July 12, 2019

Amazon Gets Bitten

Heather Oberdorf took her dog for a walk, using a retractable leash. The dog lunged causing the D-ring on the collar to break. The leash recoiled hitting Oberdorf's face and eyeglasses. She was permanently blinded in her left eye.

Judge Brann of the United States District Court for the Middle District of Pennsylvania dismissed the case finding that Amazon was not liable for Overdorf's injuries.

The Third Circuit, Judge Roth, writing for the majority of the panel, reversed Judge Brann's decision and reinstated the case in *Oberdorf v. Amazon.com Inc*, No. 18-1041 (3d Cir. 2019). Amazon asked for rehearing en banc. Judge Matthew Brann was a Republican Obama nominee and Republican Jane Richards Roth, a du Pont descendant, nominated by George H.W. Bush. The Pennsylvania Supreme Court in *Musser v. Vilsmeier Auction Co., Inc.*, 522 Pa. 367, 562 A.2d 279 (Pa. 1989), listed four factors to consider in determining whether a party is a "seller." The four considerations are (1) whether the seller is the only member of the marketing chain available to the injured plaintiff for redress; (2) whether the imposition of strict liability serves as an incentive for safety; (3) whether the seller is in a better position than the consumer to prevent circulation of the defective product; and (4) whether the seller can distribute the cost of compensation for injuries resulting from the defect by how it charges.

The Court found that all of the traditional factors militate in favor of Amazon being considered a seller. For Amazon to argue otherwise seemed to be an exercise in futility and intellectual dishonesty.

The fact that a business works primarily through the internet should not insolate that business from being responsible for defective product which it sells. The concept behind products liability law since a steering wheel fell off a Buick automobile in 1909 resulting in the seminal decision *MacPherson v. Buick Motor Co.* is that the emphasis in connection with safety must be on the product, not the behavior of the seller. Here, the product was defective and Amazon was hoping to escape the bite of the law, leaving the blinded woman with no redress of grievances.

The second and equally interesting issue is whether Amazon should be liable for failure to provide adequate warnings about the product. The Court found a warnings claim was barred by §230 of the CDA. CDA is a federal law protecting a computer service from being treated as the publisher or speaker as to any information provided by another information content provider. This unfortunate law serves as a shield to some of the biggest companies in the world.

The court ruled that §230 of the CDA precludes courts from entertaining claims that would place the compute service provider in a publisher's role. The Court further

quoted from the statute supporting the conclusion that the law is intended to allow interactive computer service companies to perform some editing on user-generated content without becoming liable for defamatory or otherwise unlawful messages which they did not edit or delete. It seems that the scope of CDA should be much more narrow than was interpreted by the Court in *Oberdorf v. Amazon*.

The Third Circuit, however, opined that courts throughout the country have interpreted the CDA provision broadly. The Court acknowledged that Amazon exercises online editorial functions. The Court also did not agree with Amazon that Oberdorf was merely attempting to treat Amazon as the publisher or speaker of information provided by another. Amazon is a "seller." Amazon plays a major role in the sales function including receiving customer shipping information, processing customer payments, relaying funds and information to third-party vendors, and collecting fees it charges for providing services.

To the extent that Oberdorf's negligence and strict liability claims address Amazon role in the sales process, they are not barred by the federal CDA. The inquiry did not end there. The Third Circuit held that to the extent that Oberdorf alleged that Amazon failed to provide or to edit adequate warnings with respect to the use of the dog collar, that activity falls within the publisher's editorial function. Failure to warn claims are barred by the CDA

Judge Scirica dissented, in part, and concurred in part. The Judge noted that no Pennsylvania Court has yet examined the product liability of an online marketplace like Amazon. The Judge believed that Amazon was not the seller of the dog leash under Pennsylvania law and therefore was not liable for the product defect. The Judge of course agreed that the CDA providing immunity on the warning claim.

The view by some that companies like Amazon should be given a free pass with respect to sale of defective products flies in the face of reason, logic, and Pennsylvania law. To suggest, as the dissenting judge does, that Amazon's role is "tangential" to the actual exchange between customer and third-party seller is most unrealistic. Amazon makes the deal. Amazon does more than offer a marketplace, but in fact is one gigantic incomprehensively large department store. The fact that Amazon functions on the internet should never be a shield to its liability as a "seller."

The Pennsylvania Supreme Court is the final arbiter of Pennsylvania law and when the United States Court of Appeals for the Third Circuit provides an opinion as to what Pennsylvania law is, it is merely exercising its "dubious oracularity" (to quote the infamous Federal Judge, Judge Malcolm Muir) as to what the state law is. Ultimately the decision concerning the responsibility of internet department store giants like Amazon will be decided by the Pennsylvania Supreme Court.

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