



STATE OF INDIANA

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ATTORNEY GENERAL

January 7, 2020

OFFICIAL OPINION 2020-1

Mr. Mark Straw, Executive Administrator
Indiana State Egg Board
Purdue University, Creighton Hall of Animal Sciences
270 S. Russell Street
West Lafayette, Indiana 47907-2041

RE: Regulation of Online “Merchant Service Provider”

Dear Mr. Straw:

Pursuant to Ind. Code § 4-6-2-5, the Indiana State Egg Board (hereafter, the “Board”) requested the opinion of the Office of Attorney General (OAG) as to whether an entity engaged in the facilitation of the sale of eggs through online means is subject to regulation by the Board as a retailer under applicable State law, specifically Ind. Code § 16-42-11 *et seq.* and Title 370 of the Indiana Administrative Code.

QUESTION PRESENTED

Does the Board have the authority to regulate an online “merchant service provider” that “facilitates” the sale of eggs?

BRIEF ANSWER

No. The “merchant service provider” (hereafter, “Provider”) does not acquire or transfer title to eggs and, therefore, does not meet the definition of a retailer under Ind. Code § 16-42-11-1.1(6) and 370 IAC 1-12-1(4). The Board’s statutory and regulatory provisions were not designed to address e-commerce¹ situations such as the one presented here.

¹ “E-commerce” refers to the “practice of buying and selling goods and services through online consumer services and of conducting other business activities using an electronic device and the Internet.” *Black’s Law Dictionary* at 625 (10th ed. 2014).

BACKGROUND

The Board's statutory authority; the meaning of sell/sale; the passage of title; and rules of statutory construction.

The State of Indiana, through legislative enactments, vests power with the Board to, *inter alia*, “regulate the sale of and commerce in eggs sold.” The Board discharges its duty pursuant to Ind. Code § 16-42-11 and Title 370 of the Indiana Administrative Code (IAC). The Board may adopt rules necessary for or incident to discharging its duties, and can formulate definitions and specifications “for the care and handling of eggs that may be offered for sale at retail and wholesale.” Ind. Code § 16-42-11-5(b)(3), (5).

To regulate the sale of and commerce in eggs, the Board issues permits and provides registration to all “retailers.”² Ind. Code § 16-42-11-5(b)(4). A “retailer” is defined as “any person who sells eggs for human consumption and not for resale.” Ind. Code § 16-42-11-1.1(6); 370 IAC 1-12-1(4). “Person” includes business entities. *See* Ind. Code § 16-42-11-1.1(5); 370 IAC 1-12-1(3).

Neither Ind. Code § 16-42-11 *et seq.* nor Title 370 of the IAC defines “sell” or “sale.” The common and legal meaning of “sale” is one and the same—“the transfer of ownership of and title to property from one person to another for a price.”³ “Sell” is to transfer property by sale.⁴ One who completes a sale or engages in the act of selling is often referred to as a “seller.” *See* Uniform Commercial Code (U.C.C.), § 2-103(1)(d), defining “seller” as “a person who sells or contracts to sell goods.” However, one who sells a good may not always be the “seller” (*e.g.*, a consignee may sell goods on behalf of a consignor). A consignment occurs when goods are delivered to another’s custody for sale or delivery.⁵ Under § 9-319 of the U.C.C., “consignment” means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

- (A) the merchant:
 - (i) deals in goods of that kind under a name other than the name of the person making delivery;
 - (ii) is not an auctioneer; and

² The Board also has the same authority with respect to “wholesalers,” but the issues raised by the Board do not implicate “wholesalers.” As a consequence, this Opinion will not address this function of the Board.

³ *See* Uniform Commercial Code, § 2-106(1) and Ind. Code § 26-1-2-106(1), defining “sale” as consisting of “passing of title from the seller to the buyer for a price.” *See Black's Law Dictionary* at 1537 (10th ed. 2014), defining “sale” as “the transfer of property or title for a price”. *See also Merriam-Webster OnLine Dictionary*, available at <http://www.merriam-webster.com/dictionary/sale>, defining “sale” as “the transfer of ownership of and title to property from one person to another for a price” (last visited February 26, 2019).

⁴ *Black's Law Dictionary* at 1567 (10th ed. 2014).

