

# Online Marketplaces Dodge Strict Liability In Amazon Case

By **Benjamin Hartwell**

Amazon.com Inc. recently settled a high-profile lawsuit in Pennsylvania that could have had far-reaching implications for its exposure to liability for defective products sold on its website.

The saga of Oberdorf v. Amazon.com began in 2016, when Heather Oberdorf sued Amazon in the U.S. District Court for the Middle District of Pennsylvania for injuries allegedly caused by a defective dog collar she purchased on Amazon.com from a third-party vendor named The Furry Gang.

Neither Oberdorf nor Amazon were able to locate a representative of The Furry Gang for purposes of joining it as a party to the lawsuit. Amazon moved for summary judgment, arguing that it was not a seller of the dog collar — and, therefore, could not be held strictly liable under Section 402A of the Restatement (Second) of Torts — because it only served as an intermediary for the sale of the dog collar, which itself was a transaction entirely between Oberdorf and The Furry Gang.

The district court agreed with Amazon, and granted its motion for summary judgment. On appeal, this aspect of the district court's ruling was vacated by a divided three-judge panel of the U.S. Court of Appeals for the Third Circuit.

The panel's majority opinion explained that the following four policy factors, enumerated by the Pennsylvania Supreme Court in the 1977 case *Francioni v. Gibsonia Truck Corp.*, weighed in favor of holding Amazon strictly liable for injuries caused by the dog collar:

- Amazon was the only member of the marketing chain available to Oberdorf for redress;
- Imposing strict liability on Amazon served as an incentive to safety;
- Amazon was in a better position than Oberdorf to prevent the circulation of defective products; and
- Amazon could distribute the cost of compensating for injuries resulting from defects by charging for it in its business.



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One judge on the panel dissented, interpreting Pennsylvania's adaptation of Section 402A to require a determination — as a prerequisite to applying the four policy factors articulated above — of whether Amazon actually supplied the product in question.

Since Amazon never took ownership or possession of the dog collar at any point during its sale, the dissenting judge would have ruled that Amazon did not supply the dog collar, rendering application of the Francioni policy factors unnecessary. Even if Amazon had supplied the dog collar, the dissenting judge would have ruled that three of the four Francioni policy factors weighed against holding Amazon strictly liable for Oberdorf's injuries.

A handful of courts — including California's intermediate court of appeals, the U.S. District Court for the Southern District of Texas and the U.S. District Court for the Western District of Wisconsin — have recently found that Amazon could be held strictly liable for injuries caused by products that pass through its warehouses as part of its Fulfillment by Amazon program. Through this optional program, Amazon, in exchange for a fee, handles storage, shipping and customer support for certain products on behalf of the merchant.

The key factor supporting strict liability in those cases, however, was that Amazon actually took possession of the products before they were delivered to the customer. In cases involving products not fulfilled by Amazon, courts across the country have almost unanimously held that Amazon was not a seller of those products subject to strict liability.

The Oberdorf panel's decision marked a significant departure from those cases, insofar as it stood for the proposition that Amazon could be strictly liable for injuries caused by products with which it had no direct interaction. The decision effectively expanded the scope of Amazon's product-liability exposure to include all products listed for sale on its website, regardless of whether Amazon had any role in storing, shipping or supporting the product.

Recognizing the gravity of the issue — not only for Amazon but for other online marketplaces such as eBay Inc., Etsy Inc. and Alibaba Group — a majority of judges on the Third Circuit voted to vacate the panel's decision, and conduct an en banc rehearing before all 14 active judges on the court. After further briefing and oral argument, the en banc court determined that it could not issue a ruling, due to the existence of an unresolved question of state law.

The court found that it could not predict, based on existing case law, how the Pennsylvania Supreme Court would apply Section 402A to e-commerce businesses like Amazon. Accordingly, the Third Circuit certified the question of Amazon's liability as a seller under Section 402A to the Pennsylvania Supreme Court.

However, on Sept. 23, before the certified question could be answered, the parties notified the court that they had reached a settlement. Amazon has not commented publicly on the settlement, but the timing of the settlement suggests that Amazon was cognizant of the far-reaching impact an adverse decision by the Pennsylvania Supreme Court could have had on its exposure to liability in future cases.

While many of the merchants who sell products on Amazon's marketplace subscribe to the Fulfillment by Amazon program, a 2020 report published by support platform Jungle Scout indicates that merchants who fulfill their own sales have far more listings on Amazon in comparison to those who pay Amazon to handle fulfillment for them.

While calculating the exact quantitative impact of an adverse decision by the Pennsylvania Supreme Court on Amazon's business would require much more data and expert analysis, what is clear is that Amazon's exposure would increase significantly if it could be held strictly liable for injuries caused by products that it had no direct role in delivering to the customer.

Most states have adopted at least some form of Section 402A into their common-law strict liability schemes. Thus, while the Pennsylvania Supreme Court's interpretation of Section 402A would have only been binding on future cases governed by Pennsylvania law, that interpretation — as well as the Third Circuit's ultimate opinion — would have almost certainly been cited as persuasive authority by litigants across the country facing similar issues.

By settling the case when it did, Amazon avoided a precedential decision that could have opened the floodgates and released a tidal wave of new strict liability litigation against online marketplaces. At least for now, the dam remains closed in Pennsylvania.

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