Santa Clara Law Review

Volume 60 | Number 2 Article 1

7-1-2020

IT'S A JUNGLE OUT THERE: PUBLIC POLICY CONSIDERATIONS ARISING FROM A LIABILITY-FREE AMAZON.COM

Sprague, Robert

IT'S A JUNGLE OUT THERE: PUBLIC POLICY CONSIDERATIONS ARISING FROM A LIABILITY-FREE AMAZON.COM

Robert Sprague*

Through its website, Amazon.com retails its own products as well as those of nearly three million third-party vendors through the Amazon Marketplace. With few exceptions, courts have concluded Amazon.com should not be considered a "seller" for purposes of strict products liability for products sold through its online Marketplace. In many cases, this leaves consumers without recourse for injuries suffered due to defective products purchased through Amazon.com, since many of these third-party vendors cannot be located. This article raises the question of whether Amazon.com, as a matter of public policy, should be subject to liability since it can better absorb the cost of compensating for injuries resulting from defects. This article concludes that courts and legislatures need to recognize that traditional methods of selling products to consumers have been upended by companies such as Amazon.com and the laws need to be updated to reflect the new methods by which Amazon.com places potentially defective products into the stream of commerce.

* J.D. University of Denver College of Law; M.B.A. University of Southern California. Professor of Legal Studies in Business, University of Wyoming College of Business.

TABLE OF CONTENTS

I. INTRODUCTION

Retail giant Amazon.com, Inc. (Amazon) now accounts for roughly half of all online retail sales,[1] offering over 100 million items for sale.[2] It is inevitable that as Amazon places millions of products into the stream of commerce, some of those products are defective, causing personal injury and property damage.[3] Unlike traditional sellers, Amazon now sells a majority of its products through third party vendors taking advantage of Amazon's web-based marketplace platform. As a result, Amazon claims that it is not the actual "seller" of a majority of products sold through its site, asserting, that it is not subject to liability when those products prove to be defective. This article first, in Part II, provides an overview of Amazon's role as a U.S. retailer, with particular emphasis on its online "marketplace" in which products are sold on Amazon's website by Amazon-approved third-party sellers. In Part III, this article reviews the public policy arguments behind the evolution of strict products liability, with a special emphasis on how some states have carved

1. MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY 444 (2019). Total U.S. online retail sales as a percentage of total U.S. retail sales are projected to be around twelve percent in 2020. *See, e.g.*, J. CLEMENT, E-COMMERCE SHARE OF TOTAL RETAIL SALES IN UNITED STATES FROM 2013 TO 2021, (Statista, 2019), https://www.statista.com/statistics/379112/e-commerce-share-of-retail-sales-in-us/.

2. *See 2018 Annual Report*, AMAZON (2019), https://ir.aboutamazon.com/files/doc_financials/annual/2018-Annual-Report.pdf [hereinafter Amazon 2018 Annual Report] (stating that over 100 million items alone are eligible for free shipping through the Prime membership program).

3. *See infra* Appendix (summarizing nineteen recent products liability court decisions, with associated claims, from sixteen lawsuits naming Amazon as a defendant); *see also* Alexandra Berzon, *Hoverboards Test Amazon's Liability in Product Safety—Cases Challenge Idea that the Tech Giant Is a Mere Platform to Connect Buyers and Sellers*, WALL ST. J., Dec. 6, 2019, at A1 (stating that Amazon has faced seventeen lawsuits over defective hoverboards alone, about half of which are still active).

out exceptions for "innocent" sellers who merely pass along products within the chain of distribution from manufacturer to consumer. Part IV examines recent court rulings addressing Amazon's principal defense to strict products liability when the product was sold on Amazon's website by an Amazon third-party seller—that Amazon is not entitled to any "innocent seller" exceptions because it is not even a "seller" subject to any strict products liability laws.[4] Part IV also reviews courts' application of Amazon's immunity under the Communications Decency Act vis-à-vis product liability claims. Part V provides an analysis of whether, for public policy purposes, Amazon should be considered a "seller" under strict products liability laws for third-party sale.

II. AMAZON ONLINE MARKETPLACE

In the past twenty years, Amazon has undergone a significant transformation. In 1999, ninety-seven percent of the company's merchandise sales were its own first-party sales.[5] In 2018, fifty-eight percent of Amazon's physical gross merchandise sales were through third-party sales on its website.[6] This reportedly represented $200 billion in worldwide sales by 3 million active sellers.[7] This growth in third-party sales was no accident. According to Amazon CEO Jeff Bezos, it resulted from providing the sellers with "the very best" selling tools, fulfillment services, and access to Amazon's Prime membership program.[8] In fact, according to a report by the *Wall Street Journal*:

> Amazon doesn't make it easy for customers to see that many products aren't sold by the company. Many third-party items the *Journal* examined were listed as Amazon Prime eligible and sold through the Fulfillment by Amazon program, which generally ships items from

4. Alternative claims plaintiffs have sought against Amazon related to allegedly defective products, such as negligence and breach of warranty, are not addressed in this article. *See infra* Appendix (summarizing recent strict products liability claims actions against Amazon and associated claims).

5. *See* Amazon 2018 Annual Report, *supra* note 2 (Jeffrey P. Bezos Letter to Shareholders); *see also* Daniel Keyes, *Jeff Bezos Says Third Parties Are Besting Amazon—Here's Why That's Good for the Firm*, BUS. INSIDER (Apr. 12, 2019), https://www.businessinsider.com/jeff-bezos-notes-third-party-sellers-are-besting-amazon-2019-4.

6. Keyes, *supra* note 5.

7. Juozas Kaziukėnas, *Marketplaces Year in Review 2019*, MARKETPLACE PULSE (Dec. 16, 2019), https://www.marketplacepulse.com/articles/marketplaces-year-in-review-2019.

8. *See* Amazon 2018 Annual Report, *supra* note 2 (Jeffrey P. Bezos Letter to Shareholders); *see also* Edward J. Janger & Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller Not a Neutral Platform* 10–13 (Brooklyn Law Sch. Legal Studies Research Paper No. 612, 2019), http://ssrn.com/abstract=3467059 (describing how Amazon manages third-party sellers and sales).

> Amazon warehouses in Amazon-branded boxes. The actual seller's name appeared only in small print on the listing page.[9]

The growth of Amazon's sales have had negative societal impacts, from reports of high rates of worker injuries at Amazon's fulfillment centers,[10] to fatal traffic accidents involving drivers delivering Amazon packages,[11] to, particularly relating to third-party sellers, increasing sales of counterfeit and unsafe goods.[12] In a recent investigation, the *Wall*

---

9. Alexandra Berzon et al., *Amazon Has Ceded Control of Its Site—The Result: Thousands of Banned, Unsafe or Mislabeled Products*, WALL ST. J., Aug. 24, 2019, at B1.

10. *See, e.g.*, *Find Out What Injuries Are Like at the Amazon Warehouse that Handled Your Packages*, REVEAL (Nov. 25, 2019), https://www.revealnews.org/article/find-out-what-injuries-are-like-at-the-amazon-warehouse-that-handled-your-packages/; Letter from Elizabeth Warren, U.S. Senator, Edward J. Markey, U.S. Senator, & Joseph P. Kennedy, III, Member of Congress, to Jeffrey Bezos, CEO, Amazon.com (Dec. 20, 2019), https://www.warren.senate.gov/imo/media/doc/2019.12.20%20Letter%20to%20Mr.%20Bezos%20on%20Fall%20River%20Facility.pdf. *See also* Josh Dzieza, *A Seventh Amazon Employee Dies of COVID-19 as the Company Refuses to Say How Many Are Sick*, VERGE (May 14, 2020, 8:20 PM), https://www.theverge.com/2020/5/14/21259474/amazon-warehouse-worker-death-indiana (noting that Amazon employees have criticized the company for failing to notify employees when their colleagues were diagnosed with the virus); Press Release, Massachusetts Attorney General, AG Healey Leads Multistate Group Urging Amazon and Whole Foods to Strengthen Worker Protections During COVID-19 Pandemic (May 12, 2020), https://www.mass.gov/news/ag-healey-leads-multistate-group-urging-amazon-and-whole-foods-to-strengthen-worker.

11. *See, e.g.*, Patricia Callahan, *Amazon Pushes Fast Shipping but Avoids Responsibility for the Human Cost*, N.Y. TIMES (Sept. 6, 2019), https://www.nytimes.com/2019/09/05/us/amazon-delivery-drivers-accidents.html; Kate Cox, *Driver Training Was Reportedly Too Much of "a Bottleneck" for Amazon*, ARSTECHNICA (Dec. 26, 2019, 9:55 AM), https://arstechnica.com/tech-policy/2019/12/driver-training-was-reportedly-too-much-of-a-bottleneck-for-amazon/ (reporting internal Amazon documents indicated the company planned to implement driver safety training courses but scrapped them in order to get drivers up and running faster); Caroline O'Donovan & Ken Bensinger, *Amazon's Next-Day Delivery Has Brought Chaos and Carnage to America's Streets—But the World's Biggest Retailer Has a System to Escape the Blame*, BUZZFEED NEWS (Sept. 6, 2019), https://www.buzzfeednews.com/article/carolineodonovan/amazon-next-day-delivery-deaths. In perhaps the ultimate irony, it is reported that in 2013 Amazon's first chief financial officer, while riding her bike, was struck and killed by a delivery van carrying Amazon packages. *See* Hayley Peterson, *Amazon Executive Was Killed After Colliding with a Van Delivering the Company's Packages, Report Reveals*, BUS. INSIDER (Dec. 23, 2019), https://www.businessinsider.com/amazons-joy-covey-killed-company-delivery-van-report-2019-12.

12. *See, e.g.*, Kaity Y. Emerson, *From Amazon's Domination of E-Commerce to Its Foray into Patent Litigation: Will Amazon Succeed as "The District of Amazon Federal Court"?*, 21 N.C. J. L. & TECH. 71, 85 (2019) (stating that Amazon has a pervasive counterfeit problem); Eugene Kim, *Amazon Added a First-Ever Warning About Counterfeit Products to Its Earnings Report*, CNBC (Feb. 4, 2019, 3:43 PM), https://www.cnbc.com/2019/02/04/amazon-10k-warns-investors-about-counterfeit-problem-for-first-time.html (reporting that for the first time Amazon listed counterfeit goods as a risk factor in a recent earnings report; reporting also that the problem could get worse as Amazon shifts more of its sales to third-party sellers); Timothy Puko & Alex Leary, *U.S. Considers Censuring Amazon Sites*, WALL ST. J., Dec. 7, 2019, at B3 (reporting that the Trump administration is considering adding some of Amazon's overseas operations to a list of global marketplaces known for counterfeit goods).

