PHILADELPHIA TRIAL LAWYERS ASSOCIATION EST. 1959

VERDICT

Volume 2021-2022 - Issue 4

Amazon - To Sue or Not to Sue

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Tincher[1] reaffirmed that Pennsylvania will be following Restatement (Second) of Torts, and specifically, §402A. Under §402A, strict liability claims are limited to "sellers" of products.[2] In *Oberdorf v. Amazon.com, Inc.*,[3] the United States District Court for the Middle District of Pennsylvania was presented with the issue of whether Amazon can be held liable under §402A as a "seller" of a product. The case arose from plaintiff's purchase of a retractable dog leash in December 2014. While using it in January 2015, the D-ring on the collar broke, causing the leash to recoil, striking Mrs. Oberdorf's face, and resulting in permanent blindness in her left eye. The Court noted there is no Pennsylvania Supreme Court authority on this issue and, therefore, it must predict what the Supreme Court might do consistent with *Berrier v. Simplicity Mfg., Inc.*[4] In concluding that Amazon is not a "seller" under §402A and granting Amazon's Motion for Summary Judgment, the Court analogized Amazon to an auctioneer, which the Pennsylvania Supreme Court previously ruled was not liable under §402A in *Musser v. Vilsmeier Auction Co.*[5]

The United States Court of Appeals for the Third Circuit[6] reversed the Middle District decision and concluded that Amazon is, in fact, a "seller" under §402A and thus, liable for strict liability claims for products that it sells through its platform. The Court then vacated this decision in favor of *en banc* re-argument[7]. However, after granting *en banc* re-argument, the Third Circuit acknowledged the issue is one of first impression and it could not predict how the Pennsylvania Supreme Court would decide the issue, and, thus, certified the following question to the Pennsylvania Supreme Court: "Under Pennsylvania law, is an e-commerce business, like Amazon, strictly liable for a defective product that was purchased on its platform from a third-party vendor, which product was neither possessed nor owned by the e-commerce business?" While the Pennsylvania Supreme Court granted the certification[8], the case settled before a ruling was issued, thus leaving this much-anticipated question of e-commerce sellers' potential liability unanswered. Nonetheless, the Third Circuit's cogent analysis remains instructive for future reference, as the question remains to be resolved.

In *Oberdorf*, the Third Circuit based its initial decision that Amazon was a seller on the four-factor analysis identified in *Musser*[9]:

1. Whether the actor is the "only member of the marketing chain available to the injured plaintiff for redress";
2. Whether "imposition of strict liability upon the [actor] serves as an incentive to safety";
3. Whether the actor is "in a better position than the consumer to prevent the circulation of defective products"; and
4. Whether "[t]he [actor] can distribute the cost of compensating for injuries resulting from defects by charging for it in his business, i.e., by adjustment of the rental terms."

Before evaluating the factors, the Court noted that Amazon has tremendous control over the products it sells on its platform. When a third-party vendor wants to sell through Amazon, they must assent to Amazon's "Services Business Solutions Agreement." The third-party vendor must then provide Amazon with a description of the product, including its brand, model, dimensions and weight, as well as digital images. It is Amazon who then formats the product's listing on its website. Amazon does offer a "Fulfillment by Amazon" service, in which it takes physical possession of third-party vendors' products and ships those products to consumers. However, not all products must be

shipped in that manner, and Amazon may not ever actually touch some of the products that are sold.

While the price is determined by the third-party vendor, as part of the Agreement, the vendor may not charge more for the product through Amazon than through any other channel through which the vendor sells its product. If a customer needs to communicate with a third-party vendor, they must do so through Amazon's platform. Amazon requires all vendors to release and indemnify, defend, and hold it harmless against any claims, losses, damages, settlements, costs, expenses, or other liability. In exchange for all of this, Amazon collects two types of fees: one is a commission, typically between 7 to 15% of the sale price, and the other is either a per item or monthly fee.

As *Oberdorf's* jurisdiction was based upon diversity of citizenship, and because the product was purchased in Pennsylvania, the Middle District Court and the Third Circuit applied Pennsylvania law. In doing so, the Third Circuit rejected any analysis provided by Amazon as well as the Middle District that analogized to other jurisdictions as those jurisdictions may have had different product liability law than Pennsylvania.

