ratings, indicating they fail to meet consumer expectations. Low ratings are a sign that consumers frequently experience similar issues, leading to a pattern, and a company does not provide a satisfying resolution, including failing to adhere to policies.

To ensure consumers buying from online marketplaces receive sufficient protection, policymakers should do the following:

- Congress should craft a national strict liability standard, based on the American Legislative Exchange Council’s model product liability act.
- State lawmakers and judicial actors should apply different liability enforcements for distinct types of online marketplaces. The enforcement of the standardized product liability standard should consider how a marketplace engages with a defective product, including if they store or ship a product directly to the consumer, before establishing potential liability.
- The Federal Trade Commission (FTC) should craft voluntary best practices for buyer protection policies on online marketplaces, with input from industry experts and consumer advocates. These best practices should include reasonable protections, such as refunds for defective goods, damaged goods, and products that do not

arrive, and outline how to notify consumers of recalls on purchased products.

- Expand data-sharing practices between retailers and government consumer protection agencies by expanding the Retailer Reporting Program. By doing so, both retailers and the Consumer Product Safety Commission would gain real-time insight into dangerous products and product recalls.

PRODUCT LIABILITY

Parties that produce and distribute products have a duty to ensure that they are safe and free from defects before they are sold. If a party fails in this legal duty, they are liable for injuries, damages, and losses caused by a defective product.¹ Generally, manufacturers, distributors, and sellers are liable if a defective product ends up in the hands of consumers, and harmed consumers can seek damages.²

Product defects and dangers can arise at any point in the production and distribution process. For example, design defects occur when a product is dangerous or defective due to its design, such as creating a child's toy with unnecessarily sharp corners.³ Mistakes in the manufacturing process can cause a product that would otherwise be safe to become dangerous or defective. Finally, marketing defects occur when a company markets or incorrectly labels a product, or when the manufacturer fails to provide adequate warnings or instructions for its use.

Legal Standards for Product Liability Lawsuits

Any product defects could lead to a product liability claim and a lawsuit, but the legal standard needed to prove harm varies by state.⁴ The most common liability standards are negligence, strict liability, and breach of warranty. Many states maintain multiple liability standards.

Strict Liability

A company is liable under strict liability if the court determines a product is defective, regardless of intent. As of 2023, 43 states apply strict liability.⁵ Strict liability is a lower standard than negligence, as it only requires the plaintiff to prove that injury occurred and the product caused injury.⁶ Courts use two separate tests to determine whether a product is defective: the Consumer Expectation Test and the Risk-Utility Test.

Consumer Expectation Test

The consumer expectation test determines whether a defect exists, and if that defect presents an unreasonable risk to the plaintiff. If the court rules that a product is defective or unreasonably dangerous, or that the danger is unknowable to the consumer, the company is liable. If evidence of a defect does not exist, consumers may also demonstrate that the product does not meet the reasonable expectation of the user.⁷ For example, if a

rubber water hose started leaking water at the seams after only the first use, the court could determine that the product did not meet the user's reasonable expectation and is therefore defective.

Risk-Utility Test

The risk-utility test is a cost-benefit analysis that involves assessing a product's risk compared to its utility. Generally, the consumer must prove that the risk of using a product is greater than the utility. Under this standard, a product is defective if a "reasonable person" would find the probability and seriousness of harm outweighs the burden or costs of precautions. For example, if an electric lighter spontaneously caught fire if used too frequently, the court could determine that the risk of spontaneous fire was too high even if the user took all precautions, thus making the product defective.⁸

Negligence

In a negligence lawsuit, the plaintiff must demonstrate that a defendant's negligence or recklessness caused injuries. In terms of product liability, this means consumers must show that negligence occurred at some point during the manufacturing or sale of the product. Negligence is a higher standard than strict liability because, legally, the plaintiff must prove the defendant owed a duty of care, breached that duty, the breach caused injury, and that injury occurred.⁹ As of 2023, 46 states have negligence liability standards, with only Florida, Louisiana, Ohio, and Pennsylvania not using this standard.¹⁰

Breach of Warranty

Breach of warranty, or breach of contract, is conceptually different from strict liability and negligence, as it is a form of contract law, with a limited number of potential plaintiffs. There are two forms of breach of warranty law. Breach of implied warranty of merchantability is like strict liability: If a plaintiff can demonstrate a product was defective and caused injuries, the defendant is liable for any harm.¹¹