⁵ *Id.*

- (iii) is not generally known by its creditors to be substantially engaged in selling the goods of others;
- (B) with respect to each delivery, the aggregate value of the goods is \$1,000 or more at the time of delivery;
- (C) the goods are not consumer goods immediately before delivery; and
- (D) the transaction does not create a security interest that secures an obligation.

The divesture and passage of title to property, while not indicative of ownership, is indicative of a sale.⁶ Generally, title passes to the buyer at the time and place at which the seller completes his performance with respect to the physical delivery of goods. Ind. Code § 26-1-2-401(2). However:

Where goods are bought at one place to be consigned and transported to the purchaser at another place, in the absence of any arrangement or agreement to the contrary, the general rule is that delivery by the seller to a common carrier of such goods, duly consigned to the purchaser, is a delivery to the purchaser; for the carrier thereby becomes the agent of the purchaser, and title to the property passes to him at the time of such delivery. There are exceptions to this general rule, but, in the absence of facts showing a different agreement or arrangement, the presumption is that the general rule prevails.

Robbins v. Brazil Syndicate R. & B. Co., 114 N.E. 707, 709 (Ind. Ct. App. 1917).

Under judicial constructions for statutory interpretation, Ind. Code § 16-42-11-1.1(6) (and, for that matter, 370 IAC 1-12-1(4)) need not be subject to interpretation should its words be unambiguous. *Peoples State Bank v. Benton Twp. of Monroe Cnty*, 28 N.E.3d 317, 322-23 (Ind. Ct. App. 2015). Rather, the words and phrases will be read in their plain, ordinary, and usual sense. *Id.* A statute should be construed so as to ascertain and give effect to the intention of the legislature as expressed in the statute. In so doing, the objects and purposes of the statute in question must be considered as well as the effect and consequences of such interpretation. *State v. Eichorst*, 957 N.E.2d 1010, 1012 (Ind. Ct. App. 2011). Lastly, when interpreting the words of a single section of a statute, the words must be construed with due regard for all other sections of the act and with regard for the legislative intent to carry out the spirit and purpose of the act itself. It is presumed that the legislature intended its language to be applied in a logical manner consistent with the statute's underlying policy and goals. *Id.*

A review of the services of the Provider and the role it plays in the e-commerce of eggs is necessary to accurately analyze whether the Provider is a retailer as defined by Ind. Code § 16-42-11-1.1(6) and 370 IAC 1-12-1(4)⁷ or is actually some other concept altogether.

⁶ See *Craig Brokerage Co. v. Joseph A. Goddard Co.*, 175 N.E. 19, 24 (Ind. Ct. App. 1931).

⁷ In its Vendor Agreement, the Provider identifies its services as the use of its website to list products, access orders, or otherwise use the website to accomplish these purposes. In short, the website brings together sellers and buyers. A copy of Market Wagon's Vendor Agreement can be found at *Market Wagon LLC Vendor Agreement* ("Vendor Agreement"), http://admin.marketwagon.com/pages/suppliers/terms_services.php (last updated May 17, 2018).

ANALYSIS

The Provider is an online marketplace.

The Provider, through its website, offers an online marketplace where farmers and vendors can sell food products, including eggs. The Provider monitors how products are advertised on its website, but vendors list the quantity and determine the price of their products.⁸ Vendors can stop or suspend the use of the Provider's services at any time and without notice, provided that there is no outstanding "Pick Ticket."⁹ A Pick Ticket is then issued by the Provider to notify a vendor of a customer's order.¹⁰

When customers purchase their food items on the Provider's website, the Provider retains a portion of the retail purchase price and remits the net amount to the vendor.¹¹ After a vendor fulfills the customer's order, the vendor brings the order, sealed and labeled, to the Provider's warehouse and places it in a customer's designated tote for customer pick-up or delivery.¹² According to the Chief Executive Officer of the Provider:

⁸ See Vendor Agreement, cl. 3(d) (stating that, "[The Provider] has the final determination in regards to acceptable products, product photos, product descriptions, vendor photos, and vendor descriptions to be conveyed using [the Provider's] Services"). See also *id.* at cl. 5(b), stating that "Vendors set the price on their product. It is understood that a fair market price for products is ideal. It is understood that customers, not [the Provider], decide what a fair price for any product might be. [The Provider] does not ensure, nor prefer, that a Vendor will be the exclusive supplier of any one product."

