



## Michigan's Lawsuit Against Amazon Fails Econ 101

### Michigan consumers will likely lose if the state wins

By Ted Bolema

#### Introduction

Most shoppers go to Amazon's site expecting to find low prices, reliable order processing, fast deliveries and easy returns. The latest Price Wars study "confirm[s] Amazon as the lowest-priced retailer for the 7th year in a row, boasting a 16% average price difference compared to its rivals."<sup>1</sup> At the same time, Amazon's Marketplace, a separate online platform for products offered by third-party sellers, gives consumers more choices.<sup>2</sup> Its delivery service is also fast and efficient.<sup>3</sup>

Rather than celebrate these benefits, Michigan Attorney General Dana Nessel wants to punish Amazon. Nessel, joined by the Federal Trade Commission and 16 other states, believes "the online retail and technology company is a monopolist that uses a set of interlocking anticompetitive and unfair strategies to illegally maintain its monopoly power," according to the press release issued when the lawsuit was filed in September 2023.<sup>4</sup>

"Amazon has taken improper steps to dominate all other online superstores and online marketplaces, decreased competition, and raised prices for everyday

shoppers," Nessel wrote. "The free market is meant to work for both buyers and sellers, and Amazon has corrupted the market in its favor."<sup>5</sup>

Amazon counters that the company has spurred competition in the retail industry, so that American consumers benefit from a greater selection of goods at lower prices and shorter delivery times.<sup>6</sup> Judging by what we see in the market, it appears that consumers are demonstrating with their purchases that they mostly side with Amazon.<sup>7</sup> If Nessel is correct that Amazon has increased prices for shoppers and corrupted the retail market, one wonders why consumers continue to prefer Amazon to the alternatives.

Amazon also benefits the third-party sellers on its Marketplace platform. They get access to the company's massive customer base and reputation, easy entry into its vast regional and international markets and its efficient Fulfillment by Amazon services.<sup>8</sup> Small- and medium-sized sellers use Marketplace to gain access to customers for a far lower cost than if they had to build their own networks. Amazon has helped thousands of small sellers in Michigan reach customers nationwide, allowing them to grow their businesses and achieve success. Putting handcuffs on Amazon should not be done lightly, as it may harm these small merchants.

#### ABOUT THE AUTHOR

Ted Bolema is a senior fellow with the Mackinac Center and member of its Board of Scholars. He previously taught law and economics, with a focus on antitrust and regulation, at Central Michigan University, George Mason University School of Law, Michigan State University and Wayne State University. He founded the Institute for the Study of Economic Growth at Wichita State University.

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Amazon should not be exempt from scrutiny for possible anticompetitive conduct. But it is hard to see how this lawsuit will do anything to help either Michigan households who buy on Amazon or the Michigan-based merchants Nessel claims need protection. Both groups will likely be hurt if this lawsuit results in preventing Amazon from doing what has made it such a success: finding new ways to improve their retail and supply chain operations to deliver products more efficiently to customers.

The lawsuit against Amazon is not the only antitrust case Nessel is bringing against a major technology company. On March 21, 2024, the Michigan attorney general joined the U.S. Department of Justice in suing Apple for alleged monopolization of the U.S. smartphone market.<sup>9</sup> As will be discussed below, this case is based on a legally questionable claim that Apple is obligated to assist its competitors by giving them special access to its platform. Federal courts have rejected these sorts of claims in the past.

If Michigan’s attorney general prevails in her lawsuit against Amazon, what is that likely to mean for customers and sellers in Michigan who use Amazon’s platforms? That answer requires looking more deeply at the claims in the lawsuit, and what the government is trying to persuade the court to prevent Amazon from doing.

## **Michigan’s case against Amazon**

Michigan’s lawsuit against Amazon makes two main claims, both based on faulty applications of economic analysis.