In contrast, breach of warranty of fitness for a particular purpose does not require a plaintiff to prove that a defendant's product was defective. Instead, the former must demonstrate that the latter misrepresented how to use a product or requirements for use, such as age, size, or weight limits, and that the defendant's product failed to meet the plaintiff's specifications.¹² As of 2023, 43 states use the breach of warranty standard.¹³

E-COMMERCE RETAILERS AND ONLINE MARKETPLACES

There are important distinctions between e-commerce retailers and online marketplaces. E-commerce retailers sell products directly to customers.¹⁴ Retailers using e-commerce follow a traditional order fulfillment model and acquire stock from product manufacturers and wholesalers. These retailers

store products at a warehouse or distribution center and then ship them directly to their customers.¹⁵ Most U.S.-based traditional brick-and-mortar retailers also operate as e-commerce retailers, and many product manufacturers also use e-commerce to sell directly to consumers.¹⁶ Retailers using e-commerce have complete control over their brand, their customers' online experience, and their pricing, and they are responsible for maintaining their online presence and attracting customers to it.

Online marketplaces such as Etsy and AliExpress are a type of e-commerce platform that acts as an intermediary between buyers and third-party sellers. They provide a venue for third-party sellers to list their products, and these platforms handle functions such as payment processing and customer support. However, not all online marketplaces operate the same way. Some marketplaces may not sell products themselves to consumers, and others may never even handle products.¹⁷ Sellers that use online marketplaces typically have less control over certain factors, such as the customer experience, but they gain more visibility and exposure to potential buyers.

Different Kinds of Sellers on Online Marketplaces

Online marketplaces can host more than one type of seller. Sometimes, the marketplace itself will list and sell products directly on the platform. In this case, the online marketplace is also an online retailer. It sells products that it buys directly from manufacturers and wholesalers.¹⁸ The online marketplace, acting as an online retailer, stores these products in its warehouses and handles fulfillment.¹⁹

Online marketplaces also have third-party sellers that place products for sale on their platforms. These sellers may be manufacturers using a platform to sell to consumers or intermediaries who buy products from manufacturers or wholesalers. In some cases, an online marketplace handles fulfillment for third-party sellers. In other cases, third-party sellers work directly with a manufacturer or wholesaler to fulfill orders, or they use their own warehouse for fulfillment. In these cases, the online marketplace never directly contracts with the product manufacturer or wholesaler, takes possession of the products, or engages in fulfillment.²⁰

For example, Amazon operates both as an online retailer and hosts third-party sellers via its online marketplace. Third-party sellers can choose to have their products “Fulfilled by Amazon” (FBA) or “Fulfilled by Merchant” (FBM).²¹ If a third-party seller elects to use the FBA service, then Amazon inventories, stores, packages, ships, and handles customer service and returns for the seller's products.²² This service allows sellers to manage their inventory.²³ If a third-party seller uses FBM, the seller is responsible for all packaging, shipping, and customer service responsibilities. For both FBA and FBM, Amazon handles payment processing. If a third-party seller provides a product using the FBM service, Amazon has no physical

interaction with that product “at any time throughout the course of the transaction.”²⁴

How Is Product Liability for Third-Party Marketplaces Evolving?

Online marketplaces raise the question of whether marketplace platforms should bear liability for harm caused by damaged or defective products sold on a marketplace, and if platforms should be subject to different product liability standards. Liability for defective products is generally decided by court cases. In brick-and-mortar retail, a plaintiff sues a defendant under negligence, breach of contract, or strict liability. This approach easily aligns with the traditional retail model because harmed consumers are purchasing products locally, and the retailer has a clear relationship with the manufacturer. However, purchasing from an online marketplace practically guarantees cross-border commerce. Buyers and sellers are purchasing and sending products anywhere in the world. Additionally, online marketplaces often have no relationship with the manufacturers, further complicating the application of traditional product liability standards.