Street Journal found 4,152 items for sale on Amazon's website that have been declared unsafe by federal agencies, are deceptively labeled, or are banned by federal regulators.[13] After Amazon was informed of the products identified by the *Wall Street Journal*, nearly half remained on its website.[14] In addition, a wave of Chinese merchants have joined Amazon's millions of third-party sellers worldwide.[15] A new product listing is reportedly uploaded to Amazon from China every 1/50th of a second, many of them mislabeled, defective, or counterfeit.[16] Some third-party sellers are literally selling garbage on the Amazon website.[17] The *Wall Street Journal*'s conclusion is that Amazon either has lost control of its massive platforms or declines to control them.[18] At the same time, for many third-party sellers, Amazon's actions can have tremendous impacts on their sales.[19] For many of these sellers, Amazon controls the prices they can charge, forbids sales to middlemen, and compels the sellers to buy ads on Amazon's website.[20]

---

13. *See* Berzon et al., *supra* note 9 (noting further that among the products identified, at least 2,000 were for toys and medications that lacked warnings about health risks to children).

14. *See id.* (noting further that when Amazon did take down listings for banned items, the same products sometimes reappeared under new accounts).

15. *See* Jon Emont, *Amazon's China Push Puts Consumers at Risk—Chinese Factories Wooed by Retailer Are Big Source of Problem Listings*, WALL ST. J., Nov. 12, 2019, at A1.

16. *See id.*; *see also* Ari Levy, *Amazon's Chinese Counterfeit Problem Is Getting Worse*, CNBC (July 8, 2016, 5:03 PM), https://www.cnbc.com/2016/07/08/amazons-chinese-counterfeit-problem-is-getting-worse.html; Casey Hopkins, *Amazon Is Complicit with Counterfeiting (Updated)*, ELEVATIONLAB (Mar. 1, 2018), https://www.elevationlab.com/blogs/news/amazon-is-complicit-with-counterfeit-sellers# ("[W]hen Chinese counterfeiters tool up and make copies of your product, send that inventory to Amazon, then overtake the real product's buy box by auto-lowering the price—it's a real problem. Customers are *unknowingly* buying crap versions of the product, while both Amazon and the scammers are profiting, and the reputation you've built goes down the toilet.").

17. *See* Khadeeja Safdar et al., *Consumers Might Be Buying Trash on Amazon—Literally—Dumpster Divers Say They Sell Discards on the Site. We Did, Too*, WALL ST. J., Dec. 18, 2019, at A1; *see also* Joshua Rosario, *Online Order of Diapers Arrives at Jersey City Home—But They Were Already Soiled*, JERSEY J. (Jan. 10, 2020), https://www.nj.com/hudson/2020/01/online-order-of-diapers-arrives-at-jersey-city-home-but-they-were-already-soiled.html (reporting that one of two boxes of diapers purchased from Amazon contained soiled diapers).

18. *See* Berzon et al., *supra* note 9.

19. *See* Karen Weise, *Prime Power: How Amazon Squeezes the Businesses Behind Its Store*, N.Y. TIMES, https://www.nytimes.com/2019/12/19/technology/amazon-sellers.html (last visited Jan. 10, 2020).

20. *See id.* In fact, Amazon determines whether an offering by a third party is eligible to be displayed as a featured offer, sometimes will credit customers' accounts when it believes a third-party seller's price is too high, and suspend third-party sellers without providing detailed reasons for the suspension. *See Online Platforms and Mkt. Power, Part 2: Innovation and Entrepreneurship, Before the Subcomm. on Antitrust, Com., and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 23, 25, 27–28 (2019) (Amazon Responses to Cicilline Questions for the Record); *see also* Annie Palmer, *Amazon Lifts FedEx Ground Delivery Ban for Sellers, FedEx Shares Rise*, CNBC (Jan. 14, 2020, 7:08 PM), https://www.cnbc.com/2020/01/14/amazon-lifts-fedex-ground-delivery-ban-for-sellers.html

Should Amazon, which serves as an integral part of the overall marketing and selling of goods, bear the cost of injuries resulting from defective products sold through its website?[21] Or should it be immune from liability because it merely passes along defective products from manufacturer to consumer?

III. STRICT PRODUCTS LIABILITY LAW AND THE "INNOCENT SELLER" DEFENSE

Products liability law is rooted in common law.[22] In the 1916 case of *MacPherson v. Buick Motor Company*,[23] the New York Court of Appeals extended a manufacturer's liability for negligence to consumers who did not have a direct relationship with the manufacturer. (Here, MacPherson purchased his Buick from a dealer, not directly from Buick.[24]) Writing for the majority, Justice Benjamin Cardozo concluded that where a product is reasonably certain to pose a risk to others beyond the purchaser, the manufacturer has a duty of care—independent of contract.[25] Over the next fifty years, courts began imposing strict liability against manufacturers based mainly on three public policy considerations outlined by William Prosser in *The Assault Upon the Citadel (Strict Liability to the Consumer)*: (1) the law should protect consumers injured by defective products who are helpless to protect themselves; (2) suppliers, by placing goods upon the market, represent to the public that the goods are suitable and safe for use—"The supplier has invited and solicited the use; and when it leads to disaster, he should not be permitted to avoid the responsibility by saying that he has made no contract with the consumer"; and (3) it is much more efficient for any supplier in the

(reporting that in December 2019, Amazon had suspended third-party sellers' access to FedEx's ground and home delivery services for Prime orders).

21. *Cf.* Vandermark v. Ford Motor Co., 391 P.2d 168, 171-72 (Cal. 1964) (explaining the "integral" role that retailers play in "bear[ing] the cost of injuries resulting from defective products").

22. Frances E. Zollers et al., *Looking Backward, Looking Forward: Reflections on Twenty Years of Product Liability Reform*, 50 SYRACUSE L. REV. 1019, 1021 (2000).

23. 217 N.Y. 382, 384-85, 94–95 (1916) (affirming judgment in favor of purchaser of automobile injured when wheel collapsed).

24. *Id.* at 384.

25. *See id.* at 389; *see also* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100 (1960) ("In 1916 there came the phenomenon of the improvident Scot who squandered his gold upon a Buick, and so left his name forever imprinted upon the law of products liability. Cardozo, wielding a mighty axe, burst over the ramparts, and buried the general rule [of nonliability to persons not in privity] under the exception."); Zollers et al., *supra* note 22, at 1021 (noting that *MacPherson* set the stage for products liability law to develop).

distribution chain to be "liable directly to the ultimate user."[26] As noted by Zollers et al.:

> The move to strict liability incorporates the faultless characteristic of breach of warranty without all the baggage of contract law such as privity and the ability to bargain away warranties. It simply holds a manufacturer and any other distributor of the product strictly liable if a product it either produced or sold contains a defect that causes injury.[27]

Strict products liability was ultimately expressed in the *Restatement (Second) of Torts*, § 402A:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.[28]

This rule applies even if: "(2) . . . (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."[29] Section 402A, which reflects products liability law in a majority of states,[30] "eliminate[d] privity so that a user or consumer, without having to establish negligence, could bring an action against a manufacturer, as well as against any other member of a distributive chain that had sold a product containing a manufacturing defect."[31]

---

26. *See* Prosser, *supra* note 25, at 1122–24. Zollers et al. note that for a while, courts applied warranty theories as a bridge between negligent and strict products liability. *See* Zollers et al., *supra* note 22, at 1022. An additional public policy argument is that strict products liability will incentivize safe products. *See* Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) ("It is to the public interest to discourage the marketing of products having defects that are a menace to the public."); Ryan Bullard**,** *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J. L. & TECH. ON. 181, 191–92 (2019).

27. Zollers et al., *supra* note 22, at 1022 ("It is irrelevant whether someone in breach of contract negligently failed to fulfill his or her promises. The only relevant issue is whether the promises were broken.").

28. RESTATEMENT (SECOND) OF TORTS: SPECIAL LIABILITY OF SELLER OF PRODUCT FOR PHYSICAL HARM TO USER OR CONSUMER § 402A (AM. LAW INST. 1965) [hereinafter § 402A].

29. *Id.*

30. *See* Adam Feeney, Note, *In Search of a Remedy: Do State Laws Exempting Sellers from Strict Product Liability Adequately Protect Consumers Harmed by Defective Chinese-Manufactured Products?*, 34 J. CORP. L. 567, 570 (2009).

31. *Introduction* to RESTATEMENT (THIRD) TORTS: PROD. LIAB., at 3 (AM. LAW INST. 1998).

Echoing Prosser's second public policy argument,[32] since all parties have participated in and profited from the product's distribution, "they should not be heard to complain if they are held responsible for defects in the products they sell when the plaintiff has no means of recovery from the manufacturer."[33] Holding these participants, including non-manufacturer sellers, strictly liable promotes "the public policy that an injured party not have to bear the cost of his injuries simply because the product manufacturer is out of reach."[34] As such, this public policy argument is strongest when the product manufacture is bankrupt, cannot be identified, or is not subject to the court's jurisdiction or service of process;[35] and it is weakest when the plaintiff does have an adequate remedy against the manufacturer.[36]

When Prosser argued that a "privity-less" strict liability regime is more efficient,[37] he was arguing from the consumer's perspective—eliminating the need to pursue multiple lawsuits until the manufacturer was finally held liable for the damages caused by its defective product.[38] But non-manufacturer sellers see an *in*efficiency—they must engage in two lawsuits: the first to defend against the injured consumer; and (assuming the consumer prevails) a second action seeking indemnity from the manufacturer.[39] Stronger arguments against holding non-manufacturer sellers strictly liable are that they simply did not create the defect in the product and they "are ill-equipped to defend a product which they neither designed nor manufactured."[40] In particular, they "usually act merely as conduits of the product between the manufacturer and the consumer."[41]

By the end of the 1970s, a majority of states had adopted revisions to their products liability statutes that limited the strict liability of non-

---

32. *See supra* text accompanying note 26.

33. Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 BAYLOR L. REV. 1031, 1036 (2003).

34. Dunn v. Kanawha City. Bd. of Educ., 459 S.E.2d 151, 157 (W. Va. 1995); *see also* Samuel Friedland Family Enters. v. Amoroso, 630 So. 2d 1067, 1068 (Fla. 1994) ("The underlying basis for the doctrine of strict liability is that those entities within a product's distributive chain who profit from the sale or distribution of the product to the public, rather than an innocent person injured by it, should bear the financial burden of even an undetectable product defect." (alteration and internal quotation marks omitted)).

35. *See* Sachs, *supra* note 33, at 1037.

36. *See id.*

37. *See supra* text (third public policy argument) accompanying note 26.

38. *See* Prosser, *supra* note 25, at 1123–24.