### **Claim 1: Anti-discounting measures**

The Michigan attorney general’s lawsuit asserts that Amazon uses “exclusionary anti-discounting conduct that stifles price competition.” It alleges the company “suppresses this price competition by wielding its monopoly power to prevent sellers and retailers from offering lower prices off Amazon.”<sup>10</sup>

Amazon has a “price parity” policy that requires merchants who want to sell on Amazon’s Marketplace to offer their products to shoppers there for the lowest price they make available online.<sup>11</sup> That means that if a product is priced at \$15 on Marketplace, the seller cannot offer the same product for less than \$15 on another website, including the seller’s own. If a seller fails to comply with the price parity policy, Amazon may have the products demoted in the search algorithm on the Amazon website, so shoppers are less likely to notice the product.

Amazon’s justification for a price parity system seems reasonable. Were the company to allow third-party sellers to advertise one price on its website and a lower price on another, it would allow sellers to shift the sale from Amazon to the other site, often the seller’s own website. Such sellers would be free riding on Amazon, using its popular website to advertise their products without paying Amazon for this benefit and closing the sale on their own website.

Being a free rider is a good deal for third-party sellers. They could shift some of the costs of promoting their products to Amazon without charge. After learning about products on Marketplace, shoppers could turn to the seller’s website for a lower price. A free-riding seller could potentially get more sales and save on advertising and promotion costs. Amazon would, in effect, be subsidizing its competitors by promoting their products.

It should be noted that the lawsuit makes no claims of direct harm to consumers from Amazon’s price parity policy. Instead, the lawsuit makes a complex argument that Amazon’s conduct forces third-party sellers to maintain artificially high prices on other retail platforms. Thus, the alleged harm is to the retail websites of Amazon’s competitors, who will not get as much business as they might otherwise.

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The lawsuit is particularly weak on how this alleged harm to Amazon’s competitors translates to harm to consumers. Amazon’s economies of scale provide many other benefits to Amazon shoppers, including product selection, shipping speeds, and ability to compare prices and other features from competing suppliers. This price parity policy is not harmful to Amazon shoppers and likely leads to lower online prices. It essentially guarantees to shoppers that the price they find on Amazon’s platform is the lowest they will find anywhere online. This certainly saves customers time, as they may no longer need to do their own comparison shopping.

Notably, the complaint emphasizes the “price surveillance” Amazon does regarding prices offered by competitors, as if this is something sinister.<sup>12</sup> But Amazon appears to be using the same price comparison tools and software that many companies and even consumers regularly use. These typically automate the monitoring of online prices, often to identify the lowest one. By using the term, Nessel and the Federal Trade Commission are attempting to vilify what appears to be a standard business practice that poses no harm to consumers. As IT expert Daniel Castro wrote about the FTC’s use of such ominous-sounding terms to describe common business practices:

If the FTC continues down this path of labeling data-driven design practices as potentially illegal activity and conflating illegal practices with bad design, businesses will face a legal minefield where they will face penalties for failing to anticipate regulators’ subjective analysis of their product design decisions, ultimately limiting the development of better online apps, games, and services for consumers. Moreover, if the FTC continues to promote misleading terms like “dark patterns” and “surveillance economy” to attack the tech industry, then it risks further eroding its credibility as an objective regulator. Instead of

seeking to inject regulators into the design of more online services—a skillset the average regulator does not have—the FTC should keep its focus on enforcing the laws already on the books to protect consumers.<sup>13</sup>

The Michigan attorney general’s lawsuit, however, turns Amazon’s lowest price guarantee on its head, claiming that the price parity policy is really a minimum price for sales on non-Amazon websites. This allegedly hurts shoppers by preventing them from buying at a lower price from another online platform. These assertions are contradicted by the basic facts of how a price parity system works.

Amazon’s price parity policy keeps prices low on its platform by removing the incentive for free riding by third-party sellers. Forcing Amazon to allow these merchants to free ride will not help consumers. If anything, Amazon shoppers in Michigan will pay more if the lawsuit succeeds.

