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The New "Web-Stream" of Commerce: Amazon and the Necessity of Strict Products Liability for Online Marketplaces

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NOTES

The New "Web-Stream" of Commerce: Amazon and the Necessity of Strict Products Liability for Online Marketplaces

Technology company Amazon has actively transformed into an e-commerce giant over the last two decades. Once a simple online bookstore, Amazon now boasts an ever-expanding identity as global cloud computing provider, major player in artificial intelligence, brick-and-mortar grocery store, and producer of original video content. At its roots, the company remains focused on e-commerce—its multibillion-dollar online marketplace hosts a massive digital space for commerce worldwide where customers can order "anything, with a capital A."

Amazon derives many of its sales from third-party vendors who list products on the company's website, Amazon.com. In this broadening chain of distribution for online retail, complicated tort issues arise in determining what entity should be held responsible when defective third-party products are sold to, and severely injure, consumers. Modern products liability law under the Restatement (Second) of Torts imposes strict liability on any seller of a defective product. Amazon has sought to avoid this liability by claiming it is not the seller but is instead a neutral platform that merely facilitates third-party sales. And until recently, courts have agreed.

Inspired by a handful of recent cases signaling a possible shift in U.S. products liability law, this Note proposes a statutory solution to hold online marketplaces such as Amazon to the same strict liability standards as brick-and-mortar retailers. This Note offers a statutory definition of "seller" that would extend liability to any party responsible for placing a defective product into the stream of commerce, providing a method of recourse for injured consumers that is not reliant on the courts.

INTRODUCTION

In December 2014, Heather Oberdorf logged on to Amazon.com to purchase a collar for her dog, Sadie. Just a month later, Oberdorf returned home from work, attached a retractable leash to the collar, and took Sadie for a walk. Unexpectedly, the dog lunged, causing the D-ring on the collar to break and the leash to quickly recoil back, hitting Oberdorf's face and smashing her eyeglasses. The incident left Oberdorf permanently blind in her left eye.[1]

After the accident, Oberdorf attempted to contact The Furry Gang, the third-party vendor that had listed the collar for sale on Amazon's website, but the company had ostensibly disappeared. She was unable to locate any contact information for The Furry Gang or find

1. Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 140 (3d Cir. 2019).

the names or identities of any representatives.[2] So Oberdorf filed suit against Amazon, bringing claims for strict products liability and negligence.[3] In response, Amazon argued it could not be held responsible for the defective product because it was not the seller; it was the digital platform that merely hosted the transaction for the vendor.[4] The United States District Court for the Middle District of Pennsylvania agreed and found that under Pennsylvania law, Amazon could not be held liable for Oberdorf's injuries.[5] This decision was consistent with similar cases in other jurisdictions holding Amazon not liable for products liability claims because Amazon was not considered a "seller" under state law.[6] Oberdorf appealed, however, and the United States Court of Appeals for the Third Circuit reversed the district court's dismissal.[7] It marked the first time a federal court of appeals found Amazon constituted a "seller" subject to liability under state law for sales of defective third-party products made available through its online marketplace.[8]

This accident and its ensuing litigation encapsulate the complicated tort issues that arise with respect to products sold on giant "e-commerce" sites like Amazon and similar online retail platforms such as auction site eBay, web craft store Etsy, or classified advertisement site Craigslist. Who is responsible for defective products that injure consumers? Which entities should be deemed at fault—those that create a product in the first place or those that distribute it on the market? Who is best available to the consumer for recourse?

With online marketplaces increasingly replacing brick-and-mortar stores in the modern economy, the purchase of consumer goods has become at once both simpler and more complex. In just a few

2. Complaint at ¶ 10, Oberdorf v. Amazon.com, Inc., 295 F. Supp. 3d 496 (M.D. Pa. 2017) (No. 4:16-CV-01127).

3. *Oberdorf*, 930 F.3d at 140.

4. *Id.* at 143.

5. *Id.* at 140.

6. *See* Fox v. Amazon.com, Inc., 930 F.3d 415, 429 (6th Cir. 2019); Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 143 (4th Cir. 2019); Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 782 (N.D. Ill. 2019); Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 401 (S.D.N.Y. 2018); Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *1 (D.N.J. July 24, 2018).