State courts in several states have recognized this different relationship. Courts in Minnesota, Illinois, Arizona, and Texas declined to extend liability to online marketplaces because marketplaces offering third-party products for sale do not have sufficient control over products and, therefore, do not qualify as a “seller” of the product.²⁵ However, some courts found that marketplace platforms are liable as sellers under state law. Differing opinions and applications of strict liability create patchwork standards and practices nationwide. Without federal preemption, such as creating standardized strict liability, marketplaces must contend with state-by-state court rulings that secure different consumer protections based on location. Federal preemption would remove some of this confusion and negate the need for states to issue specific rulings targeting online product liability.²⁶

Notable Court Cases

A series of legal cases spanning the United States illustrate the complex and evolving product liability standards impacting online marketplaces. For instance, courts in Minnesota, Illinois, Arizona, and Texas found that the Amazon marketplace was not liable for damage caused by third-party products because the company acted as a facilitator rather than a direct seller. However, a California court did find Amazon liable for the damage caused by third-party products. This court reached this conclusion with a different interpretation of the distribution chain. States are taking different judicial approaches to the subject, and some states, including New York, have considered legislation that would explicitly define the liability of online marketplaces. Collectively, these cases underscore the key difference in the legal understanding of product liability for third-party marketplaces, where the definitions of sellers, distributors, and facilitators are being reexamined in online commerce.

Berkley Regional Insurance Co. v. John Doe Battery Manufacturer et al.

The U.S. District Court ruled in January 2023 that Amazon was not liable for fire damages allegedly caused by a cell phone battery sold by a third-party seller on its platform.²⁷ The court ruled that “under Minnesota law, strict products liability applies only to manufacturers and sellers of defective products,” and that Amazon never took ownership of the allegedly defective product.²⁸ The court instead found that Amazon functioned as a distribution facilitator, which is exempt from strict liability in Minnesota.²⁹

Great Northern Insurance Co. v. Amazon.com Inc.

The U.S. District Court in Chicago ruled in 2021 that Amazon was not liable for a hoverboard fire-related case filed by a homeowner’s insurer. The court found that Amazon could not be considered a seller under Illinois law, since the law failed to define whether operating a website where others can describe, offer, and sell products is equivalent to selling products.³⁰ The judge in the case noted that, even though Amazon derives economic benefits from marketing and hosting the product for sale, Illinois legislators would need to expand the liability beyond bounds established by the state courts to consider Amazon a liable party.³¹

State Farm Fire & Casualty Co. v. Amazon.com Inc.

In another case involving a hoverboard that ignited, the 9th U.S. Circuit Court of Appeals in San Francisco upheld a lower-court decision against the homeowner’s insurer and ruled Amazon could not be held liable under Arizona’s strict liability laws because Amazon did not sufficiently engage in the stream of commerce to be considered a seller.³² Arizona uses several factors to determine whether entities participate significantly in the stream of commerce and are therefore subject to strict liability. Factors include whether a company provides a warranty for a product’s quality; if it is responsible for a product during transit; if it exercises enough control over the product to inspect or examine it; if it takes title or ownership over a product; if it derives an economic benefit from the transaction; if it can influence a product’s design and manufacture; or if it fosters consumer reliance through its involvement. The court found that, under Arizona law, Amazon did not meet the requirements of being considered a seller.³³

McMillan v. Amazon.com, Inc.

In May 2021, the Texas Supreme Court found that Amazon was not liable under Texas law for injuries caused by a third-party seller’s product that was shipped from an Amazon warehouse.³⁴ McMillan alleged a knockoff Apple TV remote sold via a third-party seller on Amazon was defective and its battery would pop out. However, the court ruled that Amazon did not meet the legal definition of a seller under the Texas Products Liability Act, and that sellers were limited to those that owned the product at some point during distribution.³⁵ Despite facilitating the transaction and

completing delivery, the court ruled that Amazon never owned the product at any point during distribution.³⁶

Loomis v. Amazon

Loomis v. Amazon, decided in April 2021 by the California Court of Appeals, found Amazon liable for third parties selling defective products through the marketplace. In the case, the plaintiff argued that Amazon should be liable for injuries suffered as the result of an allegedly defective hoverboard that was sold by a third-party seller on Amazon.³⁷ The court found that while Amazon was not a manufacturer, distributor, or supplier, the company created a market for the third party to sell the hoverboard, and therefore was sufficiently involved in the vertical chain of distribution under California’s product liability law product to be considered a liable party.³⁸

State Laws

The New York State Senate proposed a law in 2023, Bill S6437, that would extend liability to online marketplaces and create the same product liability standards for online marketplaces that exist for brick-and-mortar retailers. The bill would amend the general obligations law regarding the liability of online marketplaces for defective goods. The bill uses broad language to describe an “electronic marketplace provider” as any that facilitates the sale and purchase of property via the Internet. As stated in the proposed law, “The liability of an electronic marketplace provider shall be equal to, but not greater than, the liability of a retailer.”³⁹ The proposed law would apply to marketplaces regardless of whether they have a physical presence in the state or if they ever took physical possession of a given product.⁴⁰