The Michigan lawsuit gets its analysis entirely backwards. Amazon’s price parity policy is not an “anti-discounting scheme,” as Nessel claims. Sellers on Marketplace can discount a product as much as they like, just so long as they make those discounts available to Amazon shoppers. If Marketplace sellers choose not to offer the same products for sale on other sites, that is evidence that they find selling them on Amazon to be better than the alternatives.

Absolutely nothing prevents sellers from offering lower prices elsewhere for products they sell on Amazon. These could be offered online on their own website or on a competitor’s of Amazon, like Walmart. Many already do this. This is real price competition that benefits consumers. What Amazon’s price parity does, quite reasonably, is prevent sellers from executing a bait and switch: advertising their products on Amazon’s platform for artificially higher prices so they can lure shoppers to purchase the item elsewhere.

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This free-riding tactic would raise consumer prices on Marketplace. Amazon’s price parity policy, meanwhile, helps keep prices low for consumers. That’s why this lawsuit’s main claim has the issue exactly backward. If Nessel and the other attorneys general force Amazon to host free riders, it will come at the expense of Amazon shoppers and the Michigan-based third-party sellers the attorney general claims to be trying to protect.

## Claim 2: Coercing merchants to use Amazon services

The Michigan attorney general’s second claim is that Amazon is “coercing sellers to use Amazon’s fulfillment service.”<sup>14</sup> Fulfillment by Amazon is the company’s program that allows merchants to outsource order processing and shipping to Amazon. The program provides sellers with inventory storage, handles the shipping process and returns, and provides customer service. It gives merchants access to the nearly 200 million purchasers who are Amazon Prime members.<sup>\*</sup> Amazon certifies to its Prime members that sellers offering Prime products meet Amazon’s standards for fast and reliable shipping.

Michigan’s lawsuit against Amazon claims that Prime status is something most merchants want because it is a seal of approval for their business. That is true and hardly a controversial claim. Where the lawsuit goes wrong is in claiming that enrolling in Amazon’s fulfillment program is a requirement for gaining Prime status as a seller.

Sellers can become certified as Prime merchants in two ways. First, they can outsource their fulfillment process to Amazon and pay the fees associated with Amazon’s warehousing and logistics services. What the Michigan lawsuit fails to recognize is that there is a

second path to Prime status — sellers can become certified in Amazon’s Seller Fulfilled Prime program, which avoids entirely the fees that the Michigan lawsuit claims are mandatory.<sup>†</sup>

To become certified in this program, sellers go through a 30-day probationary period in which they demonstrate that they can provide fulfillment services on their own that meet the Prime standards. The current standards for merchants participating in the program include offering one- and two-day shipping options, having a seller-initiated cancellation rate of less than 0.5%, maintaining a 93.5% on-time delivery rate and using a shipment tracking system that is valid 99% of the time. If they can do so, their products can use the Prime label, but sellers are allowed to handle fulfillment on their own and do not need to purchase Amazon’s services.<sup>15</sup>

Thus, Amazon’s own fulfillment service is not actually bundled with Prime status, as the Michigan lawsuit claims. Merchants can choose between obtaining Prime designation through the fulfillment program, which charges fees for Amazon’s services, or the self-fulfilled option, which does not require paying any services fees to Amazon.

The Michigan lawsuit alleges that a key purpose for Amazon supposedly bundling fulfillment services with Prime status was to make sellers dependent on the program. This would supposedly discourage them from selling through other online channels that compete with Amazon. In other words, the lawsuit claims that this policy deters merchants from using competing fulfillment services once they decide to sell their products under the Amazon Prime banner. But if

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<sup>\*</sup> Amazon Prime is a membership program. Customers pay an annual fee to Amazon in exchange for exclusive discounts, free and fast shipping and easy returns. Primer membership also includes access to Amazon’s streaming and digital storage services, such as Prime Video, Amazon Music and Amazon Photos.