39. *See* Feeney, *supra* note 30, at 571–72 (citing Frank J. Cavico, Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 NOVA. L. REV. 213, 229–30 (1987)).

40. Frank J. Cavico, Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 NOVA. L. REV. 213, 227–28 (1987).

41. *Id.* at 227.

manufacturer sellers.[42] Frank Cavico categorizes the limitations into four basic categories: Indemnification Statutes allow the plaintiff to recover against a non-manufacturer product seller on a strict liability theory, but then require the manufacturer to indemnify the seller;[43] "Sealed Container" Statutes generally hold a non-manufacturer seller not liable if the product was sold in its original condition or package, no express warranties were made, and the seller did not have knowledge that the product was defective or unreasonably dangerous;[44] Absolute Bar Statutes absolutely exempt non-manufacturer sellers from strict products liability;[45] and Partial Bar Statutes generally exempt non-manufacturer sellers from strict product liability if the manufacturer can be identified and is within the court's jurisdiction.[46] Generally, these limitations to liability will not apply if the seller knew or should have known of the

42. *See id.* at 237. These revisions were primarily based on a proposed Model Uniform Products Liability Act. *See id.* at 233–37 (analyzing the Model Uniform Products Liability Act); Feeney, *supra* note 30, at 572–73 (providing overview of the Model Uniform Products Liability Act); *see also* Zollers et al., *supra* note 22, at 1023–32 (analyzing attempts to enact a federal products liability act).

43. *See* Cavico, *supra* note 40, at 237 (citing *e.g.*, ARIZ. REV. STAT. ANN. § 12-684A (1982)); *see also* 12 OKLA. STAT. ANN. § 832.1 (West 2004); MISS. CODE ANN. § 11-1-63(g) (West 2014).

44. *See* Cavico, *supra* note 40, at 238 (citing *e.g.*, KY. REV. STAT. ANN. § 411.340 (Supp. 1986)); *see also* DEL. CODE ANN. tit. 18, § 7001 (West 1995).

45. *See* Cavico, *supra* note 40, at 238–39 (citing *e.g.*, NEB. REV. STAT. ANN. § 25-21,181 (1985); *see, e.g.*, S. D. CODIFIED LAWS § 20-9-9 (1979) (unless the seller knew, or, in the exercise of ordinary care, should have known, of the defective condition of the final product); *see also* GA. CODE ANN. § 51-1-11.1 (West 1987); MISS. CODE ANN. § 11-1-63(h).

46. *See* Cavico, *supra* note 40, at 239–40 (citing *e.g.*, COLO. REV. STAT. ANN. § 13-21-402(1) (1986); *see also* Feeney, *supra* note 30, at 574 (discussing state statutes that hold non-manufacturer sellers strictly liable where the court cannot obtain jurisdiction over the manufacturer or where the manufacturer is insolvent); *see, e.g.*, MINN. STAT. ANN. § 544.41(Subd. 2)(3) (West 1980); WASH. REV. CODE ANN. § 7.72.040(2)(a) (West 1991); IND. CODE ANN. § 34-20-2-4 (West 1998); N.C. GEN. STAT. ANN. § 99B-2(a) (West 1996) (providing non-manufacturing seller immunity from strict liability for sealed container unless manufacturer is not subject to court's jurisdiction); OHIO REV. CODE ANN. § 2307.78(B)(2) (West 2001) (providing non-manufacturing "supplier" subject to strict liability where, inter alia, manufacturer is insolvent or not subject to courts' jurisdiction); TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a)(7) (West 2006) (providing non-manufacturing seller subject to strict liability where, inter alia, manufacturer is insolvent or not subject to courts' jurisdiction); W. VA. CODE ANN. § 55-7-31(b)(12)–(13) (West 2017); MO. ANN. STAT. § 537.762(2) (West 2019) (providing dismissal of non-manufacturer seller where manufacturer is before court and from whom total recovery may be had); N.J. STAT. ANN. § 2A:58C-9(c)(1) (West 1995) (providing non-manufacturing seller can escape strict product liability by identifying manufacturer); ALA. CODE § 6-5-521(d) (1979) (requiring plaintiff to dismiss non-manufacturing seller if manufacturer can be identified and an action is commenced against it); Pierce v. Amazon.com Serves., Inc., No. 4:19-CV-393-KOB, 2020 WL 374836, at *1 (N.D. Ala. Jan. 23, 2020) (applying ALA. CODE § 6-5-521(d)); RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 1, cmt. e (AM. LAW INST. 1998) (discussing application of innocent seller provisions).

defect or if the seller somehow created the defect that was a substantial cause of the incident that gave rise to the action.[47]

As the preceding review demonstrates, a number of states have enacted statutes that potentially immunize non-manufacturer sellers from strict products liability where the seller merely passes the product along the distribution chain from manufacturer to consumer. For the most part, though, these statutes fail to clarify what qualifies as a "seller" under strict products liability laws.

IV. STRICT PRODUCTS LIABILITY ACTIONS AGAINST AMAZON BASED ON THIRD-PARTY SALES

In a series of products liability cases brought against Amazon, which had facilitated the sale of an allegedly injurious defective product by a third party, the key consideration of the courts was *not* whether Amazon was an immunized seller, but whether Amazon should even qualify as a "seller" of the product in question.[48] The analysis of cases reveals that courts have been inconsistent in settling this question.

A. Cases Finding Amazon Is Not a "Seller"

In *McDonald v. LG Electronics USA, Inc.*,[49] the plaintiff alleged injuries suffered due to defective rechargeable batteries.[50] The batteries, manufactured by LG Electronics, were sold and shipped by Safetymind, an Amazon third-party seller.[51] The district court pointed out that under Maryland law, "[i]rrespective of whether the theory of recovery is breach of warranty, negligence or strict liability, a plaintiff must show 'three product litigation basics'—defect, attribution of defect to seller, and a

47. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-684(A); DEL. CODE ANN. tit. 18, § 7001(b); KY. REV. STAT. ANN. § 411.340; MINN. STAT. ANN. § 544.41(Subd. 3); MISS. CODE ANN. § 11-1-63(h); N.C. GEN. STAT. ANN. § 99B-2(a); N.J. STAT. ANN. § 2A:58C-9(d); OHIO REV. CODE ANN. § 2307.78(B); S. D. CODIFIED LAWS § 20-9-9(a); TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a); W. VA. CODE ANN. § 55-7-31(b). *See generally* Sachs, *supra* note 33 (analyzing statutes immunizing non-manufacturer sellers from strict product liability); *see also infra* Appendix (summarizing statutes immunizing non-manufacturer sellers from strict product liability).

48. As Amazon's third-party sales volume exceeded fifty percent of total consumer sales, so also did the products liability claims against Amazon begin. *See* Amazon 2018 Annual Report, *supra* note 2 (reflecting third-party sales exceeding fifty percent of Amazon's consumer sales beginning in 2015). *See, e.g.*, Mavromati v. Spot, LLC, No. CV 14-03333 SJO (Ex), 2016 WL 4820634, at *9 (C.D. Cal. Jan. 29, 2016) (dismissing products liability claim against Amazon and other defendants due to plaintiff's failure to raise a genuine issue whether defect in product caused death; first apparent reported products liability claim against Amazon related to a third-party sale).

49. 219 F. Supp. 3d 533 (D. Md. 2016).

50. *See id.* at 535.

51. *See id.*

causal relationship between the defect and the injury."[52] The plaintiff failed to establish the second element, according to the court, because the plaintiff alleged LG Electronics and Safetymind, but not Amazon, had placed the defective product in the stream of commerce.[53] Finally, the court dismissed the plaintiff's breach of implied warranty claim, concluding Amazon was not a merchant under Maryland's Uniform Commercial Code (UCC): "Here, Amazon's role as the 'platform' for the third-party sales does not qualify it as a merchant or a seller under Maryland's UCC."[54]

The notion of what constitutes a seller for purposes of products liability law was later emphasized by the Fourth Circuit Court of Appeals, applying Maryland law. In *Erie Insurance Company v. Amazon.com, Inc.*,[55] a consumer purchased an LED headlamp on Amazon's website, though it was sold by Dream Light and fulfilled by Amazon.[56] After the purchaser gave the headlamp to a friend as a gift, the friend's house caught fire allegedly due to defective batteries in the headlamp.[57] As described by the court, Amazon's involvement in the transaction consisted of receiving the headlamp from Dream Light, storing the headlamp in its warehouse, retrieving the headlamp from its warehouse, shipping the headlamp to the purchaser via UPS, collecting the purchase price, and forwarding the purchase price to Dream Light, less a service fee.[58] Dream Light itself set the price for the headlamp and created the content of the product's description used on the Amazon site.[59]

The plaintiff argued that Amazon, through its fulfillment services program, took so much control over the transaction that it effectively became the seller and therefore became responsible under theories of negligence, breach of warranty, and strict liability in tort.[60] The court

---

52. *See id.* at 541 (quoting Laing v. Volkswagen of Am., Inc., 949 A.2d 26, 39 (Md. Ct. Spec. App. 2008) (citing Ford Motor Co. v. Gen. Accident Ins. Co., 779 A.2d 362, 370 (Md. 2001))) (internal quotation marks omitted). Although the *McDonald* court initially categorized McDonald's claim as for products liability, it focused primarily on counts of negligence and breach of implied warranty. *See id.* at 541–42.

53. *See id.* at 542.

54. *Id.* (citing MD. CODE ANN., COMM. LAW § 2-314(1) (1975) (defining a merchant as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practice or goods involved in the transaction")).

55. 925 F.3d 135 (4th Cir. 2019).

56. *See id.* at 138.

57. *See id.*

58. *See id.*

59. *See id.*

60. *Id.* at 140. According to the plaintiff, "[t]he purchaser ordered from Amazon, using Amazon's website. The purchaser paid Amazon directly. Amazon packaged the product, in Amazon's warehouse, delivered it to the carrier, assumed the risk of credit card fraud, received payment, collected Amazon's fee, and presumably forwarded any remaining balance to Dream Light. The purchaser never had direct contact—or, really, privity of any sort—with

rejected the plaintiff's argument, stating it found "no indication that the term 'seller,' as used in Maryland's products liability law, should be understood in any manner other than its ordinary meaning[]"—a "seller" sells goods, and a "sale" means passing title from the seller to the buyer for a price.[61] But the court adopted this interpretation of Maryland law with very little persuasive precedent. It cited *McDonald* for the proposition that Amazon was not a seller,[62] but the *McDonald* court noted that it did so because the plaintiff's complaint failed to list Amazon as a party that had placed the allegedly defective product in the stream of commerce.[63] The *Erie* court also cited a Pennsylvania Supreme Court holding that auctioneers are not "sellers" for purposes of § 402A;[64] a Federal Circuit Court of Appeals holding that Amazon was not liable as a seller for copyright infringement of a pillowcase sold by a third-party seller on Amazon's website;[65] and *Oberdorf v. Amazon.com, Inc.*,[66] a federal district court case holding Amazon was not a "seller" under Pennsylvania law, a finding that was later vacated by the Third Circuit Court of Appeals.[67]

Amazon was sued under Tennessee's Products Liability Act after the batteries in a hoverboard, purchased through Amazon and given as a 2015 Christmas present, caused a fire that consumed the plaintiff's house.[68] Although the plaintiff purchased the hoverboard through

---

Dream Light. The contract was between him and Amazon, not between him and Dream Light."