The California Assembly has proposed two similar pieces of legislation in recent years. Rep. Mark Stone (D) introduced Assembly Bill (AB) 3262 in 2020.⁴¹ AB 3262 would have held online marketplaces strictly liable for the safety of products sold, such as traditional brick-and-mortar retailers and distributors. However, the bill did not receive a vote from the California Senate and failed to become law.⁴² In 2021, Rep. Stone introduced AB 1182, which would have imposed strict product liability on online retailers that communicated offers of sale and facilitated payments between third-party sellers and purchasers, even if the online retailers never took physical possession of the products sold. AB 1182 failed to pass out of committee and did not become law.⁴³

ONLINE MARKETPLACES POLICIES

In response to the fragmented application of legal liability for online marketplaces state by state, most of the major online marketplaces created policies to address consumer concerns and provide recourse if a product fails to meet expectations, is defective or damaged, or harms consumers or their property. (See appendix.) The marketplace purchase

protection policies are a positive step by platforms to fill the gap and provide a consumer protection guarantee.⁴⁴

These policies also help to protect sellers and merchants and allow a marketplace to engage with a harmed consumer on a seller's behalf. Finally, these policies provide some level of recourse if a seller and consumer cannot reach an agreement, if a seller fails to respond to a consumer's complaints, or if legal liability cannot be enforced due to a seller's location. These consumer protection policies replicate, and in some cases exceed, the protections and standards set by legal liability standards.

In many cases, buyer protection policies offer stronger and more effective outcomes for consumers than do product liability lawsuits. Under most policies, marketplaces guarantee consumers a refund without filing a lawsuit, demonstrating harm, or providing evidence of a product being defective. Consumers are also able to work directly with a marketplace, circumventing the need for legal services or the development of a legal case. In the case that a consumer experiences significant harm that a refund cannot mend, these policies do not preclude them from taking legal action against the third-party seller or the platform itself.

Most marketplaces require consumers to initially attempt to resolve issues with a seller before elevating the concern to a marketplace platform. This process is significantly less arduous than pursuing recourse through legal action, but can still take significant time and effort on the part of the consumer. Marketplaces may only offer a partial refund, require the consumer to pay for return shipping or restocking fees, or have a time limit for when consumers can initiate a claim. Time limits may cause consumers who encounter defective products to be without recourse if they do not immediately notice a defect. Even with these limitations, buyer protection programs bridge the gap between patchwork state-by-state cases and strict liability without federal preemption. These programs offer consumers some form of guaranteed recourse that is not provided to them by the state.

Many buyer protection programs protect sellers as well as buyers. In addition to letting third-party sellers set standards for returns, Etsy and eBay will cover the cost of a product for the seller if it is damaged during the shipping process. eBay's Money Back Guarantee lays out specific requirements for both buyers and sellers, allowing sellers to create their own return policies for products. Moreover, online marketplaces can use these types of buyer protection programs to differentiate their services and compete for both buyers and sellers.

When compared with marketplaces owned by U.S. companies, foreign marketplaces have lower ratings from the BBB. The BBB rates how companies interact with customers with a letter grade from A+ to F. The grade is determined using clearly defined metrics, such as the number of consumer complaints against a company, the response time, the resolution

quality, and whether complaints create an ongoing pattern.⁴⁵ AliExpress, DHgate, and Temu are rated D-, F, and C+, respectively. U.S.-based online marketplaces range from A+ to A-. BBB does not have a rating for Facebook Marketplace or Instagram shopping. This difference in rating indicates that the Chinese-owned marketplaces are less likely to interact positively and respond to consumer issues and often do not provide satisfying resolutions. This rating suggests that, while many of the China-based marketplaces hold similar consumer policies, they may fail to meet consumers' standards and expectations as compared with the U.S. platforms. This rating could also indicate that Chinese marketplaces do not meet their stated policies or are difficult to navigate, and often have poorer resolutions.