<sup>†</sup> Jake Pool, “How to Sell on Amazon Prime: 3 Ways to Get the Prime Badge,” February 23, 2024, accessed March 12, 2024, <https://perma.cc/U9Y2-BEEA>. There is a third way for sellers to get their products Prime status on the Amazon site, but it does not involve selling directly to consumers. Instead, sellers in this program are wholesale suppliers to Amazon. Vendor Central is a program where Amazon buys in bulk from hand-picked vendors, whose products then are sold on the platform under the Prime label.

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the Fulfillment by Amazon program is not mandatory, then that can no longer be a concern.

To understand why Amazon shoppers will be worse off if the lawsuit forces Amazon to let merchants use the company's Prime brand and fulfill orders with third-party services, it is important to consider why Amazon would want to set standards for merchants to sell goods with the Prime logo. Prime status is Amazon's promise that buying from the merchant will result in fast and reliable shipping of the purchase. Amazon has a very strong reputational interest in making sure that any merchant operating under the Prime brand will deliver as promised. Poor shipping experiences will undermine the value that consumers place on the Prime brand, for both Amazon and for every other merchant selling Prime products on the platform.<sup>7</sup>

Thus, the way Amazon administers its two paths to Prime certification can be seen as necessary for protecting the brand and consumers' expectations for Prime products. Amazon can control shipping quality when it handles fulfillment directly through its fulfillment service. This is why the self-fulfilled option includes a 30-day probationary period and ongoing monitoring of sellers' fulfillment record. Amazon must protect the reputation of the Prime brand and ensure that consumer expectations for delivery services are met.

Amazon's logistics network allows it to achieve its next-day shipping. If the Michigan lawsuit against Amazon is successful, it is likely to seriously undermine the benefits Amazon customers receive from these key features of the Amazon platform. If that happens, the inevitable result will be higher prices and slower deliveries for Amazon customers, as well as lost opportunities for smaller merchants to use all of the distribution services provided by Amazon.

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<sup>7</sup> Moreover, the lawsuit makes it clear that there is a huge value in selling products under the Prime logo. It claims that "Prime eligibility alone regularly triples a seller's sales on Amazon." If that claim is true, Amazon would be justified in making sellers pay for this privilege, based on the value Amazon adds

## Other claims in the lawsuit

The lawsuit raises two additional claims against Amazon. These may be broken off into separate claims at some point in the litigation process. Like the main claims discussed above, both of these only tell part of the story.

### Self-preference

Amazon sells its own product on its website, as well as those of more than two million third-party sellers.<sup>16</sup> The Michigan lawsuit alleges that Amazon gives priority to its own products over those from third-party sellers. The lawsuit claims that this creates unfair competition and leads to consumers purchasing inferior products. In this way, according to the lawsuit, Amazon is abusing its dominant position as both a supplier of competing products and the manager of the marketplace where those products are sold.

Amazon probably has the ability to tilt the playing field on its Marketplace platform to favor its products over those of other merchants. The important question is whether Amazon is actually doing this in an anticompetitive manner.

Just as with traditional brick-and-mortar stores, decisions have to be made about how to display products to shoppers. Products with more favorable placement have a competitive advantage. Amazon has at least two good reasons why it is not likely to tilt the playing field in its own favor, or at least why the Michigan lawsuit proves nothing of the sort.

Amazon's main business is its website ecosystem, not the products it sells. If Amazon consistently and unduly favored its own products, which the lawsuits also claims are "often inferior," shoppers would eventually notice and lose confidence in the entire Amazon online business.<sup>17</sup> That alone gives the company a strong incentive not to harm the reputation

to sellers participating in its Fulfillment by Amazon program. "Complaint, FTC et.al., v. Amazon.com, Inc." (U.S. District Court Western District of Washington, November 2, 2023), 108, <https://perma.cc/8KU2-RGVU>.

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of the Amazon brand as a place where consumers can find competitive prices on quality products that come with speedy delivery and hassle-free returns.