⁹ See *id.* at cl. 4(b), stating that the "Vendor may elect to stop or to suspend use of [the Provider's] Services at any time and without notice, provided that suspension does not violate any of the other terms herein, namely 4(e) below." See also cl. 4(e), stating that "If Vendor has one or more items on a pick ticket, Vendor [must] deliver."

¹⁰ See *id.* at cl. 4(c), stating that "[The Provider] will send a detailed email outlining the products, quantities, and customers to whom they are destined, hereinafter the 'Pick Ticket,' on a pre-determined schedule."

¹¹ See *id.* at cl. 5(c), stating that "[i]t [is] understood that a discount of the retail sale price shall be retained by [the Provider] in exchange for Vendor's use of [the Provider's] Services. The remaining net amount of the retail sale price is paid to Vendor."

¹² See *id.* at cl. 4(g), stating that "[h]ighly perishable products shall be delivered in good condition." See also *id.* at cl. 4(h), stating that "[r]otted, damaged, diseased, insect damaged and unmarketable products will not be acceptable under any circumstances." See also *id.* at cl. 4(k), stating that "[The Provider] reserves the right to assess a fee per item not delivered accurately according to the Pick Ticket." In addition, at *id.*, cl. 4(i), the agreement states that "Vendor must deliver all product[s] properly packaged according to [the Provider's] guidelines for the particular commodity," while at cl. 4(m), it states that "[u]nless [the Provider] has agreed in advance to place consigned product from Vendor into customer totes on Vendor's behalf, Vendor must arrive at [the Provider] in time and with sufficient staff to complete all the customer placements according to the Pick Ticket within the time allotment that [the Provider] sets." Lastly, at *id.*, cl. 4(n), the agreement provides that the "Vendor may not insert any material into a customer's tote that was NOT included on their Pick Ticket without written Market Wagon approval" (emphasis original).

[The Provider] does not consolidate eggs, retail them, and then deliver them. By listing products on [the] e-commerce platform[,], vendors agree to utilize [the Provider's] network of contract delivery drivers to fulfill their online orders. As part of this service, [the Provider] provides a delivery staging hub where vendors are invited to assemble their orders.... [V]endors assemble their own orders in our facility. Vendors receive specific instructions related to the exact position where their customer's delivery tote can be found in the staging hub. Vendors are required not only to deliver their egg orders to the hub, but they are also responsible to place their eggs directly into their customer's designated delivery tote. [The Provider] does not consolidate eggs.

[The Provider] provides, as part of the delivery service, a reusable insulated tote and frozen gel packs that the vendors rely on to hold their eggs under 45 degrees during delivery. Tests have been performed to verify that the amount of ice packs used is adequate to maintain temperatures for the duration of delivery. Once the vendor has placed the eggs into their customer[']s insulated delivery tote, an independent contract delivery driver will take the order to the customer's address, kept insulated with ice packs, on behalf of the vendor. [The Provider] manages the pool of contract drivers as a part of the delivery service to vendors.

[The Provider] does not purchase, nor do we receive at our facilities, wholesale orders of eggs. [The Provider] does not retail eggs. Vendors may only bring to a hub eggs which they have already retailed using [the Provider's] e-commerce platform and that are designated for their specific customers.¹³

Furthermore, the following provisions are found in the Provider's Conditions of Use Agreement:

1. Multiple Vendors

Any given "order"—which consists of your payment to [the Provider] on one of [the Provider's] websites by means of credit card, PayPal, or some other form of electronic payment—may be a single order which consolidates transactions between you and any number of multiple vendors as follows:

- ...
- A transaction for certain products requiring licensure, certification, and/or inspection from a local or regional food regulator is a transaction between you and the licensed producer of that product. [The Provider] is not a retail food establishment. Such a transaction is facilitated by [the Provider] as a merchant

¹³ Letter from Nicholas R. Carter, Chief Exec. Officer of the Provider to Mark L. Straw, Executive Administrator of the Indiana State Egg Board (Oct. 30, 2018).

service provider and [the Provider] agrees to pay the vendor for the product on your behalf.

