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Recent Rulings Highlight Limits of CDA Immunity in Products Liability Cases against E-Commerce Platforms

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In early July, an appeals court ruled that Amazon should be considered a "seller" of goods under Pennsylvania products liability law and subject to strict liability for consumer injuries caused by the defective goods sold on its site by third-party vendors. (*Oberdorf v. Amazon.com*, No. 18-1041 (3rd Cir. July 3, 2019)). While the decision involved interpretation of Pennsylvania law – and Amazon has previously prevailed on the "seller" issue in various courts around the country in recent years – the ruling is still noteworthy as it was based upon § 402A Restatement (Second) of Torts (which other states may follow), and the ruling may signal a willingness to reinterpret the definition of "seller" in the modern era of online platforms. The decision also highlights the limits of immunity under Section 230 of the Communications Decency Act (CDA) for online marketplaces when it comes to products liability claims based on a site's sales activity, as opposed to editorial decisions related to third-party product listings.

The big question in this case and other similar actions is whether an online marketplace such as Amazon is subject to strict products liability for defective products of third-party vendors. On one side, an e-commerce platform might allege that it is not a seller or distributor, but merely a service provider (e.g., providing a marketplace that assists third-party sellers with warehousing and shipping and payment processing) that is not subject to strict liability. Litigants would counter that a platform like Amazon controls numerous aspects of the sales transactions on its site and regulates some aspects of the sales offers, and thus can be effectively deemed the seller (like a brick-and-mortar store) of a particular defective product. A related query is to what extent CDA Section 230 bars any liability related to an online platform's sales of third-party goods or to any content or warnings related to such goods.

In *Oberdorf*, a purchaser of a retractable dog leash from Amazon suffered a serious eye injury when the collar broke. As a result of the accident, she sued Amazon, advancing claims for strict products liability and negligence. Following the accident, neither Amazon nor the plaintiff could locate a representative of the third-party seller of the dog collar, and its account soon became inactive.

The Amazon Marketplace serves as a platform to connect potential consumers with sellers in a streamlined manner. While Amazon sells some of its own products on its site, a significant portion of the products on Amazon (including the dog collar in question) are sold by third-party sellers, which are required to agree to a vendor agreement. Amazon does not write or develop the product detail pages for third-party sellers and vendors decide which products they wish to sell and obtain their stock from manufacturers or upstream distributors. If a seller chooses to pay to participate in Amazon's "Fulfillment by Amazon" program, Amazon will store (but not take title to) the seller's inventory and deliver it to a shipper upon an order. In displaying products to customers, Amazon distinguishes products sold through the Amazon Marketplace from those sold directly by Amazon, identifying the seller responsible for the item in a "Sold by" line placed next to the price and shipping information. Under its vendor agreement, Amazon reserves the right to remove sellers' listings or terminate Marketplace services for any reason and requires sellers to represent they are in good legal standing. Still, Amazon's Conditions of Use states that customers purchasing from third-party vendors are "purchasing directly from those third parties, not from Amazon" and Amazon is "not responsible for examining or evaluating…the offerings of any of these businesses…"

In its motion for summary judgment, Amazon argued that it is not a "seller" under Pennsylvania law and cannot be held strict liable for the defective dog collar. In December 2017, the lower court agreed and held that Amazon was not subject to strict products liability because Amazon is not a "seller" under Pennsylvania law. The lower court also found that plaintiff's remaining tort claims were barred by CDA Section 230 because plaintiff sought to hold Amazon liable for its role as the online publisher of third-party content (e.g., product listings). Various courts that considered this question have also found that Amazon was not a "seller" for products liability or other purposes. See e.g.: *Fox v. Amazon*.com, Inc., No. 18-5661 (6th Cir. July 5, 2019) (amended opinion) (affirming dismissal of state products liability claims against Amazon as it was not a the "seller" of a defective hoverboard, but allowing negligence claims to go forward due to Amazon having assumed a duty to act when it chose to send a warning to purchasers); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393 (S.D.N.Y. 2018) (Amazon is not a "seller" under New York law and cannot be strictly liable for defective products sold on its website).