AliExpress

AliExpress is a China-based online marketplace that offers products from third-party sellers. To protect consumers, AliExpress offers a buyer protection program.⁴⁶ U.S.-based consumers receive the basic buyer protection, which guarantees that if a product arrives damaged or significantly different than the original product description, AliExpress will refund the payment. The marketplace also ensures that, whenever a product has a guaranteed shipping date, it will arrive by that set date. If the product does not arrive, or does not arrive in that time frame, customers are entitled to a refund.⁴⁷ In order to enact the guarantee, customers must raise a claim within 15 days of order completion. If the customer is unable to reach a resolution with the seller, then the marketplace will engage on the customer's behalf.⁴⁸

Amazon

Amazon has a special program that applies to third-party sellers in its online marketplace. Amazon launched its A-to-Z Guarantee program in 2001.⁴⁹ The A-to-Z Guarantee replicates consumer protections offered by Amazon's Customer Service for items the company sells directly, and applies those same protections to products sold by third-party sellers, including both FBA and FBM products.⁵⁰ This means if a customer purchases a product from a third-party seller on Amazon's marketplace and finds the product unsatisfactory, Amazon will resolve the issue, including giving the consumer a refund, if the consumer is unable to do so with the seller.

In 2021, the company expanded its A-to-Z Guarantee in the United States to cover property and personal damages from defective products, with coverage up to \$1 million.⁵¹ Therefore, Amazon covers property damages up to \$1 million and offers personal injury coverage up to \$1 million if a consumer experiences bodily harm from a defective product.⁵² In addition, Amazon pays claims under \$1,000, on behalf of the seller, for defective products, damage, or injury. This reduces the need for litigation and

investigation by the sellers and helps consumers receive claims more quickly.⁵³

DHgate

DHgate is one of the largest e-commerce marketplace platforms in China and allows consumers to purchase directly from third-party wholesalers. DHGate's Standard Purchase Protection program protects buyers if a product is not received or is significantly different than described, including damaged products.⁵⁴ To enact the policy, consumers must first attempt to resolve the issue with the supplier. If they cannot, consumers can communicate directly with DHgate. They must open a dispute within 90 days of shipping and affirm that the product failed to arrive or provide evidence that it was significantly different than described.⁵⁵

eBay

eBay, an online auction website and third-party marketplace, maintains several programs to protect consumers when they purchase products from third-party sellers on its online marketplace. eBay's Money Back Guarantee automatically protects U.S. consumers if the product is not as described, is faulty, or fails to arrive, with some exceptions, including items such as heavy machinery, vehicles, digital content such as NFTs, services and classified ads, travel vouchers or tickets, and real estate transactions.⁵⁶ It uses a case-by-case system wherein if a customer is unable to resolve the issue with the original third-party seller or does not receive a response from the seller in a timely manner, they can open a case with eBay directly. eBay guarantees that it will respond within 48 hours and then potentially refund the buyer.

In addition, eBay authenticates certain types of products listed for sale on the website. Its Authenticity Guarantee, launched in September 2020, offers product inspections by professionally trained authenticators to physically inspect and verify the authenticity of eligible items in the collectible sneakers, luxury watches, luxury handbags, and trading cards categories.⁵⁷ Overall, this process works to reduce the number of counterfeit goods that reach consumers.

Beyond this, eBay maintains and actively enforces a product safety policy. This policy states that all listed products are safe to use, which generally means that the product must be compliant with any local regulations, is not banned by the marketplace, and is not currently under recall.⁵⁸ eBay enforces this policy using artificial intelligence and image detection to proactively identify potentially unsafe products. In 2021, eBay deemed more than seven million items unsafe and removed their listings from the website.⁵⁹

Etsy

Etsy launched its Purchase Protection Program in August 2022. The program offers increased protection for sellers and buyers by covering the cost of a customer's refund, up to \$250, if a product is lost or arrives damaged, while the seller retains their earnings.⁶⁰ Etsy will refund consumers if a product is not as described; however, it does not allow sellers to retain earnings if a product does not match the listing.⁶¹

Etsy does not require sellers to enroll in the program. Instead, orders are eligible for purchase protection if the order and seller meet specific criteria. Specifically, sellers must be in good standing, ship the product in a timely manner, provide valid tracking information with an estimated delivery date, use Etsy's payment platform (if eligible), keep listings accurate, and carefully package merchandise to avoid damage during shipment. Lastly, such an order cannot exceed \$250, including shipping and fees.⁶²

Etsy uses a case-by-case basis to review and refund consumer claims. Once a customer opens a case, Etsy will review the claim, and if a product qualifies, the marketplace will refund the customer.⁶³

Meta (Facebook and Instagram)