7. In August 2019, the Third Circuit granted Amazon's motion to rehear this case en banc and vacated the panel's opinion. In June 2020, the court determined that the liability questions would best be answered by Pennsylvania's Supreme Court. By September 2020, Oberdorf had agreed to end her lawsuit against Amazon, and the parties settled—ultimately leaving open the question of whether Amazon can face strict liability for defective third-party products sold on its website.

8. The court also discussed whether Oberdorf's claims were barred by the Communications Decency Act ("CDA") regarding Amazon's role in the publication of third-party content. Analysis of the CDA's protections are beyond the scope of this Note.

keystrokes, consumers can access thousands of products in a wide variety of categories on a single website and complete a transaction in a matter of seconds. And yet, the relationship between buyer and seller has been transformed and expanded to include a long list of entities outside the traditional supply chain. A manufacturer may construct the item but may pass it on to be sold by another entity; a vendor might list its product online and advertise it to the consumer; online marketplaces like Amazon may store the product in their warehouses, take payment from the purchaser, process the sale, package the item, and ultimately ship it to a customer's home.

In cases of defective products sold by third-party vendors on Amazon's website, courts have generally refused to extend tort liability to Amazon.[9] Recent cases such as *Oberdorf*, however, signal a shift in the U.S. products liability regime,[10] one that returns to the theory of "absolute" strict products liability as it was first articulated by California Supreme Court Justice Roger Traynor's concurrence in *Escola v. Coca Cola Bottling Co.*[11] These cases support the expansion of liability for internet marketplaces, appropriately targeting these players as the entities most available to injured consumers, best able to incentivize a safer market, and in the best position to distribute the costs of compensation for potential liability.

This Note proposes a statutory solution advocating for the application of truly strict products liability against online marketplaces such as Amazon. It presents statutory language and a formal definition of "seller" that would extend liability to any party that is responsible for placing a defective product into the stream of commerce, without any requirement of privity or showing of negligence. Part I offers a broad overview of the development of products liability law in the United States, as well as background information on Amazon's operations as an online marketplace and its relationship with third-party vendors. Part II examines recent approaches to Amazon's liability under existing state products liability regimes. It also considers current arguments for and against insulating Amazon from liability for injuries resulting from defective products sold to consumers. Part III advocates returning to a truly strict theory of products liability, based on the model of strict liability provided in the Restatement (Second) of Torts and the policy rationales originally espoused by Justice Traynor in *Escola*.[12]

9. *See Fox*, 930 F.3d at 429; *Erie*, 925 F.3d at 143; *Garber*, 380 F. Supp. 3d at 782; *Eberhart*, 325 F. Supp. 3d at 401; *Allstate*, 2018 WL 3546197, at *1.

10. *Oberdorf*, 930 F.3d at 136; *see* State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964 (W.D. Wis. 2019).

11. 150 P.2d 436, 461 (Cal. 1944) (Traynor, J., concurring).

12. *Id.* at 462–64.

Ultimately, this Note recommends statutory language for states to adopt that would subject online marketplaces like Amazon to strict liability for defective third-party products that they enter into the "web-stream" of commerce.

I. BACKGROUND

A. Historical Development of Products Liability Law

Products liability refers to the field of law involving the liability of those who supply products to purchasers and users when losses and injuries result from defects in such products.[13] Dangerous or defective product conditions can result in different kinds of physical or intangible losses, affecting different groups of purchasers, users, or nonparties who suffer those losses.[14] To redress these losses, a variety of theories of recovery are available to claimants, typically based in contract or tort, with liability established on the basis of negligence or strict liability.[15]

1. Privity of Contract

Originally, common law recovery in a negligence action for injuries caused by defective products depended on the existence of privity of contract between the injured consumer and the manufacturer or seller.[16] This English common law principle originated with the nineteenth-century case *Winterbottom v. Wright,* which established the general rule that any seller of goods would not be liable for damages caused by their defective products to anyone except the immediate

13. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 96, at 677 (5th ed. 1984).