61. *Erie Ins. Co.*, 925 F.3d at 141 (citing MD. CODE ANN., COMM. LAW §§ 2-103(1)(d), 2-106); *accord* Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018) (stating that, under New York Law, failure to take title to a product places an entity outside the chain of distribution). *But see* Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738 (FLW) (LHG), 2018 WL 3546197, at *25-26 (D.N.J. July 24, 2018) (citing Laidlow v. Hariton Machinery Co., Inc., 335 N.J. Super. 330, 337 (App. Div. 2000)) (stating that holding title is not a requirement before strict liability will be imposed under New Jersey law); *see also* RESTATEMENT (THIRD) TORTS: PROD. LIAB. § 20(a) ("One sells a product when, in a commercial context, *one transfers ownership* thereto either for use or consumption or for resale leading to ultimate use or consumption." (emphasis added)).

62. *See Erie Ins. Co.*, 925 F.3d at 141 (citing *McDonald*, 219 F. Supp. 3d at 541–42).

63. *See McDonald*, 219 F. Supp. 3d at 542 (finding also that Amazon's role as a platform provider did not qualify it as a merchant under Maryland's UCC); *see supra* notes 52–54 and accompanying text.

64. *See Erie Ins. Co.*, 925 F.3d at 141 (citing Musser v. Vilsmeier Auction Co., 562 A.2d 279, 283 (Pa. 1989)).

65. *See id.* (citing Milo & Gabby LLC v. Amazon.com, Inc., 693 F. App'x 879, 886–88 (Fed. Cir. 2017)).

66. 295 F. Supp. 3d 496, 501 (M.D. Pa. 2017).

67. 930 F.3d 136 (3rd Cir. 2019), *reh'g on banc granted, opinion vacated*, 936 F.3d 182 (3rd Cir. 2019).

68. Fox v. Amazon.com, Inc., No. 3:16–cv–03013, 2018 WL 2431628, at *1 (M.D. Tenn. May 30, 2018), *aff'd in part, rev'd in part*, 930 F.3d 415, 421 (6th Cir. 2019) (noting the parties did not dispute that the hoverboard's lithium-ion battery pack caused the fire).

Amazon's website, Amazon contended that the actual seller was third-party seller W2M Trading (also known as W–Deals), located in China.[69] The district court noted that Amazon did not make any statements or representations about the hoverboard, develop the product detail page content on its webpage, make any representations to the plaintiff about the hoverboard before or at the time of purchase, or design or manufacture the hoverboard.[70]

According to the court, nearly all of Amazon's hoverboard sales were through third-party sellers, earning Amazon over $200 million between September 2015 through November 2015.[71] In November 2015, Amazon began investigating the safety of hoverboards after learning that a hoverboard sold by W–Deals had burst into flames.[72] By December 10, 2015, Amazon had reports of at least seventeen complaints of hoverboard fires or explosions in the United States alone from hoverboards sold on Amazon's website.[73] On that date, Amazon decided to suspend all international sales of hoverboards, and on December 12, sent "non-alarmist" emails to U.S. Amazon hoverboard purchasers stating, "There have been news reports of safety issues involving products like the one you purchased that contain rechargeable lithium-ion batteries."[74]

Amazon argued it is not a "seller" under the Tennessee Products Liability Act ("TPLA")[75] "because it did not hold title to the product, set the price of the product, develop the product offer, or ship the product directly to [the p]laintiff."[76] The TPLA immunizes sellers from liability unless:

(1) The seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the alleged harm for which recovery of damages is sought;

(2) Altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought;

(3) The seller gave an express warranty . . . ;

(4) The manufacturer or distributor of the product or part in question is not subject to service of process in this state and the long-arm statutes of Tennessee do not serve as the basis for obtaining service of process; or

69. *Id.* at *2.
70. *Id.*
71. *Id.* at *3.
72. *Fox*, 2018 WL 2431628, at *4.
73. *Id.*
74. *Id.* at *4–5.
75. TENN. CODE ANN. §§ 29-28-101 to 29-28-108 (1978).
76. *Fox*, 2018 WL 2431628, at *6.

(5) The manufacturer has been judicially declared insolvent.[77]

The plaintiff sought to hold Amazon liable under exception (4) above because it was undisputed that the manufacturer of the hoverboard at issue was unknown.[78]

The district court therefore turned to whether Amazon qualified as a "seller" under the TPLA, which states that a " ' [s]eller' includes a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale, or for use or consumption."[79] Amazon argued it was not a "seller" under the TPLA "because it did not hold title to the product, set the price of the product, develop the product offer, or ship the product directly to the plaintiff."[80] Alternatively, the plaintiff argued Amazon was "a 'co-seller' of the hoverboard, along with W2M Trading, and it act[ed] as a 'retailer' or 'distributor' of the product because it exercised complete control over the sale and kept the entire purchase price paid by [the plaintiff]."[81]

Since "retailer" and "distributor" are not defined by the TPLA, the court looked to both the *Merriam–Webster* and *Black's Law* dictionaries, concluding Amazon was a service provider, not a "seller":

> Amazon did not hold title to the product sold here, did not set the price of the product, and did not create the text describing or making representations about the product. Amazon's role in the transaction was to provide a mechanism to facilitate the interchange between the entity seeking to sell the product and the individual who sought to buy it.[82]

As in *Erie Insurance Company v. Amazon.com, Inc.*,[83] the *Fox* district court supported its decision with the later-vacated district court holding of *Oberdorf v. Amazon.com, Inc*.[84] that Amazon was not a "seller" under Pennsylvania law.[85] Finally, the *Fox* district court concluded that Amazon had no duty to warn the plaintiff about the

77. TENN. CODE ANN. § 29-28-106 (1978).

78. *Fox*, 2018 WL 2431628, at *6.

79. TENN. CODE ANN. § 29-28-102(7) (" ' Seller' also includes a lessor or bailor engaged in the business of leasing or bailment of a product.").

80. *See Fox*, 2018 WL 2431628, at *6.

81. *See id.* The plaintiff also argued Amazon was " ' an entity engaged in the business of selling a product.' " *Id.*

82. *Id.* at *7; *accord* Stiner v. Amazon.com, Inc., 120 N.E.3d 885, 895 (Ohio Ct. App. 2019), *motion for reconsideration granted*, 129 N.E.3d 461 (Ohio Sup. Ct. 2019).

83. 925 F.3d at 144; *see also supra* notes 66–67 and accompanying text.

84. 295 F. Supp. 3d at 496.

85. 930 F.3d 136, 153 (3rd Cir. 2019), *reh'g on banc granted, opinion vacated*, 936 F.3d 182 (3rd Cir. 2019). The *Fox* court also cited *McDonald v. LG Elecs, USA, Inc.*, 219 F. Supp. 3d 533 (D. Md. 2016), in support of its conclusion that Amazon was not a seller. *See Fox*, 2018 WL 2431628, at *8; *see also supra* notes 49–54 and accompanying text.

hoverboard hazards since it was neither the seller nor the manufacturer, but merely a facilitator of the hoverboard's sale.[86]

On appeal,[87] the Sixth Circuit Court of Appeals broadened the definition of "seller" under the TPLA beyond just whether title had transferred.[88] The appeals court found persuasive and adopted the plaintiff's argument that the definition of "seller" should encompass "any individual or entity regularly engaged in exercising sufficient control over a product in connection with its sale, lease, or bailment, for livelihood or gain."[89] In particular, the court believed this definition was consistent with the remedial purpose of the TPLA: "A primary purpose of [the TPLA] is to ensure that an injured consumer may maintain a strict liability action against whomever is most likely to compensate him for his injuries."[90] However, in applying the facts to the case, the appeals court concluded that Amazon did not exercise sufficient control over the hoverboard to be deemed a "seller" under the TPLA: Amazon "did not choose to offer the hoverboard for sale, did not set the price of the hoverboard, and did not make any representations about the safety or specifications of the hoverboard on its marketplace."[91]

---

86. *See Fox*, 2018 WL 2431628, at *10. The *Fox* district court also ruled against the plaintiff's claim under the Tennessee Consumer Protection Act, concluding the plaintiff had not demonstrated any losses as a result of unfair or deceptive practices by Amazon. *See id.* at *14.

87. Fox v. Amazon.com, Inc., 930 F.3d 415 (6th Cir. 2019).

88. In particular, the court noted that the TPLA's definition of " 'seller' expressly includes a 'lessor' and a 'bailor,' neither of which necessarily transfers title to the products they lease or bail." *Id.* at 423; *see also* TENN. CODE ANN. § 29-28-102(7) (1978).

89. *Fox*, 930 F.3d at 423. The *Fox* appeals court also cited cases that considered or adopted constructions of "seller" that "hinge on the degree of control exercised over a product." *Id.* at 425 (citing *Erie Ins. Co.*, 925 F.3d at 139; Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 776–77 (N.D. Ill. 2019); Carpenter v. Amazon.com, Inc., No. 17-03221-JST, 2019 WL 1259158, at *4 (N.D. Cal. Mar. 19, 2019); *Eberhart*, 325 F. Supp. 3d at 398–99; *Allstate N.J. Ins. Co.*, 2018 WL 3546197, at *7–10; *Oberdorf*, 295 F. Supp. 3d at 498; *Stiner*, 120 N.E.3d at 895).

90. *Id.* at 424 (citing Owens v. Truckstops of Am., 915 S.W.2d 420, 432 (Tenn. 1996)) (internal quotation marks omitted).