Third-party sellers offer goods for sale directly through Facebook and Instagram.⁶⁴ Meta maintains a purchase protection policy if customers purchase directly from either website using the on-site payment system. If a customer and seller cannot resolve an issue with a purchase, customers can submit a claim through Facebook or Instagram. They can request a refund up to \$2,000 if an order did not arrive, arrived damaged, or was different than described in the listing. Customers may also request a refund if a seller refused to adhere to its stated refund policy, or if Facebook or Instagram removed the seller.⁶⁵ Purchases over \$2,000 are not eligible for the protection program, and customers are subject to a \$10,000 lifetime coverage limit.⁶⁶

Houzz

Houzz, a home décor and furniture online marketplace, does not maintain any specific buyer protection policy for third-party products. However, it does maintain a 30-day return window for all products, including those purchased from third-party sellers. If a product arrives damaged or defective, consumers must report the damage or defect in order to receive a refund. Consumers must alert Houzz to the defect or damage within 30 days of delivery, if delivered by parcel carriers. If a freight carrier, including Houzz's White Glove Service, delivers the product, the consumer must report damage within 5 days of delivery, and a defect within 30 days of delivery.⁶⁷

Newegg

Newegg, one of the largest online electronics marketplaces, maintains its Marketplace Guarantee Program for products purchased from third-party sellers. The program is applicable if a consumer did not receive a product or received an item that was damaged, defective, or different from the product listing. If customers are not able to reach a resolution with a seller directly, or if a seller fails to respond in a timely manner, Newegg will provide reimbursement for products purchased, minus a small restocking fee. However, consumers must notify a seller of a problem within 15 days of receiving a product in order to file a claim.⁶⁸

Temu

Temu is a China-based online marketplace that specializes in low-cost consumer goods. The company ships products directly from China.⁶⁹ Temu relies on a model called “next-gen manufacturing” wherein consumer demand for products drives the design and manufacturing of products, as opposed to manufacturing a set number of products, storing that inventory, and then selling those products.⁷⁰ In addition to this model, which directly connects manufacturers with consumers, Temu recently opened its U.S. marketplace to third-party sellers and introduced a purchase protection program.⁷¹ This program allows a buyer to return a product if the order fails to meet the buyer’s standards. Eligible items are products that do not match the item description, damaged goods, and items that never arrived or arrived late.⁷² Customers must initiate a claim and escalate their problem with Temu if they cannot reach an agreement with the seller.

Walmart Marketplace

Walmart Marketplace is the third-party marketplace integrated directly into Walmart.com, which is also the e-commerce storefront for products sold by the retailer Walmart. Walmart guarantees products sold on Walmart Marketplace with the Walmart Marketplace Promise. If a buyer has an issue with a product but is unable to receive a resolution from a seller, Walmart will step in to resolve the issue on behalf of the seller.⁷³

The Marketplace Promise applies if an item fails to arrive within three days of the estimated delivery date, is shipped to the wrong address, or is different than expected—or if the seller refuses to accept a return, fails to issue a refund on returned products, or deducts the shipping fees from a refund.⁷⁴

Wayfair

Wayfair does not maintain a specific buyer protection policy, nor does the marketplace guarantee products sold by third-party sellers. Instead, Wayfair maintains a 30-day return window for most products, including incorrect products or products that arrive damaged or defective.⁷⁵ Since Wayfair does not guarantee the quality of products, product defects discovered outside the 30-day window may be ineligible for returns.⁷⁶

RECOMMENDATIONS

To ensure consumers purchasing products from online marketplaces receive sufficient protection for defective products that pose a risk to their health and safety, policymakers at all levels of the government should take the following steps.

Create A National Strict Liability Standard

Forty-three states maintain some version of a strict liability standard, but the current patchwork of liability standards is confusing and treats consumers and businesses differently depending on their locations, as this approach was designed before e-commerce and cross-border commerce were prevalent. However, as cross-border commerce becomes the norm, it is necessary that consumers across the country are treated the same and subject to the same protections, regardless of location.

Consumers, retailers, and online marketplaces alike would benefit if all states adopted uniform product liability laws. Retailers and e-commerce marketplaces would no longer need to comply with ever-changing and state-specific regulations. A national strict liability standard would allow retailers and online marketplaces to shape their consumer policies to reflect the overarching legal standard, such as standardizing a complete refund for defective goods, across the industry. Consumers would benefit because they would have the same liability protections, regardless of where they live or purchase products.

This could be completed in two ways. State policymakers could use the American Legislative Exchange Council's (ALEC's) Model Product Liability Act as a foundation.⁷⁷ The model act, a revised version of the 1995 Model Product Liability Act, combines state best practices with developments since 1995. Twenty-five states have adopted the model act so far.⁷⁸ However, if states fail to standardize their practices, creating a federal liability standard may be necessary.