14. Prosser and Keeton, in their classic hornbook on tort law, categorized their theories of recovery and types of losses as follows: (1) two types of product conditions that can result in loss to purchasers or third persons (dangerous or inferior); (2) at least five kinds of resulting losses (personal injury, harm to tangible things, harm to the product by the original purchaser, harm to products constructed or repaired with a target seller's component part, and economic loss); and (3) three groups of those who suffer such losses (purchasers, users who are not purchasers, and nonusers). *Id.* at 677–79. Together, these categories make available four possible theories of recovery: strict liability in contract for breach of warranty; negligence liability in contract for breach of warranty; negligence liability in tort; and strict liability in tort. *Id.*

15. *Id.*

16. *See, e.g.*, Winterbottom v. Wright, (1842) 152 Eng. Rep. 402, 405 (cautioning against the risk of an "infinity of actions" if the plaintiff could sue where there is no privity of contract):

> [E]very passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.

buyer.[17] U.S. courts adopted this principle, which reflected a reluctance to place strict liability burdens on manufacturers in order to drive nineteenth-century economic growth.[18] Courts restricted manufacturers' duty of care to only those consumers actually in privity and confined that privity to the consumers that manufacturers dealt with directly.[19] This liability approach was based on the rationale that "industry could not grow and prosper if it had to pay for any and all injuries its defective products caused."[20]

But in the early 1900s, products liability law evolved as a result of *MacPherson v. Buick Motor Co.*[21] There, the New York Court of Appeals abolished the privity rule for negligence cases.[22] The majority permitted the plaintiff's negligence claim to proceed against automobile manufacturer Buick after the plaintiff's car collapsed as a result of defective wheels and he was thrown from the car and injured.[23] The plaintiff was not in privity with the manufacturer, having instead purchased the car from a retailer, but the court concluded that Buick still owed a duty of care to the consumer and was still liable for negligence to parties beyond the immediate purchaser of its products.[24] The *MacPherson* court reasoned that if a manufacturer put forth a product that might reasonably be expected to cause harm when defective, the manufacturer would be "under a duty to make it carefully"—essentially leaving a showing of negligence as the plaintiff's only burden.[25] The resulting products liability rule held sellers liable for negligence in the manufacture or sale of any product that could reasonably be expected to be capable of inflicting substantial harm if defective in any way.[26]

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17. *Id.* at 404–05.

18. KEETON ET AL., *supra* note 13, at 682.

19. Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 363 (1965).

20. *Id.* at 363–64 ("[Courts] feared a plaintiff-population explosion, and could not envisage how a manufacturer could be expected to exercise reasonable care toward just anybody he could foresee might suffer injury from his defective product.").

21. 217 N.Y. 382 (1916).

22. *Id.* at 389–90.

23. *Id.* at 384–85.

24. *Id.* at 392–93 ("There is nothing anomalous in a rule which imposes upon A, who has contracted with B, a duty to C and D and others according as he knows or does not know that the subject-matter of the contract is intended for their use."); *see also id.* at 397 (Bartlett, C.J., dissenting) (noting the rejection of the general rule that "[the] furnisher of an article is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of such article").

25. *Id.* at 389–90 (majority opinion) ("If [the manufacturer] is negligent, where danger is to be foreseen, a liability will follow.").

26. KEETON ET AL., *supra* note 13, at 683.

2. Absolute Liability in Food Products and Beyond

With the liability of sellers and manufacturers now established on the basis of negligence, courts in the decades following *MacPherson* attempted to impose further responsibility—to hold parties liable even where they might have exercised all reasonable care and even without privity of contract between the victim buyer and defendant seller.[27] This absolute liability imposed on manufacturers and other sellers for physical harm to persons and things "went far beyond concepts about promissory or contractual obligations."[28]

A trio of cases in California introduced this theory of absolute liability for defective products, beginning with the California Supreme Court case *Escola v. Coca Cola Bottling Co*.[29] There, the majority applied the negligence theory of res ipsa loquitor,[30] holding the defendant bottling company liable for injuries suffered by a restaurant waitress when a glass bottle of Coca-Cola exploded in her hand.[31] Though agreeing with the result, Justice Traynor in his concurrence separately sought to apply a theory of absolute liability. This concurrence made *Escola* especially influential to the development of strict products liability.[32]

Recognizing the trend in food product cases, where manufacturers of defective food products could be held to an implied warranty of quality that ran to remote consumers (not just to immediate purchasers), Justice Traynor asserted that parallel protections should be extended for consumers of all types of defective products: "Dangers to life and health inhere in other consumers' goods that are defective and there is no reason to differentiate them from the dangers of defective food products."[33] He advocated for manufacturers incurring "absolute liability when an article that [they have] placed on the market, knowing that it is to be used without inspection, proves to have

27. *Id.* § 97 at 690.