91. *Id.* at 425 (citing *Garber*, 380 F. Supp. 3d at 776–77, 780–81; *Carpenter*, 2019 WL 1259158, at *5; *Stiner*, 120 N.E.3d at 895); *accord Allstate N.J. Ins. Co.*, 2018 WL 3546197, at *12 (concluding policy argument of shifting the risk up the distribution chain cannot alone transform Amazon into a "product seller"). While affirming the district court's dismissal of the plaintiff's Tennessee Consumer Protection Act claim (*see Fox*, 930 F.3d at 428–29), the appeals court reversed the district court's dismissal of the plaintiff's negligent failure to warn claim against Amazon: because the December 12, 2015 email did not inform hoverboard purchasers of any of the actions Amazon had taken to evaluate the dangers posed by hoverboard, that the reported safety issues included a risk of fire or explosion, and that Amazon had ceased all hoverboard sales worldwide, there was a genuine issue of fact whether the plaintiff would have relied on those facts. *See Fox*, 930 F.3d at 426–28; *cf.*, Love v. Weecoo (TM), 774 F. App.x 519 (11th Cir. 2019) (reversing dismissal of plaintiff's negligent failure to warn claim against Amazon on basis that it could reasonably be inferred Amazon had constructive knowledge of the potential risk of fire associated with hoverboard at issue at time of sale).

B. Cases Finding Amazon May Be a "Seller"

In *State Farm Fire and Casualty Company v. Amazon.com, Inc.*,[92] the District Court for the Western District of Wisconsin stated that the case's key dispute was whether Amazon qualified as a "seller" or "distributor" under Wisconsin's products liability statute.[93] Noting that Wisconsin's statute specifies when sellers or distributors are *not* liable, rather than what entities are liable, the district court concluded the purpose of the statute "was to limit *when* a plaintiff may target a nonmanufacturer defendant, but not *who* may be held liable as a nonmanufacturer defendant."[94] Applying Wisconsin law, the district court also categorically rejected that a formal transfer of ownership is required to hold an entity strictly liable for a defective product,[95] accepting the principle that strict liability derives from the act of putting the defective product into the stream of commerce.[96]

Acknowledging that Wisconsin law does not impose liability if an entity plays only a peripheral role in putting a defective article into the stream of commerce, the district court focused on whether "Amazon [is] a peripheral entity like an auctioneer or . . . an integral part of the chain of distribution more akin to the lessor in *Kemp*[.]"[97] The district court concluded that Amazon was an integral part of the chain of distribution—"an entity well-positioned to allocate the risks of defective products to the participants in the chain."[98] The court then summarized the facts supporting this conclusion:

> Amazon provided the only conduit between XMJ, the Chinese [third-party] seller, and the American marketplace. Without Amazon, XMJ products would not be available at all in Wisconsin. Amazon did not directly set the price for the faucet adapter, but it set the substantial fees that it would retain for itself, so it was positioned to insure against the risk of defective products. As part of the [Fulfillment by Amazon] agreement, Amazon required XMJ to register each product, and Amazon reserved the right to refuse to sell any of them. So Amazon was in a position to halt the flow of any defective goods of which it became aware. And Amazon took steps to protect itself by requiring XMJ to indemnify Amazon. Amazon also implicitly

92. 390 F. Supp. 3d 964 (W.D. Wis. 2019).

93. *See id.* at 969. Absent the satisfaction of certain conditions, in Wisconsin, "[a] seller or distributor of a product is not liable based on a claim of strict liability to a claimant." WIS. STAT. ANN. § 895.047(2) (2011).

94. *State Farm*, 390 F. Supp. 3d at 970.

95. *Id.* at 972 (citing Kemp v. Miller, 453 N.W.2d 872, 879 (1990)).

96. *Id.*

97. *Id.*

98. *Id.*

> represented that the adapter was safe by listing it for sale among its own products, and it expressly guaranteed timely delivery in good condition. And, under Amazon's A to Z guarantee, Amazon agreed to process returns and refunds if XMJ did not respond. Amazon took on all the roles of a traditional—and very powerful—reseller/distributor. The only thing Amazon did not do was take ownership of XMJ's goods.[99]

In December 2014, Heather Oberdorf purchased a retractable dog leash from an Amazon third-party seller identified as "The Furry Gang."[100] While walking her dog, using the leash on January 12, 2015, "Oberdorf suffered severe and permanent injuries to her left eye when the retractable leash malfunctioned, snapping backwards and hitting her in the face."[101] "Following the accident, the plaintiffs" (Heather and Michael Oberdorf) were "unable to make contact with The Furry Gang or with the manufacturer of the retractable leash," but they did sue Amazon for strict products liability under § 402A.[102] The District Court for the Middle District of Pennsylvania immediately addressed the issue of whether Amazon should be considered a "seller" under Pennsylvania's adoption of § 402A.[103] Noting that "[t]he Pennsylvania Supreme Court has not ruled on whether an online sales listing service like Amazon Marketplace qualifies as a 'seller' under § 402A[,]"[104] the court principally relied on a Pennsylvania Supreme Court case, *Musser v. Vilsmeier Auction Company, Inc.*,[105] which held an auctioneer was not a "seller" under § 402A.[106] Analogizing the Amazon Marketplace Service with a newspaper's classified advertisements ("connecting potential consumers with eager sellers in an efficient, modern, streamlined manner"),[107] the district court concluded that subjecting Amazon to strict products liability would not further the purpose § 402A[108]—"*i.e.*, the 'special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger

99. *Id.*
100. *Oberdorf*, 295 F. Supp. 3d at 498.
101. *Id.* at 497.
102. *Id.* at 498–500.
103. *See id.* at 500-01 ("Although the Pennsylvania Supreme Court has defined 'seller' under § 402A expansively, it has not left that category boundless." (citation omitted)).
104. *Id.* at 501.
105. 562 A.2d 279 (1989).
106. *See Oberdorf*, 295 F. Supp. 3d at 500–01; *see also Musser*, 562 A.2d at 376 ("[W]e hold that auctioneers are not 'sellers' within the meaning of [§ 402A].").
107. *Oberdorf*, 295 F. Supp. 3d at 501.
108. *Id.*

the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods[.]' "[109]

Although Amazon and the district court relied on *Musser*, the Third Circuit Court of Appeals actually used the analysis in *Musser* to reverse the district court's holding on strict liability.[110] The appeals court focused on four factors articulated by the Pennsylvania Supreme Court in determining whether an actor is a "seller" under § 402A:

(1) Whether the actor is the "only member of the marketing chain available to the injured plaintiff for redress";

(2) Whether "imposition of strict liability upon the [actor] serves as an incentive to safety";

(3) Whether the actor is "in a better position than the consumer to prevent the circulation of defective products"; and

(4) Whether "[t]he [actor] can distribute the cost of compensating for injuries resulting from defects by charging for it in his business, i.e., by adjustment of the rental terms."[111]

The appeals court concluded that all four factors weigh in favor of imposing strict liability on Amazon.[112]

Although Amazon argued every item sold through its Marketplace service could be traced to a third-party seller, the court noted that those third-party sellers can communicate with purchasers only through Amazon, which enables them to conceal themselves from those purchasers.[113] The appeals court also noted that Amazon has no vetting process to ensure that its third-party sellers are amenable to legal process.[114] Finally, the appeals court noted the other cases in which purchasers had been injured by allegedly defective products sold by Amazon third-party sellers who could not be located.[115] The court believed that since Amazon exerts significant control over its third-party sellers (e.g., its unfettered right to suspend or terminate any third-party vendors or remove their products at any time) it is therefore capable, in its sole discretion, of removing unsafe products from its website, and imposing strict

109. *Id.* at 500 (quoting *Musser*, 562 A.2d at 281 (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. f.)).

110. Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 143–44 (3rd Cir. 2019), *opinion vacated, reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019).

111. *Id.* at 144 (quoting *Musser*, 562 A.2d at 282).

112. *Id.* at 147–48.

113. *Id.* at 145.

114. *Id.*

115. *Id*. at 145 n.20 (citing *Allstate N.J. Ins. Co.*, 2018 WL 3546197, at *2 (D.N.J. July 24, 2018); Fox v. Amazon.com, No. 16-cv-3013, 2018 WL 2431628, at *6 (M.D. Tenn. May 30, 2018); Stiner v. Amazon, 15-cv-185837 (Ohio. Com. Pl. Sept. 20, 2017) (Dkt. No. 120-1), *aff'd*, 120 N.E.3d 885 (Ohio Ct. App. 2019)).

liability would provide Amazon with an incentive to do so.[116] The court also believed Amazon was in a better position than the consumer to prevent the circulation of defective products because of its ongoing relationships with its third-party sellers.[117] And it is through its own website that Amazon can better collect information to identify defective products—particularly because "Amazon specifically curtails the channels that third-party vendors may use to communicate with customers[.]"[118] Finally, the court believed Amazon was better able to distribute the cost of compensating for injuries resulting from defects because Amazon could adjust the commission-based fees that it charges to third-party sellers based on the risk sellers presented.[119] The court concluded: "Amazon's customers are particularly vulnerable in situations like the present case. Neither the Oberdorfs nor Amazon has been able to locate the third-party vendor, The Furry Gang. Conversely, had there been an incentive for Amazon to keep track of its third-party vendors, it might have done so."[120]

The Third Circuit Court of Appeals also rejected Amazon's argument that it was not a "seller" subject to strict liability under § 402A because it neither took nor transferred title to the product in question.[121] The appeals court noted that a Pennsylvania Superior Court ruling had determined that transfer of title was not required, and Pennsylvania's Supreme Court had not repudiated that decision.[122] The Third Circuit Court of Appeals' *Oberdorf* decision was vacated pending rehearing by the Third Circuit *en banc*.[123] The rehearing was held February 19, 2020, and oral argument was to be limited to whether Amazon is subject to strict products liability claims as a "seller" under Pennsylvania law.[124]

---

116. *Oberdorf*, 930 F.3d at 146.

117. *Id*. 146–47.

118. *Id.* at 147.

119. *See id.*

120. *Id*. at 147.

121. *Id*. at 148 (citing *Hoffman v. Loos & Dilworth, Inc.*, 452 A.2d 1349, 1354-55 (holding that a participant in a sales process may be held strictly liable for a defective product, even when the participant never took title nor possession of the product)).

122. *See Oberdorf*, 930 F.3d at 148.

