

No. 18-1041

IN THE
**United States Court of Appeals
for the Third Circuit**

HEATHER R. OBERDORF and
MICHAEL A. OBERDORF, her husband,
Plaintiffs-Appellants,

v.

AMAZON.COM, INC., a Washington Corporation,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

**BRIEF OF THE
CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA AND THE PENNSYLVANIA CHAMBER
OF BUSINESS AND INDUSTRY AS *AMICI CURIAE*
SUPPORTING APPELLEE SEEKING AFFIRMANCE**

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**CORPORATE DISCLOSURE STATEMENT
AND STATEMENT OF FINANCIAL INTEREST**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Appellate Rule 26.1, the Chamber of Commerce of the United States of America and the Pennsylvania Chamber of Business and Industry make the following disclosure:

(1) For non-governmental corporate parties please list all parent corporations:

NONE

(2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

NONE

(3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

NONE

(4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: (i) the debtor, if not identified in the case caption, (ii) the members of the creditors' committee or the top 20 unsecured creditors; and (iii) any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by the appellant:

NOT APPLICABLE

Dated: October 24, 2019

s/ Colin E. Wrabley

Colin E. Wrabley

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.*

The Pennsylvania Chamber of Business and Industry (the Pennsylvania Chamber) is the largest broad-based business association in Pennsylvania. Thousands of members throughout the Commonwealth employ more than 50 percent of Pennsylvania's private workforce. The Pennsylvania Chamber's mission is to improve

* The undersigned certifies that the parties have consented to the filing of this brief, no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Pennsylvania's business climate and increase the competitive advantage for its members.

The Chamber has routinely filed *amicus curiae* briefs addressing Pennsylvania tort and products-liability law. *See* Br. of *Amici Curiae* Pa. Coal. for Civil Justice Reform et al., *Gregg v. Ameriprise Fin.*, No. 29 WAP 2019 (Pa. Sept. 5, 2019) (strict liability); Br. of *Amici Curiae* Chamber of Commerce of U.S. et al., *Baptiste v. Bethlehem Landfill Co.*, No. 19-1692 (3d Cir. Aug. 12, 2019) (nuisance); *Amici Curiae* Br. of Pa. Bus. Council et al., *Tincher v. Omega Flex, Inc.*, No. 17 MAP 2013 (Pa. June 4, 2013) (strict liability). The Chamber has also filed *amicus* briefs around the country opposing the expansion of strict liability. *See, e.g.*, Br. of *Amici Curiae* Chamber of Commerce of U.S. et al., *Aubin v. Union Carbide Corp.*, No. SC12-2075 (Fla. Oct. 25, 2013) (strict products liability under Florida law); Ltr. Br. of Chamber of Commerce of U.S., *Sherman v. Hennessy Indus., Inc.*, No. S228087 (Cal. Sept. 11, 2015) (strict products liability under California law).

This case calls upon the Court to predict whether Pennsylvania's highest court would impose strict "seller" liability on an online

marketplace facilitating sales between third parties and consumers. The Chamber and Pennsylvania Chamber submit this brief because the expansion of strict liability under tort is harmful to American businesses, their customers (due to higher prices and reduced availability of goods), and the economy more generally. The Chamber’s Institute for Legal Reform has issued a number of reports detailing the harmful consequences of such expansions of tort law. *See, e.g.*, U.S. Chamber Inst. for Legal Reform, *Costs and Compensation of the U.S. Tort System* (Oct. 2018). The Chamber and Pennsylvania Chamber take no position on the meaning of the term “seller” in other contexts. Nor do they express a view on the proper treatment of counterfeit or infringing goods sold through online platforms—matters governed by other laws not at issue here.