28. *Id.* § 98 at 692.

29. 150 P.2d 436 (Cal. 1944).

30. Res ipsa loquitur (Latin for "the thing speaks for itself") is a tort law doctrine where the court infers negligence from the very nature of the accident itself; the rule allows a plaintiff to create a rebuttable presumption of negligence by offering circumstantial evidence, without having to prove specific negligent conduct by the defendant. Byrne v. Boadle, (1863) 159 Eng. Rep. 299, 300.

31. *See Escola*, 150 P.2d at 440 (holding "all the requirements necessary to entitle plaintiff to rely on the doctrine of res ipsa loquitur to supply an inference of negligence are present"). The court explained that the doctrine of res ipsa loquitor does not apply unless (1) the defendant had exclusive control of the thing causing injury, and (2) the accident was of such a nature that it ordinarily would not occur in the absence of some negligence by the defendant. *Id.* at 438.

32. *Id.* at 440–44 (Traynor, J., concurring).

33. *Id.* at 442.

a defect that causes injury to human beings."[34] This strict liability of manufacturers to all consumers injured by defective products would follow "without proof of negligence."[35] Justice Traynor explained that compelling policy reasons existed in support of imposing such strict liability: he emphasized the need to compensate innocent customers, the ability of manufacturers to insure against the risk of injury and distribute the costs of compensating victims, and the possibility of incentivizing the creation of safer products.[36] Additionally, Justice Traynor reasoned that such an adjustment in products liability law was a necessary response to the changes in how products were being manufactured, advertised, and sold in the modern world.[37]

Over the next twenty years, a number of courts and scholars increasingly argued for strict manufacturer liability for defective products generally.[38] In 1960, Dean William Prosser published his groundbreaking article *Assault upon the Citadel*, which predicted and argued for a generalized doctrine of strict liability for the sale of any category of defective products, a doctrine that lay explicitly in tort.[39] This rule would avoid the previous obstacles to recovery found in contract law, such as requiring privity, title to the good, disclaimers, or notice.[40]

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34. *Id.* at 440.

35. *Id.* at 442.

36. *Id.* at 440–41 ("Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.").

37. *Id.* at 443:

> As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product . . . ;

see also Traynor, *supra* note 19, at 363 ("The great expansion of a manufacturer's liability for negligence since [*MacPherson*] marks the transition from industrial revolution to a settled industrial society.").

38. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 83 (N.J. 1960) (explaining why the demise of the privity defense in personal injury cases involving foodstuffs compelled the same application for cases involving other defective products, such as automobiles):

> We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants, and others, demands even less adherence to the narrow barrier of privity.

39. William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1140 (1960).

40. *Id.* at 1127–34 ("If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask.").

Just three years later, Justice Traynor wrote the majority opinion for *Greenman v. Yuba Power Products, Inc*. Relying on his previous *Escola* concurrence, Justice Traynor embraced truly "strict" products liability to hold a manufacturer liable for severe injuries inflicted by a defective power tool attachment.[41] The majority adopted the clear rule that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[42] As predicted by Prosser, this liability would be imposed as a matter of tort law, not by any implied warranty under contract law.[43] Strict liability in tort also meant that a "plaintiff's claim would not be barred by the defendant's contractual disclaimers or limits on liability."[44]

The next year, Justice Traynor also wrote the majority opinion in *Vandermark v. Ford Motor Co.*, which further broadened the theory of strict products liability to apply even to nonmanufacturing retailers.[45] The court held an authorized dealer strictly liable for injuries resulting from an assembly defect that caused an automobile accident.[46] The court emphasized that because retailers, like manufacturers, are involved in the business of distributing goods to the public, they should be considered an "integral part of the overall producing and marketing enterprise" and therefore "should bear the cost of injuries resulting from defective products."[47] Again, the policy justifications set forth in Justice Traynor's original *Escola* concurrence supported the imposition of strict liability for manufacturers and retailers alike.[48]

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41. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900–01 (Cal. 1963) (en banc).