123. Oberdorf v. Amazon.com, Inc., 936 F.3d 182 (3d Cir. 2019).

124. Oberdorf v. Amazon.com, Inc., No. 4-16-cv-01127 (3rd Cir. Dec. 3, 2019) (Dkt. No. BL105) (order limiting scope of suit at February hearing). The Third Circuit panel reportedly was inclined toward certifying the question of Amazon's status as a seller to the Pennsylvania Supreme Court. *See* Martina Barash, Amazon 'Seller' Issue May Get Punted to Pennsylvania High Court, Bloomberg L. (Feb. 20, 2020, 4:03 PM), https://www.bloomberglaw.com/exp/eyJjdHh0IjoiTFdOVyIsImlkIjoiMDAwMDAxNzAtNjNkNC1kMjJlL-WFkZjctNjNmZGVlZDIwMDAwIiwic2lnI-joid2NtNmRvY1htVG9JZmFENE9YUG5sbjRhV3FBPSIsInRpbWUiOiIxNTgyMzIwMDI0IiwidXVpZCI6IkhvdDg2TXo5Y2xYWGsyUWFBYldCZVE9PW02ZkU3aXlBMURYMW

Two early 2020 U.S. District Court cases have also indicated that Amazon should be considered a "seller" vis-à-vis third-party sales through its online Marketplace. In *Legal Aid of Nebraska, Inc. v. Chaina Wholesale, Inc.*,[125] the plaintiff brought negligence, strict failure to warn, and UCC breach of warranties claims under Nebraska law after a space heater, purchased from a third-party on Amazon's Marketplace, caused a fire.[126] Without questioning whether Amazon was the actual "seller" of the space heater, the District Court for the District of Nebraska denied Amazon's motion to dismiss on all counts (except an implied warranty of fitness for a particular purpose claim).[127]

Gartner v. Amazon.com, Inc. involved the sale of a generic Apple TV remote from a third-party seller through Amazon's online Marketplace.[128] The remote's battery compartment opened, exposing a button battery that was ingested by the plaintiff's nineteen-month-old daughter, resulting in serious injuries.[129] As in most of the other third-party seller strict products liability actions, Amazon claimed it was not subject to the plaintiff's claims because it was not the "seller" of the remote.[130] Texas has an innocent seller statute,[131] but a non-manufacturer seller can still be subject to a products liability action if the manufacture is not subject to the jurisdiction of the court.[132] The Texas statute then provides that where a non-resident manufacturer fails to answer or otherwise make an appearance on time, the manufacturer will be deemed "not subject to the jurisdiction of the court unless the *seller* is able to secure personal jurisdiction over the manufacturer in the action."[133]

Since Amazon claimed it was not, in fact, the "seller," the court turned to that issue. The court first noted that based on Texas's courts' interpretation, § 402A applies to any person engaged in the business of selling a product for consumption, manufacturers, distributors, lessors, bailors, and dealers.[134] Amazon argued it was more like an auctioneer that plays only an *incidental* role in a product's placement in the stream

52MDlXSkNBanc9PSIsInYiOiIxIn0 (reporting also that plaintiffs' counsel favored certification while Amazon's counsel did not).

125. No. 4:19-CV-3103, 2020 WL 42471 (D. Neb. Jan. 3, 2020).

126. *See id.* at *1.

127. *See id.* at *2–5.

128. No. 4:18-CV-02242, slip op. at 1 (S.D. Tex. Jan. 7, 2020) (order granting in part and denying in part motion for summary judgment).

129. *Id.* at 2.

130. *Id.* at 5.

131. TEX. CIV. PRAC. & REM. CODE ANN. § 82.003 (West 2006); *see also supra* note 46 and accompanying text.

132. *See id.* § 82.003(a)(7)(B).

133. *See id.* § 82.003(c) (emphasis added).

134. *Gartner*, slip op. at 8.

of commerce.[135] The court, however, noted that Amazon, through its Fulfillment by Amazon service, stored the remote, packaged and prepared it for delivery, and delivered it.[136] While Amazon did not set the remote's price, it set the fees it retained from the sale of the remote and it controls the process by which the customer pays for the product and the third-party seller receives payment.[137] Amazon retained the right to withhold payments to the third-party seller and operated as the sole channel of communication between customers and third-party sellers.[138] In sum, according to the court, Amazon was "*integrally* involved in and exert[ed] control over the sales of third-party products."[139]

Once again, Amazon argued it was not a seller because it never took title to the remote.[140] The court noted, however, that "Texas law does not require an entity to transfer title or sell a product to be considered a seller."[141] Amazon also argued that it should not be considered a "seller" for public policy reasons by asserting it had "no relationship with the manufacturer, rendering it unable to directly pressure the manufacturer on safety or spread the cost of defects across units sold."[142] The court rejected this argument, noting that Amazon has the power to "halt the placement of defective products in the stream of commerce, deterring future injuries."[143] For these reasons, the District Court for the Southern District of Texas concluded Amazon was a "seller" subject to Texas's innocent seller exception (meaning Amazon could be held liable if it is unable to secure personal jurisdiction over the manufacturer).[144]

As discussed below and although outside the realm of strict products liability law, there are a few court decisions on what constitutes a "seller" that could apply by analogy to Amazon's status in relation to third-party sales through its online Marketplace. For example, in determining that Amazon's third-party sellers were not the actual "sellers" on Amazon's Marketplace for purposes of its state's sales tax collection laws, and that it was Amazon that was "engaged in the business of

135. *Id.* at 10.
136. *Id.* at 11.
137. *Id.*
138. *Id.*
139. *Id.* (emphasis added).
140. *Gartner*, slip op. at 14. *See also Erie Ins. Co.*, 925 F.3d at 141; *Fox*, 2018 WL 2431628, at *6; *but see Fox*, 930 F.3d at 422; *Oberdorf*, 930 F.3d at 148.
141. *Id.*
142. *Id.*
143. *Id.* at 15. Furthermore, the court noted that Amazon required indemnification from third-party sellers for any strict products liability. *See id.*
144. *Id.*; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 82.003 (West 2006) ("[T]he manufacturer is not subject to the jurisdiction of the court unless the seller is able to secure personal jurisdiction over the manufacturer in the action.").

selling," the South Carolina Department of Revenue noted identical factors discussed in products liability cases, namely:

> (1) a purchase is often completed through Amazon Services' website without any interaction between the customer and the [third-party] other than a product description (possibly) written by the [third-party]; (2) the [third-party] is prohibited from accepting payment from the customer; (3) Amazon Services sends the order confirmation to the customer; (4) Amazon Services notifies the customers when an order has been received or shipped; and (5) Amazon is the only party that provides a receipt for the products purchased.[145]

In general, indirect purchasers—i.e., those who purchase through a middleman—cannot maintain an antitrust action.[146] Apple raised this defense against iPhone users who had purchased third-party apps through Apple's App Store, arguing that iPhone users are indirect purchasers because they purchased the apps—not from Apple—but from the third-party app developers who set their own prices and used Apple only as a medium.[147] The Supreme Court rejected Apple's argument that its iPhone users were not direct purchasers merely because the third-party app developers set the price.[148] Nor did it matter that Apple never took title to the third-party apps: "Denying standing because 'title' never passes to a broker is an overly lawyered approach that ignores the reality that a distribution system that relies on brokerage is economically indistinguishable from one that relies on purchaser-resellers."[149] Ultimately, the Supreme Court refused to elevate form (the precise arrangement between manufacturers or suppliers and retailers) over substance (e.g., is the consumer harmed because of Amazon's actions?).[150]

C. Immunity Under the Communications Decency Act

Because Amazon operates through a website, it has, in some cases, raised a defense of immunity to liability for defective products under the

145. Amazon Services, LLC v. S.C. Dep't of Rev., Docket No. 17-ALJ-17-0238-CC, slip op. at 46 (Sept. 10, 2019), https://src.bna.com/LXJ.

146. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 731-36 (1977) (rejecting the defense that indirect purchasers, as opposed to direct purchasers, were the injured parties of an alleged antitrust violation).

147. *See* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1518-19 (2019).

148. *See id.* at 1521–24.

149. *Id.* at 1523 (2019) (applying Clayton Act) (quoting 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, *Antitrust Law* ¶ 345, at 183 (2014)).

150. *See id*. (specifically identifying the "substance" question as whether "the consumer paying a higher price because of the monopolistic retailer's actions").

Communications Decency Act (CDA).[151] Section 230(c)(1) of the CDA provides, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[152] Since the sales in question are made by third-party sellers, Amazon claims that it is immune from liability for any information those third-party sellers posted on Amazon's website regarding their products.[153]

Section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[154] As a result, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[155] Courts use a three-part test to determine whether a party is immune under § 230: "1) whether Defendant is a provider of an interactive computer service; 2) if the postings at issue are information provided by another information content provider; and 3) whether Plaintiffs [*sic*] claims seek to treat Defendant as a publisher or speaker of third party content."[156] Generally, there is no question that Amazon operates an interactive computer service, or that information related to the product in question was posted by a third party.[157]

However, the courts that have addressed this issue have distinguished Amazon's liability for its own tortious conduct, such as negligence or breach of implied warranty, from its liability as a publisher of information under a theory of failure to warn.[158] But where a court has

---

151. *See infra* Appendix (summarizing recent products liability claims actions against Amazon and its CDA -defense); *see also* Pub. L. No. 104-104, tit. V, § 509, 110 Stat. 56, 137–39 (1996) (codified as amended at 47 U.S.C. § 230 (2016)).

152. 47 U.S.C. § 230(c)(1).

153. *See, e.g.*, McDonald v. LG Electronics USA, Inc., 219 F. Supp. 3d 533, 536 (D. Md. 2016).

154. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

155. *Id.*

156. Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 564 F.Supp.2d 544, 548 (E.D. Va. 2008), *aff'd*, 591 F.3d 250 (4th Cir. 2009).

157. *See McDonald*, 219 F. Supp. 3d. at 537.

158. *See id.* at 538; *Erie Ins. Co.*, 925 F.3d at 139–40 ("While the Communications Decency Act protects interactive computer service providers from liability *as a publisher of speech*, it does not protect them from liability as the seller of a defective product.") (emphasis in original); *Oberdorf*, 930 F.3d at 153 ("[T]o the extent that [the plaintiff]'s negligence and strict liability claims rely on Amazon's role as an actor in the sales process, they are not barred by the CDA. However, . . . failure to warn claims are barred by the CDA."); Order, *Gartner*, No. 4:18-cv-02242, at 17 ("Insofar as Plaintiff's claims might relate to Amazon's editorial control over the product detail page and failure to provide adequate warning on the page, those claims would be barred by the CDA . . . . As to Plaintiff's claims that relate only to Amazon's involvement in the sales process of third-party products, the CDA does not apply . . . ."); *State Farm Fire & Casualty Co.*, 390 F. Supp. 3d at 973–74 ("Amazon's active participation in the

determined Amazon is not a "seller," it will most likely consider Amazon's CDA defense moot.[159]

V. PUBLIC POLICY CONSIDERATIONS FOR HOLDING AMAZON STRICTLY LIABLE AS A "SELLER"

Over the past 100 years, courts and state legislatures have eliminated the privity of contract requirement to allow consumers injured by defective products to hold liable any party in the chain of distribution.[160] The underlying public policy has been that actors who place defective products into the stream of commerce should be liable to innocent purchasers and users for damages and injuries suffered as a result of the defect. The *Restatement (Third) of Torts: Products Liability* explains the rationale for holding non-manufacturer sellers strictly liable for defective products they place in the stream of commerce:

> An often-cited rationale for holding wholesalers and retailers strictly liable for harm caused by manufacturing defects is that, as between them and innocent victims who suffer harm because of defective products, the product sellers as business entities are in a better position than are individual users and consumers to insure against such losses. In most instances, wholesalers and retailers will be able to pass liability costs up the chain of product distribution to the manufacturer. When joining the manufacturer in the tort action presents the plaintiff with procedural difficulties, local retailers can pay damages to the victims and then seek indemnity from manufacturers. Finally, holding retailers and wholesalers strictly liable creates incentives for them to deal only with reputable, financially responsible manufacturers and distributors, thereby helping to protect the interests of users and consumers.[161]

One exception to this elimination of privity has been to hold harmless "innocent" sellers who merely pass along products without modifying them, affecting their packaging, or knowing of any defect.[162] But even that exception has its own exception—many courts and state

---

sale, through payment processing, storage, shipping, and customer service, is what makes it strictly liable. This is not activity immunized by the CDA.").

