

## Update: Amazon Can (Still) Be Liable in Louisiana

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On November 25, 2024, in *Pickard v. Amazon.com, Inc.*, No. 5:20-cv-01448, 2024 U.S. Dist. LEXIS 215377, the United States District Court for the Western District of Louisiana (District Court) ruled that Amazon.com, Inc. (Amazon) could be liable for manufacturer-seller liability under the Louisiana Products Liability Act (LPLA) for a defective product sold by a third-party seller through the "Fulfillment by Amazon" program (FBA). The court also dismissed two tort claims against Amazon as follows: (i) Amazon does not qualify as a "seller" for purposes of non-manufacturer seller liability (because passing title is required for that claim); and (ii) there is insufficient evidence to prove the decedent, Archie Pickard (Pickard), relied on Amazon's safety practices when purchasing the defective product, precluding a claim for negligent undertaking.

### Background

Pickard died from injuries sustained in a house fire allegedly caused by a defective battery charger he purchased on Amazon. Jisell, a Chinese company and a third-party seller, manufactured and sold the charger. Amazon never took title to the charger but stored it in its warehouse and delivered it to Pickard through the FBA. Pickard's children filed a wrongful death lawsuit against Amazon alleging three claims: (i) manufacturer-seller liability under the LPLA; and tort-based claims of (ii) non-manufacturer seller liability and (iii) negligent undertaking. After Amazon moved for summary judgment on all claims, the District Court certified questions to the Supreme Court of Louisiana (Supreme Court) seeking guidance as there was minimal guidance regarding the application of products claims to online marketplaces.

### Guidance from the Supreme Court of Louisiana

The Supreme Court explained that the LPLA only applies to manufacturers, but a manufacturer includes "[a] seller of a product of an alien manufacturer if the seller is in the business of importing or distributing the product for resale and the seller is the alter ego of the alien manufacturer." *La. R.S. § 9:2800.53(a)(d)*. The Supreme Court determined that Amazon is a "seller" of the charger because Amazon conveyed possession of the product to Pickard through the FBA (even though Amazon did not own or convey title of the charger to Pickard).

### District Court Decision

The District Court had to confirm two elements of *La. R.S. § 9:2800.53(a)(d)* to apply the LPLA to Amazon as a "manufacturer" of the charger:

- i. Is Amazon in the business of importing or distributing the charger? (Held: Yes, Amazon is a distributor)
- ii. Is Amazon the alter ego of the alien manufacturer, Jisell? (Held: The jury must weigh the facts to determine this factor).

#### a. Amazon is a "Distributor" of the Charger

A “distributor” under the LPLA is an entity that “gives out” or “delivers” a product, regardless of whether it holds and transfers title. The court determined that Amazon clearly is a “distributor” of the charger, as it stored and delivered it through the FBA.

#### **b. Amazon as the “Alter Ego” of the Third-Party Seller**

The court provided four factors to determine whether a domestic seller (i.e., Amazon) is the alter ego of an alien manufacturer (i.e., Jisell): (i) whether the seller is affiliated with the alien manufacturer by common ownership or control; (ii) whether the seller assumes or administers product warranty obligations of the alien manufacturer; (iii) whether the seller prepares or modifies the product for distribution; and (iv) any other relevant evidence. The court held that the jury must decide this issue since it involves a mixed question of law and fact. If the jury decides that Amazon is the “alter ego” of Jisell, Amazon can be liable as the “manufacturer” of the charger under the LPLA. The court determined that reasonable people could draw different conclusions when applying the alter-ego factors to the evidence and, therefore, the question must be decided by the jury.

The *Pickard* court suggests (but does not outright say) that Amazon is the alter ego of its third-party seller/manufacturer, Jisell. Interestingly, the court highlights the fourth factor of the alter-ego analysis (“any other relevant evidence”) to explain that the typical Amazon customer may not know the origin of products on the marketplace (i.e., consumers may believe Amazon and its third-party seller/manufacturer to be one and the same or, alter egos, when making a purchase). The court explained that the average Amazon shopper knows little to nothing about foreign manufacturers, such as Jisell, and instead relies on Amazon’s marketing and reputation when choosing products to purchase online.

#### **c. Tort Claim - Non-Manufacturing Seller Liability**

The court dismissed the tort claim for non-manufacturing seller liability because Amazon did not meet the definition of “seller”. For non-manufacturer seller liability, the term “seller” was interpreted narrowly in line with the Sale Title of the Louisiana Civil Code, which requires the transfer of ownership (not the transfer of possession as required by the LPLA). Since Amazon never owned the charger (and therefore did not pass title to *Pickard*), it could not be a “seller” for purposes of non-manufacturing liability.

#### **d. Tort Claim - Negligent Undertaking**

The court dismissed the claim for negligent undertaking because there was no evidence that *Pickard* relied on Amazon’s safety practices when purchasing the battery charger. The analysis for a negligent undertaking claim in Louisiana is two steps: (i) whether the defendant assumed a duty when undertaking the rendition of services to another and failed to exercise reasonable care in performance of that duty; and (ii) whether the plaintiff suffered harm because of his reliance on the defendant’s undertaking to perform the duty. In dismissing the claim for negligent undertaking, the court pointed out that there were no safety complaints regarding the battery charger and that there was no evidence that *Pickard* actually relied upon promises or assurances made by Amazon about its product safety practices when deciding to purchase the charger.

### **Lesson for Subrogation Professionals**

Although two claims were dismissed, the *Pickard* decision potentially provides a path to recovery against Amazon under the LPLA for defective third-party products sold through the FBA. However, the Federal Court ruled that the alter-ego analysis is an issue of fact that must be decided by the jury. Even though the LPLA claim survived summary judgment, the jury must determine that Amazon is the alter ego of Jisell for Amazon to be liable as a “manufacturer” of the charger under the LPLA. This case paves a way for subrogating carriers to pursue claims against Amazon for defective third-party products, but those carriers will similarly have to establish at trial that Amazon is the alter ego of the third-party seller to sustain their LPLA claims, which may vary in each case depending on case-specific facts.

The guidance from the Supreme Court in *Pickard* suggests that Amazon may not be a “seller” under the LPLA regarding *non-FBA* products because Amazon does not convey possession of those products (because they are stored and shipped by the third-party seller and Amazon never touches the product). This is why it is critical to confirm whether a defective product on Amazon was sold through the FBA, which has repeatedly been analyzed by courts across the country (not just Louisiana) in determining Amazon’s liability for defective third-party products. The *Pickard* decision gives leverage to subrogating carriers pursuing Amazon for products sold through the FBA.

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