However, in a 2-1 decision, the Third Circuit reversed the lower court's dismissal of the products liability claim and also ruled that plaintiff's claims against Amazon were not barred by CDA § 230 except to the extent they rely upon a "failure to warn" theory of liability. In determining that Amazon was a seller under Pennsylvania law, the court applied a four factor test that took into account such things as whether Amazon was in "a better position than the consumer to prevent the circulation of defective products" or the "only member of the marketing chain available to the injured plaintiff for redress." The court distinguished other courts' holdings that did not deem Amazon a "seller" for purposes for strict products liability, finding that such interpretations were dependent on interpretations of other states' products liability laws. Instead it held that Amazon is a "seller" for purposes of § 402A of the Restatement (Second) of Torts and thus subject to the Pennsylvania strict products liability law:

> ”In this case, Amazon’s role extends beyond that of [a] sales agent, who in exchange for a commission merely accepted orders and arranged for product shipments. Amazon not only accepts orders and arranges for product shipments, but it also exerts substantial market control over product sales by restricting product pricing, customer service, and communications with customers.”

Beyond the strict products liability issue, the Third Circuit ruled that any related negligence claims were barred by CDA Section 230 to the extent the claims sought to hold Amazon liable for the content it permitted the third-party seller of the defective goods to post on the site or for failing to provide adequate warnings regarding the use of the dog collar, as such actions would seek to hold Amazon liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content. The appeals court rejected Amazon’s argument that both negligence and strict liability claims should be barred by the CDA because plaintiff is essentially claiming that Amazon should be held liable for letting the third-party seller to post the offer for the dog collar and for failing to police that offer once it was posted. The court stated that it did not agree that all of plaintiff’s claims seek to treat Amazon as a publisher of third-party content, rather that Amazon’s involvement in transactions extended beyond a mere editorial function and into the actual sales and distribution process.

> “Therefore, to the extent that Oberdorf’s negligence and strict liability claims rely on Amazon’s role as an actor in the sales process, they are not barred by the CDA. However, to the extent that Oberdorf is alleging that Amazon failed to provide or to edit adequate warnings regarding the use of the dog collar, we conclude that that activity falls within the publisher’s editorial function.”

Later in July, in a similar case, a Wisconsin district court ruled that Amazon was properly considered a seller for purposes for Wisconsin products liability law due to Amazon's "active participation in the sale." (*State Farm Fire and Casualty Co. v. Amazon.com, Inc.*, No. 18-261 (W.D. Wisc. July 23, 2019)). The court also ruled that the CDA did not immunize Amazon because the plaintiff-insurer did not seek to impose liability merely because Amazon posted some third-party content. While the Wisconsin products liability law was not identical to the Pennsylvania law at issue in *Oberdorf*, the district court considered similar factors (e.g., the manufacturer of the defective product is not amenable to suit within the state or is judgment-proof) and, at least according to this court, Wisconsin law does not require a formal transfer of ownership of the goods in question for an entity to be considered a "seller." In reaching its decision, the Wisconsin court also cited the Third Circuit's *Oberdorf* opinion favorably. On the CDA issue, the Wisconsin court declined to dismiss on those grounds, distinguishing a recent Wisconsin Supreme Court decision that afford broad CDA immunity to a classified advertising site, and concluding that: "Amazon's active participation in the sale, through payment processing, storage, shipping, and customer service, is what makes it strictly liable. This is not activity immunized by the CDA."

It remains to be seen what effect these ruling will have on future courts (or state legislatures interested in modernizing products liability law), or even whether the *Oberdorf* ruling will stand, as Amazon has moved for an *en banc* rehearing. Regardless of the outcome, online marketplaces may opt to reexamine e-commerce practices in general, including third-party vendor contracts, fees, oversight, and the extent of fulfillment activities. These decisions are also a reminder that CDA immunity, while quite broad, is not limitless, particularly in strict liability cases where claims may hinge on purported "sales" activity and not third-party content moderation.

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