

Online Retailers' Losing Streak Shows Evolving Liability Trend

By **Stephanie Sheridan, Meegan Brooks and Amanda Schwartz** (September 7, 2021)

Just over two years ago, courts were unanimously ruling that online marketplaces were not liable for products sold by third parties on their websites. That trend abruptly shifted in July 2019, when the U.S. Court of Appeals for the Third Circuit in *Oberdorf v. Amazon* held that Amazon was not shielded from liability for products sold on its website by third parties.

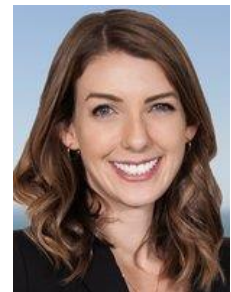
Signaling the significance of this issue, the Oberdorf court held an en banc review and solicited guidance from the Pennsylvania Supreme Court, yet the case settled before the state's high court could rule.

Since then, several recent developments demonstrate that Oberdorf is not an outlier, but the genesis of a trend:

- A series of California decisions have followed the Third Circuit's lead by holding that a marketplace can be liable in products cases, even where it never took custody of the products at issue.
- On July 14, 2021, the Consumer Product Safety Commission, or CPSC, filed an administrative complaint against Amazon, directing the online retailer to recall hazardous products sold on its site.
- On Aug. 9, Amazon announced a new policy that "in the unlikely event a defective product sold through Amazon.com causes property damage or personal injury, Amazon will directly pay customers for claims under \$1,000 — which account for more than 80% of cases — at no cost to sellers, and may step in to pay claims for higher amounts if the seller is unresponsive or rejects a claim we believe to be valid." For reimbursements under \$1,000, Amazon reiterated that it will "not seek reimbursement from sellers who abide by our policies and hold valid insurance."



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These developments affect marketplaces and retail brands that compete against marketplaces, either by selling directly on Amazon or by selling comparable or identical products through other channels. It is imperative that retailers stay abreast of these quickly evolving developments in order to evaluate the potential impact on their business and take necessary steps to protect themselves.

Online Marketplaces And Pre-2019 Product Liability Claims

The key issue is whether online marketplaces qualify as sellers subject to state product liability laws where they do not hold title of the products at issue or transfer ownership of the product to the buyer.

While the courts considering this question have involved different states' laws, the holdings consistently concluded that online marketplaces did not qualify as sellers for purposes of finding them responsible for product liability claims for items sold on their sites.

That tide began to turn in the Spring and Summer of 2019, when courts — while still applying these basic principles and dismissing cases against marketplace defendants — started acknowledging that marketplaces may not always be immune from liability.

In May 2019 *Erie Insurance Co. v. Amazon.com Inc.*, the U.S. Court of Appeals for the Fourth Circuit, following the numerous cases before it, affirmed the lower court's summary judgment ruling that Amazon was not a seller liable from products sold on the site under Maryland law.

U.S. Circuit Judge Diana Gribbon Motz's concurrence noted that while the current state of the law supported the majority's holding, the opinion would not "stand the test of time" given that "much of the state's products liability law was adopted at a time when the American economy operated much differently than it does now."

While traditional supply chains have allowed consumers to sue retailers for product injuries, Judge Motz noted that with the modern proliferation of online shopping, often for products sold by unaccountable international suppliers with lax safety precautions, consumers are without recourse if they are injured by a shoddy product.

In *Fox v. Amazon.com Inc.* in U.S. Court of Appeals for the Sixth Circuit, Amazon was sued under Tennessee law for damages from a defective hoverboard purchased from a third-party vendor on Amazon.com, under product liability and duty to warn theories.

The court affirmed the dismissal of the product liability claim, holding that the online marketplace did not exercise enough control to be a seller and therefore could not be liable under the applicable state law.

But despite a ruling in the marketplace's favor on the product liability claims, the court ruled that the marketplace had assumed a duty to warn when it sent a warning email to customers regarding safety issues, which failed to mention that the reported safety issues included a risk of fire or explosion and that Amazon had ceased all hoverboard sales worldwide.

The Oberdorf Sea Change

Oberdorf v. Amazon marked the first time a court held a marketplace potentially liable for injuries from products sold by third-party sellers on its site.

The plaintiff, Heather Oberdorf, sustained a serious eye injury from a defective dog leash she purchased on Amazon from a third-party vendor. In July 2019, the Third Circuit initially held that the marketplace was strictly liable for the plaintiff's injuries because it was a "seller" within the meaning of Pennsylvania law, vacating the summary judgment order of the district court.

Rejecting the "holding title" test used by other courts — which the Oberdorf Court found contrary to Pennsylvania law — the court applied a four-part test, based on the Restatement (Second) of Torts, Section 402A, which considered:

- Whether the defendant is the only member of the marketing chain available to the injured party for redress;
- Does imposition of strict liability serve as an incentive to safety;
- Is the defendant in a better position than the consumer to prevent circulation of the defective product; and
- Whether the defendant can distribute the costs of strict liability by charging for it in its business.