### Sponsored ads

Another claim is that Amazon accepts payments from advertisers, called sponsored ads, that appear on the same webpage as unsponsored search results. Amazon does this, supposedly, to extract higher fees from third-party sellers. The lawsuit claims this places third-party sellers who compete with Amazon's own products at a cost disadvantage, because Amazon gives favorable placement to its own products and to sellers who buy sponsored ads from Amazon. Thus, according to the complaint, sellers feel pressure to pay for advertising to make sure their products are not buried underneath the deluge of sponsored products.

The complaint greatly oversimplifies how sponsored advertising works online. With more than two million merchants selling to more than 300 million customers, not even Amazon has enough information about the products being sold on its Marketplace to consistently feature ones that are likely to be top sellers.<sup>18</sup> Amazon knows even less about the demand for new products being introduced for the first time. Neither Amazon nor anyone else can know which products will be most appealing to specific customers at any given time.

Online sponsored advertising helps by providing a price-based mechanism to identify which products should be shown first to consumers. Online ads are only effective if merchants have products people do not know about and would like to buy. People may grumble at times about the amount of online advertising, but it is not different than television, radio and newspaper ads, which people also grumble about. As long as we keep staring at screens, it will remain ubiquitous.

Nessel's allegation in the complaint appears to claim that excessive online advertising could disadvantage Amazon shoppers if less desirable and inferior

products are featured first as a result of sponsored ads. If so, then online advertising may also increase sellers' costs, and sellers would pass those costs on to Amazon shoppers by charging higher prices. This would mean Amazon prominently displays products consumers do not want. If that were true, overall sales would decrease, and Amazon would lose business.

This also assumes that the benefits consumers receive from sponsored advertising are nonexistent or insignificant. Consumers are not sheep waiting to be sheered. If the products they buy on Amazon turn out to be overpriced and poor quality, they will shop someplace else.

Sellers benefit from sponsored advertising because this advertising conveys information that helps consumers find products they want to buy. The sellers paying for the sponsored ads are in the best position to assess whether the ads are effective. Sellers will only benefit from this advertising if it results in more satisfied customers.

### Who wins if Amazon loses the lawsuit?

If the Michigan lawsuit against Amazon does not help Amazon shoppers, whom does it help? The most obvious beneficiaries will be other large online retailers like Walmart and Target, who will gain market share from a weakened competitor. Indeed, the Federal Trade Commission, Michigan's partner in bringing the lawsuit, has leaked to the press its allegation that Walmart, the largest company in the world in terms of revenues, was a victim of how Amazon does business.<sup>19</sup>

Protecting Amazon's competitors, even if it comes at the expense of Amazon's customers, appears consistent with the policy agenda at the FTC. The head of the agency, Lina Khan, was known for her negative views toward Amazon well before she joined the FTC.<sup>20</sup> One of her earliest antitrust publications was "Amazon's Antitrust Paradox," in which she claimed that Amazon keeps its prices low to get people to buy from Amazon and drive its competitors out of

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business, after which, she predicts, Amazon will be dominant and will raise its prices.<sup>21</sup>

In a 2019 article, Khan asserted that when Amazon sells products in competition with other suppliers on the Amazon platform, the company has an unfair advantage over those of other sellers. According to Khan:

One feature dominant digital platforms share is that they have integrated across business lines such that they both operate a platform and market their own goods and services on it. This structure places dominant platforms in direct competition with some of the businesses that depend on them, creating a conflict of interest that platforms can exploit to further entrench their dominance, thwart competition and stifle innovation.<sup>22</sup>

Note that Khan is claiming the problem with Amazon is not that it is bad for consumers, but rather that it is dominant. Khan argues that Amazon's dominance means the FTC should consider the company too big relative to its competitors like Walmart, with little consideration for whether consumers are benefiting.

The Michigan lawsuit against Amazon takes the same approach — giving lip service to helping consumers but really targeting Amazon for its dominance. In other words, this amounts to little more than picking winners and losers in the economy. Government officials should, instead, serve as neutral referees of the competitive process. Empowering a state government to substitute its judgment for the judgment of consumers makes government officials another beneficiary of this lawsuit. They will have gained new powers to influence the economy.