159. *See, e.g.*, *Fox*, 930 F.3d at 425 n.6; *Allstate N.J. Ins. Co.*, 2018 WL 3546197, at *12 n.9; *Carpenter*, 2019 WL 1259158, at *3; *Garber*, 380 F. Supp. 3d at 782; Philadelphia Indemnity Ins. Co. v. Amazon.com, Inc., No. 17-CV-03115 (DRH)(AKT), 2019 WL 6525624, at *6 (E.D.N.Y. Dec. 4, 2019).

160. *See* Steven Bonanno, *Privity, Products Liability, and UCC Warranties: A Retrospect of and Prospects for Illinois Commercial Code 2-318*, 25 J. MARSHALL L. REV. 177, 178–90 (1991).

161. RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 2, cmt. a (AM. LAW INST. 1998).

162. *See supra* Part III.

statutes will still hold an innocent seller liable if the manufacturer of the defective product is insolvent, cannot be identified, or is not subject to service in the applicable court.[163]

In many of the products liability lawsuits recently filed against Amazon, this exception to the exception would most likely apply—the manufacturers of the defective products at issue simply cannot be identified, found, or subjected to the court's jurisdiction. In these cases, though, Amazon has argued this is all irrelevant, since it is not even a "seller" of the product in question. It argues it merely served as a conduit between the consumer and the entity that actually sold the product to the consumer. The public policy question is whether Amazon should be allowed to serve as a conduit to place defective products into the stream of commerce without any responsibility for the injuries and damages caused by those products.

As the Third Circuit Court of Appeals in *Oberdorf* pointed out, public policy would be best served by imposing liability on Amazon in the following instances: (1) it is the "only member of the marketing chain available to the injured plaintiff for redress"; (2) holding it liable would "serve as an incentive to safety"; (3) Amazon is "in a better position than the consumer to prevent the circulation of defective products"; and (4) Amazon "can distribute the cost of compensating for injuries resulting from defects by charging for it in its business," i.e., by adjusting its terms of sales.[164] All four of these public policy arguments apply to Amazon and many of its third-party sales.[165]

In 2018, third-party sales on Amazon's Marketplace were $160 billion,[166] generating close to $50 billion in annual revenue for Amazon.[167] Amazon itself acknowledges that it faces potential liabilities for the products sold through third parties.[168] And while Amazon may not take

163. *See, e.g.*, *supra* text accompanying notes 33 and 44; note 46.

164. *See Oberdorf*, 930 F.3d at 144 (quoting *Musser*, 562 A.2d at 282). *But see* Eric Goldman, Opinion, *Should Amazon Be Responsible When Its Vendors' Products Turn Out to Be Unsafe? Critics of Amazon Say Legal Precedents Justify Holding the Company Liable for Third-Party Sellers' Products. Others Say Amazon's Scale Makes It Unfeasible to Do So*, WALL ST. J. (Feb. 28, 2020), https://www.wsj.com/articles/should-amazon-be-responsible-when-its-vendors-products-turn-out-to-be-unsafe-11582898971.

165. *See id.* at 147–48 ("[A]lthough the four-factor test yielded a different result when applied by the *Musser* court to an auction house, all four factors in this case weigh in favor of imposing strict liability on Amazon.").

166. *See* Amazon 2018 Annual Report, *supra* note 2, at *2 (Jeffrey P. Bezos Letter to Shareholders).

167. *See, e.g.*, News Release, Amazon, *Amazon.com Announces Third Quarter Sales up 24% to $70.0 Billion* (Oct. 24, 2019, 4:01 PM), https://ir.aboutamazon.com/news-releases/news-release-details/amazoncom-announces-third-quarter-sales-24-700-billion (summing revenues for third-party seller services for Q4 2018 through Q3 2019).

168. *See* Amazon 2018 Annual Report, *supra* note 2.

or transfer title, as the District Court for the Western District of Wisconsin concluded, Amazon takes on "all the roles of a traditional—and very powerful—reseller/distributor."[169] Though arguing with respect to CDA immunity, Benjamin Edelman's and Abbey Stemler's conclusion applies equally to strict products liability: "[U]ntouchable intermediaries not only facilitate bad behavior but also are likely to disproportionately hurt those most vulnerable."[170] Meanwhile, as third-party sales through its online Marketplace have grown, there are indications Amazon is losing control of not only who is selling on its website, but also the quality of the products sold.[171] Perhaps if Amazon had an incentive—in the form of potential strict products liability—to keep better track of its third-party vendors, it might do so.[172]

Amazon has been primarily successful in avoiding strict products liability claims for third party sales by arguing it is not actually a "seller." Since most state products liability statutes do not define seller,[173] this has left—primarily federal—courts to fashion their own interpretation (often of what the state courts would conclude).[174] Ideally, states should adopt a formal definition of "seller" for strict products liability purposes, and arguably a very broad one. Georgia has done just that:

> [T]he term "product seller" means a person who, in the course of a business conducted for the purpose leases or sells and distributes;

---

169. *State Farm Fire & Cas. Co.*, 390 F. Supp. 3d at 972.

170. Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 56 HARV. J. ON LEGIS. 141, 197 (2019).

171. *See* Safdar et al., *supra* note 17; Berzon et al., *supra* note 9 and accompanying text.

172. *See Oberdorf*, 930 F.3d at 146 (finding in favor of imposing strict liability on Amazon, in part, because it "is fully capable . . . of removing unsafe products from its website" and "[i]mposing strict liability upon Amazon would be an incentive to do so").

173. *See* James H. Rotondo, Jennifer L. Shukla, and Julia M. Sorenson, *INSIGHT: Amazon Tests Boundaries of What It Means to Be a Product Seller*, BLOOMBERG LAW (Oct. 17, 2018), https://news.bloomberglaw.com/product-liability-and-toxics-law/insight-amazon-tests-boundaries-of-what-it-means-to-be-a-product-seller (exploring the ways that various courts have used definitions of "seller" with respect to Amazon); *but see* ARIZ. REV. STAT. ANN. § 12-681(9) (1978); COLO. REV. STAT. Ann. § 13-21-401(3) (West 2003); DEL. CODE ANN. tit. 18, § 7001(a)(4) (West 1995); GA. CODE ANN. § 51-1-11.1(a) (West 1987); N.C. GEN. STAT. ANN. § 99B-1(4) (West 1996); OHIO REV. CODE ANN. § 2307.71(15)(a) (West 2001); TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(3) (West 2006); WASH. REV. CODE ANN. § 7.72.010(1) (West 1991).

174. Procedurally, this can raise a barrier for plaintiffs. While clearly recognizing that Maryland's highest court may conclude Amazon is a "seller" for public policy reasons, Judge Motz of the Fourth Circuit Court of Appeals recognized that federal courts sitting in diversity "must proceed with caution." *Erie Ins. Co.*, 925 F.3d at 145 (Motz, J. concurring). Judge Motz declined to predict whether Maryland courts would treat Amazon as a seller under state law "[g]iven the policy-intensive nature of this inquiry, the lack of on-point Maryland precedent, and Amazon's novel business model." *Id.* (noting "Amazon's strategy of removing nearly every products liability case to federal court has complicated this endeavor and arguably stunted the development of state law").

> installs; prepares; blends; packages; labels; markets; or assembles pursuant to a manufacturer's plan, intention, design, specifications, or formulation; or repairs; maintains; *or otherwise is involved in placing a product in the stream of commerce*.[175]

State products liability statutes could then include partial innocent seller defenses to liability unless the following exceptions apply: (1) the seller exercised some significant control over the design or manufacture of the product, or provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage; (2) the seller had actual knowledge of the defect; (3) the seller is a controlled subsidiary of a manufacturer, or the manufacturer is a controlled subsidiary of the seller; (4) the seller created the defect or provided the plans or specifications for the manufacture or preparation of the product and such plans or specifications were a proximate cause of the defect; or (5) the defect was the result of the seller' negligence or the breach of an express warranty made by the seller. In particular, the innocent seller defense would not apply in these situations: (1) the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts of the state, or, despite due diligence, the manufacturer is not amenable to service of process; (2) the manufacturer is unable to satisfy any judgment as determined by the court; or (3) the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with the plaintiff.

This approach would satisfy the public policy justifications for strict products liability expressed in *Restatement (Third) Torts: Products Liability*: Amazon is in a better position, relative to an innocent purchaser, to insure against losses; Amazon can always seek indemnity from the manufacturer; and this approach can incentivize Amazon to allow only reputable and financially responsible third parties to sell products through its marketplace platform.[176]

VI. CONCLUSION

When courts were first presented with the issue of whether Amazon was a "seller" in third-party sales transactions, they relied on very thin precedent to conclude Amazon was not a "seller" (principally because it never took nor transferred title) and therefore had no liability for the defective product purchased (usually under an Amazon Prime membership and shipped by Amazon).[177] Courts and legislatures need

175. GA. CODE ANN. § 51-1-11.1(A) (emphasis added).

176. *See* RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 2, cmt. a (AM. LAW INST. 1998), *supra* note 161 and accompanying text.

177. *See, e.g.*, *supra* notes 62–67 and accompanying text.

to recognize Amazon has disrupted the supply chain: "By design, Amazon's business model cuts out the middlemen between manufacturers and consumers, reducing the friction that might keep foreign (or otherwise judgment-proof) manufacturers from putting dangerous products on the market."[178] If courts were to instead examine the realities of the transactions in question—Amazon's control over third parties and involvement in the sales and delivery processes—and factor in public policy considerations, they may reach a different conclusion: of the millions of products Amazon sells to millions of households—in which it is much more than peripherally involved—it should be liable for defective products it places into the stream of commerce.