- A transaction for certain products exempt from local and regional food regulations could be a transaction between you and [the Provider] directly as a reseller of such goods.
- All product is considered FOB (Free On Board) at the vendor's origin and you, as customer, have directed [the Provider] to deliver as a courier.¹⁴

4. Personal Use

Products sold on [the Provider] are intended for direct-to-consumer use. No warranty is made about the qualification of products for wholesale or food-service use[.]

Although vendors prepare and assemble eggs directly into customer totes, the same cannot be said for all food products. In some instances, vendors, at the Provider's sole discretion, may consign products to the Provider "in exchange for fees to cover both the storage and the placement of product into customer totes on Vendor's behalf."¹⁵ Also unlike eggs, which only arrive at the Provider's warehouse after they have been purchased by a customer, some food products are brought to the Provider's warehouse *before* they are purchased on the Provider's e-commerce platform.¹⁶ At all times, however, vendors remain responsible for the quality and safety of food products, and must "indemnify [the Provider] against any claims which may arise from utilizing its online marketplace."¹⁷

¹⁴ See Ind. Code § 26-1-2-319(a), stating that "[w]hen the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in IC 26-1-2-504 and bear the expense and risk of putting them into the possession of the carrier."

¹⁵ Vendor Agreement, cl. 3(h).

¹⁶ See *id.* at cl. 5(a), stating that "[i]t is understood that certain foods and products have varying availability seasonally. Therefore, it is not required that the Vendor post inventory each week. It is understood, however, that the Vendor will make every effort to supply [the Provider] as products are available for consumers to purchase." See also Standard Operating Procedures for Vendors, cl. 3(a), stating that "[p]otentially hazardous foods such as meat, poultry, and heat-and-eat entrees should be pulled from the Vendor's storage frozen and may be placed into insulated delivery totes in a Solid-Chilled state at [the Provider's] facility no earlier than 6 hours before scheduled arrival at the customer's delivery location."

¹⁷ See *id.* at cl. 4(f), stating that "[The Provider] does not make any guarantees relating to quality or safety of food. This is the sole responsibility of the Vendor." See also *id.* at cl. 6, stating that "[The Provider] is not a wholesaler, retailer, merchandiser, or reseller of any products offered for sale through [its] Services. By using this website, Vendor agrees that [the Provider] is being enlisted as a courier for products Vendor sells to end consumers via this website. Vendor shall obtain and maintain, at its own expense, commercial general liability insurance ([i]ncluding products liability and/or umbrella coverage). Vendor shall, at its own cost and expense, indemnify, defend and hold harmless Market Wagon . . . from and against any and all allegations . . . asserted in any claim, action, lawsuit, investigation or proceeding."

The online marketplace and logistical services of the Provider resemble the services offered by other online marketplaces.

Courts have held that websites that offer online marketplaces are not sellers of the products. For example, the United States Court of Appeals for the Federal Circuit held that:

Amazon operates a website that offers an online marketplace for customers. Although Amazon sells some of the products available on its website, most of the products offered for sale on Amazon’s website are offered by third-party sellers. When a third-party seller uses Amazon’s website to sell a product, the seller provides information regarding the product, such as a product description, images of the product, and a price for the product. Amazon’s website then automatically generates a “product-detail page” that displays the information and identifies the seller.

Amazon also offers third-party sellers a service called “Fulfillment by Amazon,” which allows third-party sellers to take advantage of Amazon’s logistical network. When using this service, a third-party seller sends its product to an Amazon fulfillment center, where Amazon stores the product. If a customer buys the product from the third-party seller, Amazon pulls the product off the shelf, packages it, and ships it to the customer on behalf of the seller. A third-party seller even can use this service when selling products outside of Amazon’s online marketplace; for example, a third-party seller can use the service when selling the product on another website, such as eBay.

Milo & Gabby LLC v. Amazon.com, Inc., 693 F. Appx. 879, 879–81 (Fed. Cir. 2017), *cert. den.*, 138 S. Ct. 335 (2017).