If the federal government creates a product liability standard, it should use ALEC's Model Product Liability Act to craft a law. Such a law should reflect the strict liability standard held by 43 states and extend liability to parties based on how they engage with a product. For example, those engaged in shipping should be nonliable, unless the danger or defect occurred during shipping. Parties that bear possession of a good in a physical store, through a manufacturing contract, or in a warehouse could be liable if the damage or defect were noticeable. Parties that do not engage in the shipping or take possession of a good, but simply provide the venue for sale, should not bear liability for damages or defects, as they could never be aware of the potential danger. A national strict liability standard would also ensure federal preemption of the law and remove the need for continued engagement on the issue at the state level.

While it would be best to replace the state-by-state approach with a national strict liability standard, states can also simplify the liability framework by creating uniform rules for which parties are liable for dangerous and defective products. Doing so would solidify protections for all Americans, reduce the need for continued litigation on which businesses are liable for these products, and limit the need for federal action.

Different Liability Rules for Different Types of Online Marketplaces

After establishing a standardized strict liability, courts and state lawmakers should engage different frameworks for strict liability based on an online marketplace's operation. For example, in some cases, an online marketplace never handles products and instead only connects buyers and sellers—in this scenario, insight into the shipment, manufacturing, or storage of a product sold. Therefore, the marketplace is never able to prevent a defective product from entering the commerce stream. In this instance, it would not be feasible for the online marketplace to inspect the product to ensure safety or quality standards. Imposing liability on this marketplace would be detrimental for both consumers and sellers. In response, the marketplace may drop third-party sellers entirely, reducing the total number of sellers and seller-enabled marketplaces.

However, some third-party sellers will use the online marketplace to list their products and for fulfillment. In this instance, the marketplace could maintain liability for fulfilled products, depending on the specific storage and fulfillment activities. The marketplace may simply engage in fulfillment, such as parcels shippers including UPS and USPS, or it may receive the product directly from the manufacturer, like a brick-and-mortar store would. How a marketplace handles a product should be taken into account when designing and then applying a strict liability standard.

Before making any regulatory or legislative changes, state lawmakers should work alongside industry experts and representatives to understand how different marketplaces engage in commerce and the impact of changes to liability on buyers and sellers. These insights should craft any potential legislation, with a focus on aligning the practices of marketplaces with their roles in the commerce stream.

For example, if a platform takes possession of a product in the same way as a brick-and-mortar retailer does, the platform should bear liability for that product. However, if it acts as a shipper, the platform should bear the same liability as a private distributor, such as UPS or FedEx. Finally, if the platform never takes possession of the good and solely acts as a venue for commerce, the platforms should not bear liability for the product if it is damaged or defective.

Develop Voluntary Best Practices for Buyer Protection Programs

The FTC should work alongside online marketplaces and the U.S. Consumer Product Safety Commission (CPSC) to develop voluntary best practices for buyer protection programs on online marketplaces. These voluntary best practices should include reasonable protections, such as protection for defective goods, damaged goods, and products that are not as described, and practices to notify consumers about product recalls for purchased products. The FTC should create best practices with advice and input from representatives of online marketplaces and consumer advocacy groups.

Before commencing, the FTC should study the efficacy of current buyer protection programs. This study should incorporate consumer complaints data submitted to the FTC to understand if and how any existing buyer protection programs harm consumers, as well as data from CPSC on product recalls to understand how marketplaces respond to these notices. The FTC should also solicit input from online marketplaces for this study. These platforms should be able to provide significant information about how consumers engage with buyer protection policies, return rates, and overall costs of buyer protection programs.

Expand Data Sharing Between Retailers and Government Agencies

Retailers must report product hazards and defects that could lead to recalls directly to CPSC, and they may be found in violation of reporting requirements if product hazards are not reported in a timely manner.⁷⁹ To expedite the process of reporting, CPSC allows retailers to submit bulk data related to product hazards and defects on a weekly or biweekly basis through the Retailer Reporting Program (RRP).⁸⁰ This bulk data sharing offers a safeguard from civil penalties in connection to provided data for retailers and allows CPSC to identify trends and potentially dangerous products. However, CPSC limits membership to the RRP to Walmart, Sears, Amazon.com, Target, and Home Depot.⁸¹ This means smaller, regional stores may not submit dangerous products they find to CPSC, even if the product is widely available and could impact consumers across the country. It also means that large foreign sellers with a significant U.S. footprint are not reporting information. These data gaps also make it difficult for CPSC to preemptively inform all businesses about dangerous products or issue a recall in a timely manner. To help alleviate this, the CPSC should expand the RRP and allow more retailers, including online marketplaces, to join the voluntary reporting program. They should also engage in two-way data sharing. This would allow retailers to see anonymized reports in real time to gain awareness of potentially defective products.