42. *Id.* at 900.

43. *Id.* at 901.

44. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 450 (2d ed. 2020).

45. 391 P.2d 168, 172 (Cal. 1964).

46. *Id.*

47. *Id.* at 171.

48. *See id.* at 171–72:

> In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.

3. The Restatement Approach

The Restatement (Second) of Torts, promulgated the year following *Vandermark*, incorporated these developing theories of strict products liability into a new section, 402A.[49] Crafted by Dean Prosser, section 402A provided that liability would be imposed on "one who sells" any defective products that cause physical harm to the consumer or ultimate user, "whether or not they were at fault and whether or not they were in privity with the plaintiff."[50] The only requirements for such liability were that the seller be "engaged in the business of selling" such products and that the defective products "reach the user or consumer without substantial change in the condition in which [they were] sold."[51] Comment c to section 402 further articulated the justifications Justice Traynor provided in *Escola*: "[P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them" and "the proper persons to afford [the cost of such liability] are those who market the products."[52] The commenters explained that such a seller "has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured" by a product.[53] The Restatement clarified that this rule would apply liability to any person engaged in the business of selling products—including, but not limited to, any "manufacturer," "any wholesale or retail dealer," or any "distributor."[54] With these developments, section 402A precipitated a major expansion of the imposition of strict liability on sellers and protections for consumers[55]

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49. *See* DOBBS ET AL., *supra* note 44, § 450. *See generally* DAVID G. OWEN, PRODUCTS LIABILITY LAW § 5.3 (2005) (discussing the drafting process of section 402A, which originally addressed strict liability for the sale of "food for human consumption," but was ultimately expanded to apply to all products).

50. DOBBS ET AL., *supra* note 44, § 450; *see* OWEN, *supra* note 49, § 5.3, at 260 ("[T]he liability principle of § 402A is short and simple: manufacturers *and other suppliers* are subject to strict liability in tort for injuries caused by defects in the products that they sell." (emphasis added)).

51. RESTATEMENT (SECOND) OF TORTS § 402A(1) (AM. L. INST. 1965).

52. *Id.* § 402A cmt. c; *see* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring).

53. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. L. INST. 1965).

54. *Id.* § 402A cmt. f.

55. *See* James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1512 (1992) (indicating that section 402A has been cited by "thousands upon thousands of product liability decisions"); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793–94 (1966) (characterizing the adoption of strict products liability following the promulgation of section 402A as "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts" (footnote omitted)).

and would serve as a foundation for the development of a number of states' products liability law regimes in the years following.[56]

B. Amazon's Online Marketplace

Retail giant Amazon has played a substantial role in the rise of e-commerce through the operation of its website Amazon.com. A pioneer in online shopping, Amazon evolved from originally selling only books[57] to selling "anything, with a capital A."[58] By 2019, its share of the U.S. e-commerce market was more than double the market share of its next nine competitors combined.[59] As a giant online marketplace, Amazon has fulfilled its goal of transforming into the paradigmatic internet shopping bazaar, providing a megaplatform that facilitates transactions by creating a "digital space for commerce."[60]

Originally, Amazon operated as a simple online retailer, one that procured goods at wholesale prices from suppliers and sold them at retail prices to consumers.[61] In 1999, Amazon introduced Auctions, its online auction service, and zShops, a service through which businesses could set up independent online storefronts.[62] These soon evolved into the Amazon Marketplace, launched in 2000, which allowed third-party merchants to market and sell their products directly to Amazon customers.[63] Of the millions of products now offered for sale on its website, some are still offered for sale directly by Amazon itself, but a "significant portion"[64] is sold by third-party vendors who take advantage of the Amazon Marketplace service to access a wider

56. Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 714 (1970) (noting that "state courts in at least 15 jurisdictions" had adopted section 402A just five years after its promulgation).