ARGUMENT

I. THE PANEL MAJORITY DEPARTED FROM SETTLED PENNSYLVANIA LAW AND CREATED NEW LIABILITIES NOT ACCEPTED BY THE GENERAL ASSEMBLY OR STATE COURTS

Because the primary issue in this case arises under Pennsylvania tort law, this Court’s consideration of it is governed by *Erie*

Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938). Under that seminal decision, federal courts may not “engraft onto those state rules exceptions or modification which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.” *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975). Instead, federal courts “should be reluctant to expand the common law[,]” *Lexington Nat’l Ins. Corp. v. Ranger Ins. Co.*, 326 F.3d 416, 420 (3d Cir. 2003), and should “exercis[e] restraint . . . and opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of [the State] decides differently[,]” *Travelers Indem. Co. v. Dammann & Co.*, 594 F.3d 238, 253 (3d Cir. 2010) (citation omitted).

The panel majority failed to exercise the appropriate restraint and erroneously expanded Pennsylvania common law strict liability. Unlike any defendant ever recognized as a strict-liability “seller” under Pennsylvania’s incorporation of Restatement (Second) of Torts § 402A (1965), Appellee Amazon.com, Inc. never

owned or possessed rights in the product at issue. The panel majority nevertheless expanded Pennsylvania’s definition of a “seller” to include Amazon.com.

In doing so, the panel majority failed to give proper weight to Pennsylvania Supreme Court precedent. As Judge Scirica in his panel dissent correctly points out, the majority gave short shrift to the most closely analogous precedents—particularly *Musser v. Vilsmeier Auction Co.*, 562 A.2d 279 (Pa. 1989). The majority compounded that misstep by failing to acknowledge the import of *Cafazzo v. Central Medical Health Services, Inc.*, 668 A.2d 521 (Pa. 1995), which, in turn, caused it to misapply *Francioni v. Gibsonia Truck Corp.*, 372 A.2d 736 (Pa. 1977).

Significantly, Pennsylvania mirrors *Erie* jurisprudence in counseling judicial restraint, especially in the context of strict liability. “[T]he default position” under Pennsylvania law “is that, unless the justifications for and consequences of judicial policymaking are reasonably clear with the balance of factors favorably predominating, [that court] will not impose new affirmative duties.” *Seebold v. Prison Health Servs., Inc.*, 57 A.3d 1232, 1245 (Pa. 2012).

Indeed, the Pennsylvania Supreme Court has admonished “that there should be no further judicial expansions of [§ 402A’s] scope under current strict liability doctrine.” *Schmidt v. Boardman*, 11 A.3d 924, 941 (Pa. 2011). Putting that principle into action, the Supreme Court of Pennsylvania repeatedly has declined to expand “seller” strict liability. *See, e.g., Cafazzo*, 668 A.2d at 527 (rejecting strict liability for healthcare providers and reasoning that “[i]t is . . . not clear enough that strict liability has afforded the hoped for panacea in the conventional products area that it should be extended so cavalierly”); *Coyle v. Richardson-Merrell, Inc.*, 584 A.2d 1383, 1387 (Pa. 1991) (rejecting strict liability for pharmacies as “sellers” of drugs and cautioning that “[r]eliance on cost-shifting as the only factor to be considered in whether a given party should be exposed to liability . . . would result in absolute liability rather than strict liability”).

The panel majority failed to follow those controlling principles of Pennsylvania law. It also failed to give any weight to the scores of other courts that have refused to find Amazon.com strictly liable as a “seller” under similar state laws, deeming them to be of “little

consequence.” *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 150 (3d Cir.), *vacated*, 936 F.3d 182 (3d Cir. 2019). *But see* *Amazon.com* Suppl. Br. 4–6. To be sure, there may be some distinctions between those decisions and this case. But they help demonstrate the longstanding common-law rule, and none of the distinctions diminishes the relevance of those closely analogous cases to the *Erie* analysis or permits a court to ignore them.

