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Online Marketplaces: Continuing Product Liability, CDA Issues

By **Steven Kramer** (July 10, 2019, 5:06 PM EDT)


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The debate continues as to whether online marketplaces can incur liability for products manufactured or sold by third parties. Since we last surveyed the law,[1] two federal circuit courts have handed down decisions. Both considered whether online marketplaces were immune to suit by virtue of the Communications Decency Act of 1996.

First, the continuing debate.

In Erie Insurance Company v. Amazon.com Inc., the U.S. Court of Appeals for the Fourth Circuit recently analyzed Maryland law. The court addressed the core issue head on, noting "the main issue before us is whether [Amazon] is subject to liability for a defective product that a customer purchased on its website from a third-party seller with Amazon 'fulfilling' the transaction by storing the product and shipping it to the customer."[2]

The court affirmed the grant of summary judgment dismissing the complaint, reasoning that Maryland imposes product liability upon "sellers," and a "seller" was an entity that holds title to and then transfers ownership.[3] The facts demonstrated that:

- While the product was sent to Amazon, "[A]mazon did not, by that simple transfer, receive title."

- There was no agreement between the product seller and Amazon that "[a]mounted to the consummation of a sale," but rather, the agreement provided the product seller retained title while the product was stored by Amazon.[4]

The plaintiff raised the alternate argument that Amazon could incur liability as a "distributor," relying on Section 402A of the Restatement of Torts (Second). But the Fourth Circuit rejected the argument, reasoning otherwise any entity in the distribution chain — "[s]hippers, warehousemen, consignees and deliverers" — would face liability.[5]

Next, the question of whether the Communications Decency Act provides immunity.

CDA Section 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher of any information provided by another content provider," and "the majority of federal circuits have interpreted [the act] to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third party user of the service."

In Erie, the online marketplace raised the CDA as a defense, but the Fourth Circuit held that the CDA "[p]rotects interactive service providers from liability as a publisher of speech, it does not protect

them from liability as the seller of a defective product."[6] Because the plaintiff's product liability claims were limited to sale of the product (as opposed to representational or warning liability), the court held the CDA did not preclude the claims.

Yet, in Henrick v. Grindr LLC, the U.S. Court of Appeals for the Second Circuit, in an unpublished decision, recently found CDA preclusion of the plaintiff's product liability claims was warranted. The case involved a dating app which was misused by the plaintiff's ex-boyfriend.

The plaintiff argued that his claims against Grindr were not premised on its role as a publisher of third-party content, but on a design defect (the app's alleged lack of safety features). The Second Circuit rejected the argument, reasoning the gravamen of the claim was the "[f]ailure to combat or remove offensive third-party content."[7]

But what if liability is premised not on the sale of a product, but the failure to warn about the product? Warnings involve analysis of speech and content (absence or sufficiency), so does the CDA bar warning claims? Case law is not mature yet on this question, but as of now, there are three key guidepost cases.

In Doe v. Internet Brands Inc., the U.S. Court of Appeals for the Ninth Circuit (en banc, after recalling its prior decision) held that the CDA did not bar a warning claim. The facts were horrific — an aspiring model posted information about herself on a modeling industry networking website, and was lured to a fake audition, drugged, raped and recorded for a pornographic video.

The Ninth Circuit reasoned that because the plaintiff was not seeking to impose liability for the publication of speech posted by a third party on the website, but rather, for failing to warn about information the defendant obtained from an "[o]utside source about how third parties targeted and lured victims through [the website],"[8] the warning claim survived.

McDonald v. LG Electronics USA Inc. arose from a fire involving batteries manufactured by LG and ordered through Amazon. The district court easily found that the CDA did not bar the plaintiff's negligence and breach of implied warranty claims, but then tackled the failure to warn claim.

The court noted such a claim "[d]oes attempt to treat Amazon 'as a publisher or speaker of third party content' … [and] seeks to impose on Amazon either (1) a duty to edit and filter content posted by third parties on Amazon's website or (2) a duty to speak alongside content posted by third parties."[9] The first duty was quickly found by the district court to be barred by the CDA, but the second duty involved a more difficult analysis.

The court suggested Internet Brands could be read to "[r]equire … some type of warning that third-party sellers are known to sell dangerous or defective products through its website."[10] But given that the Fourth Circuit had not analyzed Internet Brands, and the complaint did not allege the online marketplace "[h]ad any knowledge that the [product seller] was using the [online marketplace's] website to sell dangerous or defective products,"[11] the court held the warning claim was barred by the CDA.

In Henrick, supra, the Second Circuit held that the plaintiff's warning claim was barred by the CDA because it was "[i]nextricably linked to Grindr's alleged failure to edit, monitor, or remove the offensive content provided by a third-party."[12]

Conclusion

Online marketplaces are here to stay. Depending how their business model is structured and procurement agreements are drafted, marketplaces may be able to argue, state by state, that they are not "sellers" for purposes of product liability, because they do not hold title to the products ordered through their websites. In any event, procurement agreements should contain risk transfer provisions (indemnity and additional insured insurance) running in the favor of the online marketplace.

Application or nonapplication of the CDA involves thorny questions. As online marketplaces have expanded beyond the ordering of products to providing services linking people and entities, questions arise as to what exactly is the "product," and whether the gravamen of a claim is speech- or product-

related.

These difficult issues sometimes land in courts that — in a world now far more accustomed to e-commerce than in 1996, when the CDA was enacted — are skeptical of online marketplaces being treated differently than brick-and-mortar stores. The debate will continue.

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[1] Kramer, Product Liability For Online Marketplaces And Car-Sharing, Law360 (Sept. 28, 2018).

[2] Erie Insurance Company v. Amazon.com Inc., __ F.3d __, 2019 WL 2195146 at *1.

[3] Id. at *3-4.

[4] Id. at *4.

[5] Id. at *6.

[6] Id. at *3.

[7] Henrick v. Grindr LLC, 2019 WL 1384092 (2d Cir. Mar. 27, 2019) at *3.

[8] Doe v. Internet Brands Inc., 824 F.3d 846 (9th Cir. 2016), 824 F.3d at 851.

[9] McDonald v. LG Electronics USA Inc., 219 F.Supp.3d 533 (D.Md. Nov. 10, 2016) at 538.

[10] Id. at 539.

[11] Id.

[12] See note 7 at *3.