57. Makeda Easter & Paresh Dave, *Remember When Amazon Only Sold Books?*, L.A. TIMES (June 18, 2017, 12:40 PM), http://www.latimes.com/business/la-fi-amazon-history-20170618-htmlstory.html [https://perma.cc/GF6Y-NQYX] (detailing Amazon's history and origins as an online bookselling site).

58. Leslie Kaufman, *Amazon.com Plans a Transformation to Internet Bazaar*, N.Y. TIMES (Sept. 30, 1999), https://www.nytimes.com/1999/09/30/business/amazoncom-plans-a-transformation-to-internet-bazaar.html [https://perma.cc/95ZA-5ZKU] (quoting Jeff Bezos, Amazon founder and CEO).

59. Lina M. Kahn, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 986 (2019).

60. Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 56 HARV. J. ON LEGIS. 141, 144 (2019).

61. Kahn, *supra* note 59, at 985.

62. Feng Zhu & Qihong Liu, *Competing with Complementors: An Empirical Look at Amazon.com*, 39 STRATEGIC MGMT. J. 2618, 2623–24 (2018).

63. *Id.*

64. Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 396 (S.D.N.Y. 2018).

consumer market.[65] In 2017, for example, more than fifty percent of all units sold on Amazon came from third-party sellers.[66]

1. Amazon's Distribution Methods

For these third-party vendors, Amazon offers two methods to fulfill orders for products available on its website: "Fulfilled by Amazon" ("FBA") or "Fulfilled by Merchant" ("FBM").[67] If a third-party vendor elects to use the FBA service, then Amazon inventories, stores, packages, ships, and handles customer service and returns for the vendor's products.[68] This service allows vendors to manage their inventory and market their products to a wider reach of customers. As a result, Amazon charges vendors certain fulfillment and storage fees while handling all payment processing from customers.[69] Throughout the FBA process, vendors retain title to their products, even though Amazon stores, ships, and delivers the products to buyers.[70]

If a third-party vendor does not elect to use FBA and, instead, opts for FBM, the vendor remains personally responsible for all packaging, shipping, and customer service responsibilities, though Amazon continues to handle all payment processing.[71] If a third-party vendor provides a product using the FBM service, Amazon has no physical interaction with that product "at any time throughout the course of the transaction."[72]

2. Amazon's Guarantees

Regardless of the method by which orders are fulfilled, Amazon requires all third-party vendors to agree to the Amazon Services Business Solutions Agreement ("BSA"), which provides the terms of

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65. Ryan Bullard, Note, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J.L. & TECH. 181, 193 (2019). *See generally* Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 140–42 (3d Cir. 2019) (providing a detailed description of the "anatomy of a sale" by third-party vendors on Amazon's online marketplace).

66. Amazon.com, Inc., Annual Report (Form 8-K) (Apr. 18, 2018).

67. John E. Lincoln, *Fulfillment by Amazon vs. Fulfillment by Merchant vs. Seller-Fulfilled Prime (The Ultimate Guide)*, IGNITE VISIBILITY (July 25, 2017), https://ignitevisibility.com/fulfillment-amazon-vs-fulfillment-merchant-vs-seller-fulfilled-prime-ultimate-guide/ [https://perma.cc/Y73E-9P7N].

68. *Fulfillment by Amazon: How It Works*, AMAZON SERVS., https://sell.amazon.com/fulfillment-by-amazon.html?ref_=asus_soa_rd& (last visited Jan. 1, 2021) [https://perma.cc/8DGU-BECT]; Lincoln, *supra* note 67.

69. Lincoln, *supra* note 67.

70. Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 396 (S.D.N.Y. 2018).

71. Lincoln, *supra* note 67.

72. Amy Elizabeth Shehan, Note, *Amazon's Invincibility: The Effect of Defective Third-Party Vendors' Products on Amazon*, 53 GA. L. REV. 1215, 1220 (2019).

service for third-party vendors worldwide and offers a variety of optional services for sellers.[73] Under the terms of the BSA, third-party vendors remain responsible for "deciding what to sell, sourcing their products, providing product descriptions, setting the prices for their products, and packaging their products (or ensuring their products are properly packaged)."[74] Notably, section 6 of the BSA requires third-party vendors to indemnify Amazon from any claims, losses, damages, or costs arising from the sale of products, and section 9 requires vendors to maintain liability insurance in conjunction with the operation of any product sales.[75] Under the BSA, third-party vendors must also provide Amazon with a set of necessary product information, including price, brand, model, dimensions, weight, a product description, digital images of the product, and shipping and handling options, which Amazon uses to build the product's listing on its website.[76]