Appendix
Summary of Amazon Marketplace Product Liability Cases

Case	Product/Incident	Law(s) Applied	Conclusion
McDonald v. LG Electronics USA, Inc., 219 F. Supp. 3d 533 (D. Md. 2016)	Purchaser burned by rechargeable batteries	Communications Decency Act ("CDA"), 47 U.S.C. § 230; MD. CODE ANN., COM. LAW §§ 2-104(1), 2-314(1)	Amazon's own negligence not immune under CDA, but negligent failure to warn claim is barred by CDA; Amazon not a merchant under Maryland UCC
Hearing, Erie Ins. Co. v. Amazon.com, Inc., No. 16-02679-RWT, 2018 WL 3046243 (D. Md. Jan. 22, 2018), *aff'd in part and rev'd in part by* 925 F3d 135 (4th Cir. 2019)	Batteries in headlamp malfunctioned, causing house to catch fire	Strict products liability, negligence, breach of warranty; Communications Decency Act ("CDA"), 47 U.S.C. § 230	Amazon not a "seller" for purposes of product liability; Amazon immune from liability under CDA

178. *Erie Ins. Co.*, 925 F.3d at 144.

Case	Product/Incident	Law(s) Applied	Conclusion
Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135 (4th Cir. 2019)	Batteries in headlamp malfunctioned, causing house to catch fire	RESTATEMENT (SECOND) OF TORTS § 402A (adopted by Maryland); MD. CODE ANN., COM. LAW § 2-403; Communications Decency Act ("CDA"), 47 U.S.C. § 230	Affirming— Amazon not a "seller" for purposes of product liability; Reversing— Amazon *not* immune from liability under CDA as a seller of defective products (but still protected from liability *as a publisher of speech)*
Fox v. Amazon.com, Inc., No. 3:16-cv-03013, 2018 WL 2431628 (M.D. Tenn. May 30, 2018), *aff'd in part and rev'd in part by* Fox v. Amazon.com, Inc., 930 F.3d 415 (6th Cir. 2019)	Lithium-ion battery in hoverboard started fire in home	Tennessee Products Liability Act ("TPLA"), TENN. CODE ANN. §§ 29-28-101–108; Tennessee Consumer Protection Act ("TCPA"), TENN. CODE ANN. §§ 47-18-104, 109; Communications Decency Act ("CDA"), 47 U.S.C. § 230	Amazon not a "seller" under TPLA because it did not hold or transfer title to the product; since claims dismissed against Amazon, no need to consider CDA defense

Case	**Product/Incident**	**Law(s) Applied**	**Conclusion**
Fox v. Amazon, 930 F.3d 415 (6th Cir. 2019)	Lithium-ion battery in hoverboard started fire in home	Tennessee Products Liability Act ("TPLA"), TENN. CODE ANN. §§ 29-28-101–108; RESTATEMENT (SECOND) OF TORTS §§ 323, 324A; Tennessee Consumer Protection Act ("TCPA"), TENN. CODE ANN. § 47-18-104	Amazon did not exercise sufficient control over hoverboard to be deemed a "seller" of the hoverboard under the TPLA; genuine issue of fact whether Amazon breached duty to warn of hoverboard's dangers
Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738 (FLW) (LHG), 2018 WL 3546197 (D.N.J. July 24, 2018)	Laptop computer replacement battery started fire in home	New Jersey Products Liability Act ("PLA"), N.J. STAT. ANN. §§ 2A:58C-1–11; Communications Decency Act ("CDA"), 47 U.S.C. § 230	Although Amazon may have technically been a part of the chain of distribution, it never exercised control over the product sufficient to make it a "product seller" under the PLA; transfer of title irrelevant; since claims dismissed against Amazon, no need to consider CDA defense

Case	**Product/Incident**	**Law(s) Applied**	**Conclusion**
Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393 (S.D.N.Y. 2018)	Glass French press coffee maker shattered, lacerating thumb	New York strict product liability; RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1; negligence; breach of warranty	Amazon, an "online marketplace," not a "seller" or distributor—under *Restatement (Third)*, distributor must, at some point, own the defective product; Amazon made no statement about coffee maker
Stiner v. Amazon.com, Inc., 120 N.E.3d 885 (Ohio Ct. App. 2019)	Death from caffeine toxicity	Ohio Products Liability Act, OHIO REV. CODE ANN. §§ 2307.71–.80	Amazon not a supplier

Case	**Product/Incident**	**Law(s) Applied**	**Conclusion**
Carpenter v. Amazon.com, Inc., No. 17-cv-03221-JST, 2019 WL 1259158 (N.D. Cal. Mar. 19, 2019), *appeal filed,* Carpenter v. Amazon.com, Inc., No. 19-15695, (9th Cir. Jan. 30, 2020) (Dkt. Nos. 32-33)	House burned down a few weeks after hoverboard delivered	California strict product liability; negligence; failure to warn; breach of implied warranty; Communications Decency Act ("CDA"), 47 U.S.C. § 230	Amazon not strictly liable because its role was not integral to the business enterprise (hoverboards) and a necessary factor in bringing the product to market; Amazon had no duty to protect consumers from defective products; since claims dismissed against Amazon, no need to consider CDA defense
Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766 (N.D. Ill. 2019)	Hoverboard spontaneously self-ignited and started a fire that caused extensive damage to a home	RESTATEMENT (SECOND) OF TORTS § 402A (adopted by Illinois); product liability; negligence; Communications Decency Act ("CDA"), 47 U.S.C. § 230	No strict liability for Amazon since it is a marketplace provider, not a "seller," outside of the distributive chain; Amazon had no duty to warn; since claims dismissed against Amazon, no need to consider CDA defense

Case	Product/Incident	Law(s) Applied	Conclusion
Oberdorf v. Amazon.com, Inc., 295 F. Supp. 3d 496 (M.D. Pa. 2017), *aff'd in part and vacated in part by* Oberdorf v. Amazon.com, Inc., 930 F.3d 136 (3d Cir. 2019)	Retractable dog leash malfunctioned causing permanent eye injury	RESTATEMENT (SECOND) OF TORTS § 402A (adopted by Pennsylvania); Communications Decency Act ("CDA"), 47 U.S.C. § 230	Amazon not a "seller" for purposes of § 402A; CDA bars claims of negligent misrepresentation based on information provided by third-party seller
Oberdorf v. Amazon.com, Inc., 930 F.3d 136 (3d Cir. 2019), *vacated pending reh'g en banc in* Oberdorf v. Amazon.com, Inc., 936 F.3d 182 (3d Cir. 2019)	Retractable dog leash malfunctioned causing permanent eye injury	RESTATEMENT (SECOND) OF TORTS § 402A (adopted by Pennsylvania); Communications Decency Act ("CDA"), 47 U.S.C. § 230	Public policy considerations compel holding Amazon potentially liable for participation in chain of distribution (vacated pending rehearing); CDA protects Amazon from claims for failure to warn, but not in role as seller of a defective product
State Farm v. Amazon.com, Inc., 390 F. Supp. 3d 964 (W.D. Wis. 2019)	Bathtub faucet adaptor purchased from Amazon third-party seller malfunctioned, damaging purchaser's home	WIS. STAT. ANN. § 895.047; Communications Decency Act ("CDA"), 47 U.S.C. § 230	Amazon critical part of distribution chain; transfer of title not necessary; Amazon not immune under CDA

Case	Product/Incident	Law(s) Applied	Conclusion
Paptaros v. Amazon.com, Inc., 2019 WL 4011502 (D.N.J. Aug. 26, 2019), *stayed by* Papataros v. Amazon.com, Inc., No. 2:17-cv-9836 (KM) (MAH), 2019 WL 4740669 (D.N.J. Sept. 3, 2019)	Plaintiff injured by allegedly defective scooter	New Jersey Products Liability Act ("PLA"), N.J. STAT. ANN. §§ 2A:58C-1–11; Communications Decency Act ("CDA"), 47 U.S.C. § 230	Relying on *Oberdorf*, Amazon's control of product weighs in favor of finding Amazon a "seller"; plaintiff's claims for Amazon's failure to provide or edit adequate warnings are barred by CDA (stayed pending *Oberdorf*)
State Farm Fire & Cas. Co. v. Amazon.com, Inc., 407 F. Supp. 3d 848 (D. Ariz. 2019)	Hoverboards purchased from Amazon third-party seller burst into flame and ignited fire in insureds' home	RESTATEMENT (SECOND) OF TORTS § 402A; negligence	Amazon not strictly liable because it did not participate significantly in hoverboard's stream of commerce; Amazon not negligently liable
Philadelphia Indemnity Ins. Co. v. Amazon.com, Inc., No. 17-cv-03155 (DRH) (AKT), 2019 WL 6525624 (E.D.N.Y. Dec. 4, 2019)	Defective blender allegedly caused fire in restaurant where it was used	New York strict products liability; negligence; breach of warranty; Communications Decency Act ("CDA"), 47 U.S.C. § 230	Amazon not a "seller" based on *Eberhart;* since claims dismissed against Amazon, no need to consider CDA defense

Case	Product/Incident	Law(s) Applied	Conclusion
State Farm Fire & Cas. Co. v. Amazon.com, Inc., 414 F. Supp. 3d 870 (N.D. Miss. 2019)	Hoverboards purchased from Amazon third-party seller burst into flame and ignited fire in insureds' home	Mississippi Products Liability Act ("MPLA"), MISS. CODE ANN. § 11-1-63; negligence; failure to warn	Amazon is a marketplace facilitator subject to negligence and negligent failure to warn claims for defective hoverboard
Legal Aid of Nebraska, Inc. v. Chaina Wholesale, Inc., 4:19-cv-3103, 2020 WL 42471 (D. Neb. Jan. 3, 2020)	Defective quartz space heater caused fire in plaintiff's office	Nebraska common law negligence; strict liability failure to warn; breach of warranty	Denied Amazon's motion to dismiss (except as to implied warranty of fitness for a particular purpose claim); no discussion of whether Amazon was the "seller"
Order Granting in Part and Denying in Part Mot. for Sum. J., Gartner v. Amazon.com, Inc., No. 4:18-cv-02242 (S.D. Tex. Jan. 7, 2020) (Dkt. No. 60)	Generic Apple TV remote's battery compartment opened, exposing a button battery that was ingested by the plaintiff's 19-month-old daughter, resulting in serious injuries	RESTATEMENT (SECOND) OF TORTS § 402A; TEX. CIV. PRAC. & REM. CODE § 82.001; negligence; breach of implied warranty; Communications Decency Act ("CDA"), 47 U.S.C. § 230	Amazon is a "seller" because it is integrally involved in and exerts control over the sales of third-party products; CDA applies only to editorial content on Amazon's website