Amazon has consistently maintained that it is not the *seller* of products sold on its online marketplace.¹⁸ In *Milo & Gabby LLC v. Amazon.com, Inc.*, a federal district court held that Amazon was not a *seller* under the federal Copyright Act because “third-party sellers retain full title to and ownership of the inventory sold by the third-party.”¹⁹ The United States Circuit Court of Appeals agreed, explaining that:

Though [third-party sellers] shipped its product to an Amazon warehouse for storage and Amazon boxed up and shipped the product when a sale was consummated on the website,

¹⁸ See, e.g., *Allstate New Jersey Ins. Co. v. Amazon.com, Inc.*, 2018 WL 3546197 at *9, n. 5 (D.N.J., July 24, 2018) (finding Amazon not to be a “product seller” under New Jersey Products Liability Act); *Fox v. Amazon.com, Inc.*, 2018 WL 2431628 (M.D. Tenn., May 30, 2018) (finding Amazon not to be a “seller” under the Tennessee Products Liability Act); *Erie Ins. Co. v. Amazon.com Inc.*, 2018 WL 3046243 (D. Md., Jan. 22, 2018) (finding that Amazon was not a seller under the Uniform Commercial Code of Maryland); *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496 (M.D. Pa. 2017) (finding Amazon to not be a “seller” under Pennsylvania’s Strict Products Liability Law); *McDonald v. LG Elecs. USA, Inc.*, 219 F. Supp. 3d 533 (D. Md. 2016) (finding that Amazon’s role as the “platform” for the third-party sales does not qualify it as a merchant or a seller under the Uniform Commercial Code of Maryland); *Stiner v. Amazon.com, Inc.*, 2017 WL 9751163 (Ohio Ct. Common Pleas, Sept. 20, 2017) (finding Amazon is not a “supplier” under Ohio’s products liability law), *affirmed*, 2019 WL 757822 (Ohio Ct. App., February 19, 2019).

¹⁹ 2015 WL 4394673 at * 6 (D. Wash., July 16, 2015).

Amazon never held title to the accused products. Amazon therefore could not sell the product on its own, even if done on behalf of the third-party seller. The third-party seller also could request that Amazon return the product to the third-party seller at any time.

Amazon, moreover, did not control what information or pictures were put on the product-detail page, nor did it control the price for which the product was sold. . . . Amazon, therefore, was not responsible for the actual listing of the product for sale, consummating the sale, or transferring title. Instead, Amazon merely provided an online marketplace that third-party sellers could use to sell their products and then, in some instances when the third-party sellers used the additional Amazon services, shipped the products to the final destination. Thus, while Amazon’s services made it easier for third parties to consummate a sale, the third parties remained the sellers.

Milo & Gaby LLC, 693 Fed. Appx. at 886-87 (citations omitted).

The plaintiffs in *Milo & Gabby* asserted that there are ““numerous circumstances’ in which a party can be considered a seller of a product without taking legal title to the product,” and argued that Amazon is a consignee, selling goods on behalf of third-party owners under U.C.C. § 9-319. *Id.* at 885. The Federal Circuit Court of Appeals disagreed, noting:

- (1) [the plaintiffs] did not deliver the products to Amazon “for the purpose of sale” but instead for the purpose of logistics and shipping after a sale had been made through the website; and
- (2) there is no allegation that the aggregate value of the products would have been \$1,000 or more at the time of delivery. The commentary for this section also notes that an intermediary company shipping the products, as Amazon did here, would not be involved in a consignment agreement. U.C.C. § 9-102, cmt. 14. Section 9-319 simply does not apply to this case.

Id. at 887.

The analysis in *Milo & Gabby*, as well as other cases where parties have attempted to assert that Amazon is a seller of goods on its website, further signifies that the passage of title is an indicium that a sale has occurred.

The Provider is not a retailer as defined by Ind. Code § 16-42-11-1.1(6) and 370 IAC 1-12-1(4) because it does not acquire or pass title to eggs.

A “retailer,” under the plain and ordinary meaning of Ind. Code § 16-42-11-1.1(6) and 370 IAC 1-12-1(4), is someone who sells eggs. To sell eggs is to transfer eggs to another for a consideration (*e.g.*, money).

The Provider is much like Amazon in that it does not acquire or transfer title to goods sold on its website. Rather, it offers an online marketplace, which is passive and collateral to the sale of eggs. The Provider only acquires eggs after a customer has purchased them on the

Provider's website and a vendor brings the eggs to the Provider's warehouse, sealed and labeled for delivery. Vendors control the quantity and price of their products and can stop using the Provider's services at any time, provided there is not an outstanding Pick Ticket.