Increasing data collection would have several benefits. CPSC's goal with the RRP is to improve response time and reporting of recalls. By expanding the program, CPSC would have greater visibility into different product

defects and consumer complaints. This would help CPSC find trends and issue recalls in real time. Retailers would also benefit from increased reporting and insight into reported data prior to official recalls. Retailers could proactively monitor product stock and pull products prior to a recall if CPSC provided anonymized data on insights about product concerns, reported hazards, and frequent consumer complaints that retailers could access.

CONCLUSION

State product liability laws work well for traditional retail but need to be adapted to address the emergence of online marketplaces with third-party sellers. The disparity in court decisions and state laws regarding the liability of online marketplaces has created a patchwork approach to consumer safety that is arduous to navigate and applies differently state by state. Fortunately, most platforms have strong buyer protection programs that provide more security to consumers and offer some kind of guarantee.

But more can be done to ensure safety for Americans shopping online. Establishing voluntary best practices for platforms would help create a minimum level of protection for consumers. Studying the current landscape of consumer complaints, product recalls, and platform responses would help policymakers understand the harms and address them. Additional data sharing could increase the effectiveness of product recalls. These steps would create a stronger, safer marketplace for all Americans.

APPENDIX: BUYER-PROTECTION POLICIES FOR U.S. CONSUMERS

	AliExpress	Amazon	DHgate	eBay	Etsy	Houzz	Meta Platforms	Newegg	Temu	Walmart Marketplace	Wayfair
Consumer protection policy	Buyer Protection	A-to-Z Guarantee	Standard Purchase Protection Program	Money Back Guarantee	Purchase Protection Program	30-day return window	Purchase Protection	Marketplace Guarantee Program	Purchase Protection Program	Walmart Marketplace Promise	No specific policy
Products covered	All products	Any product	Any product	Any product	Purchases using Etsy's payment system	All products	Purchases using FB or IG payment systems, excluding vehicles and products worth more than \$2K	Third-party products	All products	All products	All products
Damaged goods	Yes	Yes	Yes	Yes	Yes	Within 5 days for freight deliveries; 30 days for all others	Yes	Yes	Yes	Yes	If reported within 30 days
Defective or faulty	Yes	Yes	Yes	Yes	Yes	Within 30 days	Yes	Yes	Yes	Yes	If reported within 30 days
Product not as described	Yes	Yes	Yes	Yes	Yes	Within 30 days	Yes	Yes	Yes	Yes	Yes
Arrived late	If purchased with guaranteed shipping	Yes	No	Yes	Yes	No	Yes	No	Yes	Yes	At Wayfair's discretion
Did not arrive	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	At Wayfair's discretion
Consumer no longer wants	No	Yes	No	Yes	Yes	No	No	No	No	No	No
Recourse for consumer	Full refund	Full refund or replacement	Full refund	Full refund	Refund up to \$250	Full refund for damaged or defective goods; minus shipping for other products	Full refund up to \$2K, with a \$10K lifetime coverage limit	Partial refund	Full refund	Full refund	Full refund
Personal property or damage protection	None	Up to \$1M in personal property or damage protection	None	None	None	None	None	None	None	None	None
Claims process required?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Better Business Bureau rating	D-	B	F	A-	A+	A+	No rating available	A	C+	A+	A+
2022 revenue (USD)	\$1.34B ⁸²	\$513.9B ⁸³	Not publicized	\$9.7B ⁸⁴	\$2.5B ⁸⁵	\$340M ⁸⁶	\$117.9B ⁸⁷	\$1.99B ⁸⁸	\$19.2B ⁸⁹	\$73.2B ⁹⁰	\$10.5B ⁹¹

ERRATA

This report has been updated on page 5 to clarify details of Amazon’s “Fulfilled by Amazon” (FBA) and “Fulfilled by Merchant” (FBM) services, and on page 10 to clarify details of Amazon’s A-to-Z Guarantee.

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