The court found that all four factors weighed in favor of imposing strict liability.

The first Oberdorf decision garnered extensive attention from the retail industry, leading the Third Circuit to vacate the decision, re-hear the case en banc, and seek guidance from the Pennsylvania Supreme Court on the issue of first impression as to whether an ecommerce business could be strictly liable for a defective product that was purchased on its platform from a third-party vendor.

Although the state high court agreed to weigh in on this issue, the case settled before the court could rule.

California Delivers Two Big Wins To Consumers

On Aug. 13, 2020, California jumped on the bandwagon when the California Court of Appeals in *Bolger v. Amazon.com, LLC* found Amazon strictly liable for injuries the plaintiff suffered as a result of an exploding battery purchased on the site, reversing the trial court's summary judgment order.

The court's analysis largely mirrored the four-factor test applied in *Oberdorf*, ruling that under the principles of strict liability, "Amazon placed itself between [the seller] and [buyer] in the chain of distribution of the product" by handling payment, shipping, and storing of the product in its warehouse, and "should be held liable if a product sold through its website turns out to be defective."

Echoing Judge Motz's concurring opinion in *Erie*, the *Bolger* Court held that online marketplaces should have liability under such circumstances, because otherwise, some injured plaintiffs would have no recourse against certain third-party vendors.

On April 26, 2021, the California Court of Appeal issued a similar decision in *Loomis v. Amazon.com*, reversing the trial court's summary judgment order and held that the marketplace may be held strictly liable for plaintiff Kisha Loomis' injuries from the defective hoverboard she purchased online.

The *Loomis* Court found that "Amazon's own business practices make it a direct link in the vertical chain of distribution under California's strict liability doctrine." Rejecting the lower court's reasoning, the appellate court held that the marketplace may be strictly liable because:

- It "received a direct financial benefit from its activities and from the sale of the product";

- Its "role was integral to the business enterprise such that the [Amazon]'s conduct was a necessary factor in bringing the product to the initial consumer market"; and
- Amazon "had control over, or a substantial ability to influence, the manufacturing or distribution process."

Similar to Bolger, the court further determined that Amazon may be the only "member in the distribution chain reasonably available to the injured plaintiff" given that the manufacturer in Loomis failed to appear and a default was taken against it — just like in Bolger in which two of the defendants failed to appear, and a third could only be served in China.

In a concurring opinion in Loomis, Superior Court Judge John Shephard Wiley, a former policy consultant at the Federal Trade Commission, focused on an Amazon press release, in which Amazon touted that it takes significant precautions to ensure products sold on its site are safe:

The admissions confirm the obvious: Amazon can control its river. It can undertake cost-effective steps to minimize accidents from defective products sold on its website.

The Government Jumps Onboard — Suing Marketplace to Recall Hazardous Products

On July 14, 2021, the CPSC announced that it had filed an administrative complaint against Amazon to recall hazardous products sold on the site by third parties, including defective carbon monoxide detectors, flammable children's sleepwear, and hair dryers that fail to protect consumers from shock and electrocution.

Indicating that this is likely the first of many government enforcement efforts to come, Acting CPSC Chairman Robert Adler stated that "we must grapple with how to deal with these massive third-party platforms more efficiently, and how best to protect the American consumers who rely on them."

Smooth Sailing Ahead, or More Choppy Waters?

While some had opined that the initial Oberdorf decision was an outlier, the subsequent Bolger and Loomis decisions, as well as the recent CPSC enforcement activity, instead illustrate that Oberdorf marked a new trend that is likely to continue to pick up speed.

There are already a number of pending product liability suits across the country. But it remains to be seen whether the number of suits will decrease in light of Amazon's new \$1,000 payment option, or increase in light of Oberdorf and the recent California decisions, and as more public attention is focused on this issue.

Given the quickly developing current legal landscape, businesses with an online marketplace should take all necessary steps to ensure they are following any product liability law changes on a state-by-state basis^[1] and that third-party sellers hosted on their sites are following all U.S. consumer product safety laws.

Online marketplaces should ensure they have strong indemnification provisions in their seller agreements with third-parties. Finally, while Amazon removed its arbitration clause

from its terms of use in May of 2021, smaller platforms might consider incorporating an arbitration clause in its online terms.

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[1] See, e.g., *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101 (Tex. 2021) (holding online retail marketplace operator was not "seller" of television remote control listed by third party vendor on its website); *Stiner v. Amazon.com, Inc.*, 2020-Ohio-4632, 162 Ohio St. 3d 128. In October 2020, the Ohio Supreme Court found for the second time that Amazon was not liable under the Ohio Products Liability Act for the death of a teen who consumed caffeine powder sold by a third party, concluding Amazon was not considered a supplier.