While there are limited circumstances where the Provider may store products and accept a consignment of products in exchange for storage and placement fees, there is no evidence to suggest that the Provider has stored or will store eggs for the purpose of selling them at a future date. It is difficult to see how the Provider could accept eggs on consignment if title to the eggs had already been purchased and held by a customer as explicitly stated in the Provider's Conditions of Use Agreement.²⁰ Further, there is no evidence to suggest that the Provider has the requisite infrastructure in its warehouse to accept eggs under consignment and then preserve eggs against contamination and spoilage until sold. The Provider uses frozen gel packs and insulated ice containers, but only to deliver eggs maintained at or below 45 degrees Fahrenheit to consumers.²¹ Even if the Provider were to store eggs and then retrieve them from storage when purchased, the vendor would still be the seller of the eggs under the court's rationale in *Milo & Gabby LLC*. And even if the Provider were to accept eggs under consignment, it would not be a consignment under § 9-319 of the U.C.C. unless the aggregate value of the eggs would be \$1,000 or more at the time of delivery.

The fact that the Provider collects money from the customer at the time of purchase does not make it a seller. While the Provider collects money, it does so as a fee for providing access to its online marketplace. The Provider's business is to sell *access* to its online marketplace, not eggs.

The Board has the statutory authority to regulate in this area; however, the Provider is not a "retailer" as currently defined by Ind. Code § 16-42-11-1.1(6) and 370 IAC 1-12-1(4). Pursuant to Ind. Code § 16-42-11-5(b)(5), the Board can adopt rules necessary to carry out its statutory duties, but it is still unlikely that the Provider would be considered a "retailer" given its e-commerce operation.

This does not necessarily preclude the Board's interest in such a matter. The Board's statutory and regulatory schemes were not designed to address e-commerce. There may need to be amendments to address the sort of service involved in this matter. It is possible that the service at issue is the online equivalent of a "farmers' market," which would require a "farmers market retail permit" under Ind. Code § 16-42-11-9.5(a) for farmers or egg producers who use the online service. However, Ind. Code § 16-42-11-1.1(3) defines "farmers market" to mean "a common *facility* where two (2) or more farmers or growers gather on a regular basis to sell farm products, which they produce, directly to the consumer" (emphasis added). *See also* 370 IAC 1-12-1(2), defining "farmers market retailer." The commonly accepted understanding of what constitutes a "farmers' market" is "a place where farmers come to bring their products to sell to

²⁰ See Conditions of Use Agreement, stating that "[a]ll product is considered FOB (Free On Board) at the vendor's origin and you, as customer, have directed [the Provider] to deliver as a courier."

²¹ See 370 IAC 1-2-2 (stating that eggs shall be stored at 45 degrees Fahrenheit).

the general public.” *People v. Shifrin*, 101 N.Y.S.2d 613, 198 Misc. 348, *rev. on other grounds*, 94 N.E.2d 724, 725 (N.Y. 1950). In order to update the concept of a “farmers’ market” to include the online version, the definition at Ind. Code § 16-42-11-1.1(3) would have to remove “facility,” which is commonly understood to mean a physical structure, or define “facility” to be more expansive to include an online transactional equivalent. Even at that, under Ind. Code § 16-42-11-9.5(a), the “farmers market retail permit” would apply only to a “farmer or bona fide egg producer who markets directly to the consumer at a location that is not the farmer’s or producer’s own premises and is recognized as a farmers market.”

CONCLUSION

The Board cannot regulate the Provider as a retailer under Ind. Code §16-42-11 *et seq.* and Title 370 of the IAC because the Provider, although active in the chain of commerce of eggs, does not acquire or transfer title to the eggs. For the Board to regulate in this area, there would likely need to be legislative changes to its authorizing statutes.

Sincerely,

A handwritten signature in black ink, appearing to read "Curtis T. Hill, Jr.", written in a cursive style.

Curtis T. Hill, Jr.
Attorney General

David P Johnson, Chief Counsel, Advisory
William H. Anthony, Assistant Chief Counsel
Travis Lovett, Deputy Attorney General