In addition to government regulators and Amazon's competitors, the third main beneficiary if Michigan prevails against Amazon will be the larger third-party merchants who want to free ride on the Amazon Marketplace. The smaller sellers on Amazon benefit greatly from access to Amazon's massive customer

base, reputation, easy entry into a vast geographic market and fulfillment services.<sup>23</sup> Larger merchants may not benefit as much from these services but would definitely gain from being able to list their products on the platform for free.

## **Michigan's latest antitrust lawsuit against Apple**

In March 2024, Attorney General Nessel and the U.S. Department of Justice sued Apple for monopolization of the U.S. smartphone market.<sup>24</sup> According to the lawsuit against Apple:

Apple reduces competition in the markets for performance smartphones and smartphones generally. It does this by delaying, degrading, or outright blocking technologies that would increase competition in the smartphone markets by decreasing barriers to switching to another smartphone, among other things. The suppressed technologies would provide a high-quality user experience on any smartphone, which would, in turn, require smartphones to compete on their merits.<sup>25</sup>

Nessel's lawsuit against Apple raises similar issues to those in the Verizon vs. Trinko case. The U.S. Supreme Court held in that case that Verizon had no antitrust duty to assist its competitors or to provide them with easy access to its platform.<sup>26</sup> Thus, unless Nessel can convince the federal courts to overrule the standards set by the Supreme Court in the Trinko case, it seems unlikely that this lawsuit against Apple will be successful. In short, this lawsuit ignores the Supreme Court's strong line of precedent finding that antitrust protects the competitive process, not individual competitors.

Apple also has a strong counterargument that their design decisions are motivated by satisfying customers. They are willing to pay a premium for the curated and streamlined experience the company provides and for the better system security. Apple will

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almost certainly argue that interfering with these decisions will harm its customers. In fact, during the years of litigation this case is expected to endure, Apple customers may be harmed if the company responds to the legal uncertainty by pulling back from competing as aggressively or reducing investments in new technologies.\*

## Conclusion

Consumers will not benefit from Amazon being forced to allow merchants to free ride off its services. If allowed, sellers could list their products at artificially high prices on Amazon, essentially using the platform as a free advertising tool, and then offer a lower price on their own website or those of Amazon’s competitors. At best, that would result in Amazon shoppers paying the same price they would have otherwise, but only after first having to navigate to a different website. But some customers would still make the purchase at Amazon, where they would pay more than they would under Amazon’s current policies.

Likewise, consumers would not benefit from Amazon being required to give sellers its valuable Prime status for free. Amazon sets high standards for products labeled Prime, and allowing third-party sellers to use the Prime label while evading Amazon’s quality standards is just another means of free riding off the company’s reputation for delivery quality, reliability and speed. Some large merchants selling on Amazon’s Marketplace might take advantage of this, but it is hardly in the best interest of the consumers who rely on the Prime designation for a guarantee of fast and reliable service.

Despite the claims by the Michigan attorney general that the “illegal monopolistic practices of the behemoth Amazon hurt both its own customers and its marketplace sellers,” Nessel’s lawsuit against

Amazon will do nothing to protect those customers and marketplace sellers. More likely the opposite is true: The Michigan lawsuit is targeting conduct by Amazon that is actually beneficial for Michigan’s consumers and small businesses. The main winners from the lawsuit will be Amazon’s competitors, like Walmart and Target, along with the largest third-party sellers on Amazon’s Marketplace. And last but not least, government regulators would benefit by expanding their power to include calling the shots on how Amazon operates its business.

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\* Alden Abbott, the former general counsel to the U.S. Federal Trade Commission, provides a more detailed analysis of the flaws in the lawsuit against Apple. Alden Abbott, “US v. Apple Lawsuit Has Big Implications for Competition

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