Given this legal landscape, the panel majority’s determination that Pennsylvania’s highest court would impose strict liability on *Amazon.com* was a headlong dive against the strong, contrary currents of Pennsylvania jurisprudence, as well as the on-point holdings of other courts. That is exactly what *Erie* prohibits. By breaking so sharply from the constraining principles that govern *Erie* predictions, the panel majority’s approach only underscores the need for this Court to reemphasize the federalism principles that control here and give litigants greater assurance that federal courts will not take a State’s law where it has never gone before. For the Chamber’s membership in particular, clarity in this regard will help foster the “[p]redictability [so] valuable to corporations

making business and investment decisions.” *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

II. THE EXTENSION OF STRICT LIABILITY HARMS AMERICAN BUSINESSES AND THE ECONOMY

The American tort system imposes hundreds of billions of dollars in costs annually. In 2016 alone, such costs in Pennsylvania exceeded \$18.3 billion or approximately 2.5 percent of Pennsylvania’s gross domestic product. *See* U.S. Chamber Inst. for Legal Reform, *Costs and Compensation of the U.S. Tort System* 22 (Oct. 2018). Approximately 57 percent of such amounts constituted compensation paid to plaintiffs. *Id.* at 4. “The remaining 43 percent covered the cost of litigation of both sides, operating costs for the insurers, and profits to effectuate risk transfer.” *Id.*

Expanding the use of strict liability—where liability does not depend on proof of a defendant’s negligence or intent to do harm—will only exacerbate the problem. “High litigation and administrative costs constitute the majority of the price increases” passed onto consumers. Joanna M. Sheperd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform’s Impact on Businesses, Employment, and Production*, 66 *Vand. L. Rev.* 257, 287

(2013). Price increases resulting from litigation costs can even go so far as to “discourage most consumers from purchasing the product and consequently cause the manufacturer to withdraw the product from the marketplace or to go out of business.” A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 Harv. L. Rev. 1437, 1472 (2010).

Therefore, precisely at a time in our history when innovation is essential to America’s economic competitiveness, strict liability reduces the incentives for innovation and promotes ossification. *See Sheperd, supra*, at 287–88. The Court should reject the panel majority’s unprecedented expansion of Pennsylvania’s strict-liability regime.

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CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment.

Dated: October 24, 2019

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COMBINED CERTIFICATIONS

Bar Membership

Pursuant to Local Appellate Rule 46.1(e), the undersigned certifies that he is a member of the bar of the United States Court of Appeals for the Third Circuit.

Type and Volume

The undersigned certifies that the Brief of the Chamber of Commerce of the United States of America and the Pennsylvania Chamber of Business and Industry as *Amici Curiae* Supporting Appellee Seeking Affirmance complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d) and Local Appellate Rule 29.1. The brief contains 1,569 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

The brief also complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point New Century Schoolbook font.

Electronically Filed Brief Identical to Paper Copies

The undersigned certifies that the text of the electronically filed Brief of the Chamber of Commerce of the United States of America and the Pennsylvania Chamber of Business and Industry as *Amici Curiae* Supporting Appellee Seeking Affirmance is identical to the text of the paper copies that were dispatched this twenty-fourth day of October, 2019, by the United States Postal Service for delivery to the Clerk of the United States Court of Appeals for the Third Circuit.

Anti-Virus Detection

Pursuant to Local Appellate Rule 31.1(c), the undersigned certifies that a virus-detection program (Symantec Endpoint Protection version 14) has been run on the electronic Brief of the Chamber of Commerce of the United States of America and the Pennsylvania Chamber of Business and Industry as *Amici Curiae* Supporting Appellee Seeking Affirmance and that no virus was detected.

Service

The undersigned certifies that on this twenty-fourth day of October, 2019, the Brief of the Chamber of Commerce of the United States of America and the Pennsylvania Chamber of Business and Industry as *Amici Curiae* Supporting Appellee Seeking Affirmance was filed with the Clerk of the United States Court of Appeals for the Third Circuit by using the CM/ECF system. The undersigned further certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Colin E. Wrabley

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