In evaluating the first factor, whether the actor is the "only member of the marketing chain available to the injured plaintiff for redress," the Court concluded that "yes" Amazon was the only member of the chain. The third-party vendor was an entity called "The Furry Gang." As of the time of the litigation, and through the process of litigation, neither party could locate "The Furry Gang." Additionally, it was noted that there were a number of other cases brought against Amazon where the third-party vendor could no longer be located after an incident had occurred. Of this, Amazon was aware. And because, under the Agreement, customers can only contact third-party vendors through Amazon, the Court concluded "this enabled the third-party vendors to conceal themselves from the customer…" As such, the Third Circuit concluded Amazon was the only member of the marketing chain available to Mrs. Oberdorf.

When considering the second factor, whether "imposition of strict liability upon the [actor would] serve as an incentive to safety," the Third Circuit held that since Amazon "exerts substantial control over third-party vendors" then "Amazon is fully capable, in its sole discretion, of removing unsafe products from its website. Imposing strict liability upon Amazon would be an incentive to do so."[10] As such, the second factor was found to weigh in favor of imposing liability upon Amazon.

With regard to the third factor, as to whether Amazon is "in a better position than the consumer to prevent the circulation of defective products," this was a factor that also favored imposing liability upon Amazon. As the Court noted, "Amazon is uniquely positioned to receive reports of defective products, which in turn can lead to such products being removed from circulation." It was noted that in its Agreement with third-party vendors "Amazon already retains the ability to collect customer feedback." As such, again, because of Amazon's unique position, and how it structures its platform, the Court determined Amazon was in a better position than the consumer to prevent circulation of defective products.

The fourth and final factor, as to whether Amazon "can distribute the cost of compensating for injuries resulting from defects," again, the Court noted this factor weighs in favor of imposing liability upon Amazon. Amazon can adjust its fees to allow for compensation, payment of insurance premiums, etc. Additionally, Amazon had provided in its Agreements for full defense and indemnification for any claims regarding defective products. Thus, Amazon had already taken steps in this regard.

All four factors weighed in favor of imposing strict product liability upon Amazon in light of the platform it provided. However, the analysis did not stop there. Amazon argued it never took possession of most products, which factor weighed against it being a "seller" of those products. But the Court noted its ruling and rationale in *Oberdorf* was consistent with *Hoffman v. Loos & Dilworth, Inc.*[11] where the Pennsylvania Superior Court had already determined that someone in the chain of distribution need "not take title or possession of those products" in order to be held liable under Pennsylvania strict product liability law. Thus, while Amazon contended it did not take possession of said products, although it did under its "Fulfillment by Amazon" service, taking possession of the product was unnecessary to impose strict product liability.[12] Similarly, there can be no dispute that large box-store type retailers can be held liable under strict product liability law.[13]

After re-argument, the Third Circuit indicated it remained unclear if the §402A analysis was a one-step process or a two-step process. Essentially both analyses require the four factors outlined above, but the Third Circuit believed it was possible there was an additional step: whether the seller "is in the business of selling the kind of product at issue." The Third Circuit indicated that if that question was a predicate to the four-factor analysis above, and the "defendant does not sell that kind

of product, then there is no need to consider the four [] factors because strict liability is inapplicable." While not exclusive to e-commerce defendants, the issue is certainly more applicable to such an entity. As the *Oberdorf* case resolved before a Supreme Court ruling, that question was not answered.

It should be noted, however, that the Third Circuit did affirm the preclusion of one of the claims asserted by the Oberdorfs under §230 of the Communications Decency Act (CDA). The CDA provides, in pertinent part, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This is a "safe harbor" provision that allows computer service companies to perform some editing of content without becoming liable for the entirety of the content. Thus, while Amazon certainly does have involvement in transactions that extend far beyond a mere editorial function, and those claims are not barred by the CDA, the CDA does bar any of the Oberdorfs' claims that Amazon "failed to provide or to edit adequate warnings regarding the use of the dog collar." Thus, the failure to warn claims were barred by the CDA, but the allegations "relating to selling, inspecting, marketing, distributing, failing to test, or designing the product were not barred. Amazon is a 'seller' for purposes of §402A of the Second Restatement of Torts."

Other jurisdictions have evaluated this issue, with inconsistent results. Thus, careful consideration of what jurisdiction you will be in needs to be taken before bringing a claim against Amazon. See *Loomis v. Amazon.com, LLC*[14] (Amazon can be strictly liable as a seller of defective products because it uses its power as a gatekeeper between an upstream supplier and the consumer to exert pressure on those upstream suppliers (third-party sellers) to enhance safety); *Waler v. Honest Indus., Inc.*[15] (Amazon not liable to a customer who allegedly suffered chemical burns after using beard balm he had purchased through the online retailer); *McMillan v. Amazon.com, Inc.*[16] (Amazon not "seller" of third-party products sold through Fulfillment by Amazon program); *Stiner v. Amazon.com, Inc.*[17] (Amazon was not a supplier that could be held liable for a defective product because no evidence it had any control over product); *Bolger v. Amazon.com, LLC*[18] (Amazon was liable for third-party products sold on its site based on it distributing the products into the U.S. market); *Fox v. Amazon.com, Inc.*[19] (Amazon's e-mails about defective product to consumers and issuance of refunds was evidence it actively participated in the product's distribution and thus could be held liable); *Erie Ins. Co. v. Amazon.com, Inc.*[20] (Amazon not a "seller" of product because did not transfer title to product purchasers for a price); *Wallace v. Tri-State Assembly, LLC*[21] (Amazon not liable for injuries sustained by user of electric bicycle sold on its website because seller sold and shipped product directly to plaintiff and bicycle was never in Amazon's possession or control).

It is important that companies like Amazon are held liable as a "seller" under §402A. It should not be that a company like Amazon, who has a name, a reputation, and through which there would be an expectation of safety of its products, can insulate itself from liability for selling a defective product, only to point to "The Furry Gang" should anything go wrong with its products. It is safe to assume the seller's reputation weighs in on the purchasing decision process, and Mrs. Oberdorf might not have purchased from "The Furry Gang" had it not been backed by a massive company like Amazon. Amazon is in the best position to ensure the products that it sells are safe. Just like Lowes, Home Depot, Costco, Walmart, and other large box stores are "sellers" of their products, Amazon cannot insulate itself simply because it has a different logistics model and does not have a store front. Amazon is every bit a seller as those other companies, and every bit as responsible to ensure the products themselves are safe for its consumers. ◆

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1 *Tincher v. Omega Flex, Inc.,* 104 A.3d 328 (Pa. 2014).
2 *Nath v. National Equipment Leasing Corp.,* 439 A.2d 633 (Pa. 1981) (holding a financial lessor is not a seller under §402A); *Musser v. Vilsmeier Auction Co., Inc.,* 562 A.2d 279 (Pa. 1989) (holding an auctioneer is not a seller under §402A).
3 295 F.Supp. 3d 496 (M.D. Pa. 2017).
4 563 F.3d 38, 45-46 (3d Cir. 2009).
5 562 A.2d at 279.
6 *Oberdorf v. Amazon.com, Inc.,* 930 F. Supp. 3d 136 (3d Cir. 2019).
7 *Oberdorf v. Amazon.com, Inc.,* 936 F.3d 182 (3d Cir. 2019).
8 *Oberdorf v. Amazon.com Inc.,* 237 A.3d 394 (Pa. 2020).
9 562 A.2d at 279.
10 It should be noted that the decision in this matter is "limited to the question of whether Amazon is a 'seller' based on its role in effectuating sales of physical products offered by third-party vendors." *Oberdorf supra,* 930 F. Supp. 3d at FN11. Thus, this decision seemingly does not have wide sweeping implications to other companies as it is based upon the factual narrative that is unique to Amazon. The Court indicated "we express no view, for example, on whether other companies providing on-line marketplaces are considered 'sellers.'" *Id.*
11 452 A.2d 1349 (Pa. Super. Ct. 1982).
12 As indicated in a prior endnote, while the rationale of this holding only applies to Amazon and its unique platform, it should be noted that this portion of the opinion would not be unique to Amazon.
13 See *Nath supra,* 439 A.2d at 633; *Barton v. Lowes Home Centers, Inc.,* 124 A.3d 349 (Pa. Super. Ct. 2015); *Burch v. Sears, Roebuck & Co.,* 467 A.2d 615 (Pa. Super. Ct. 1983); see also *Restatement (2d) Torts*, §402A, cmt f.
14 2021 WL 1608878 (Cal. Ct. App. 2021).
15 2021 WL 394830 (S.D. Tex. 2021).
16 2021 WL 2660209 (5th Cir. 2021).
17 164 N.E.3d 395 (Ohio 2020).
18 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020).
19 930 F35 415 (6th Cir. 2019).
20 925 F.3d 135 (4th Cir. 2019).
21 2021 WL 5575245 (N.Y. App. Div. 2021).