Importantly, under the BSA, Amazon retains the right at any point during the sales process to "cease providing any or all of the Services at its sole discretion and without notice, including suspending, prohibiting, or removing any listing."[77] This means that Amazon also retains the right to require any third-party vendor to stop or cancel orders of any product or to withhold payments to a vendor if Amazon determines that a vendor's actions may result in unjustifiable risks to Amazon or another third party.[78]

Finally, Amazon provides a guarantee to all customers for all products purchased from third-party vendors on its online marketplace under its "A-to-z Guarantee."[79] Specifically, the Guarantee applies to "the timely delivery and the condition of [the purchased items]," such that customers may be eligible to request a refund if certain conditions are (or are not) met.[80] The Guarantee does not function as a strict

73. *Eberhart*, 325 F. Supp. 3d at 396; *see Amazon Services Business Solutions Agreement*, AMAZON: SELLER CENT., https://sellercentral.amazon.com/gp/help/1791 (last visited Jan. 1, 2021) [https://perma.cc/EEU6-7BRX] [hereinafter *Business Solutions Agreement*] (containing terms and conditions on enrollment, payments, termination, license, representations, indemnification, disclaimer and general release, limitation of liability, insurance, tax matters, confidentiality, force majeure, relationship of the parties, suggestions, modification, password security, export, and other miscellaneous topics).

74. *Eberhart*, 325 F. Supp. 3d at 396.

75. *Business Solutions Agreement*, *supra* note 73.

76. Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 141 (3d Cir. 2019).

77. *Id.* at 142.

78. *Id.*

79. *See About A-Z Guarantee*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=201889410 (last visited Jan. 1, 2021) [https://perma.cc/R9ZJ-2B8X] ("The Amazon A-to-z Guarantee protects you when you purchase items sold and fulfilled by a third-party seller.").

80. *Id.*:

warranty, however, and there are several restrictions limiting this guarantee's scope.[81]

* * *

The BSA and a vendor's chosen distribution method define almost every aspect of the relationship between Amazon and third-party vendors. On their own, however, these elements do not fully illustrate Amazon's essential role in the placement of defective products into the hands of consumers. The rest of this Note will provide further analysis of Amazon's intimate involvement in the buyer experience, retail transaction, and e-commerce distribution chain, as well as an examination of existing case law, to demonstrate the necessity of strict products liability for online marketplaces such as Amazon.

II. PRODUCTS LIABILITY AS APPLIED TO THIRD-PARTY VENDORS' PRODUCTS ON AMAZON'S MARKETPLACE

The sheer volume of third-party sales through Amazon has naturally raised the issue of whether, and when, Amazon should be liable for harm caused by defective products under traditional theories of strict products liability. In the case of defective products sold by third-party vendors on Amazon's Marketplace, courts have generally declined to extend strict liability to Amazon. A string of recent cases has reinforced Amazon's position that it merely provides an online platform for the sale of products, each finding that Amazon does not exercise sufficient control over third-party vendors' products to qualify as a "seller" in order to subject it to products liability claims.[82] Two recent cases, however, have demonstrated a possible—and this Note would posit necessary—shift in the U.S. products liability regime.[83] This

> You may . . . request a refund . . . when the following applies: 1. You have not received your package and three days have passed since the maximum estimated delivery date or the tracking shows a delivery confirmation, whichever is sooner[;] 2. You received an order that is different than expected and have requested a return with the seller[;] 3. You returned your item with a trackable shipping method and the seller has not issued you a refund.

81. *See id.* (noting that the guarantee does not cover, for example, digital items or payments for services).

82. *See* Fox v. Amazon.com, Inc., 930 F.3d 415, 429 (6th Cir. 2019); Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 143 (4th Cir. 2019); Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 782 (N.D. Ill. 2019); Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 401 (S.D.N.Y. 2018); Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *1 (D.N.J. July 24, 2018).

83. *See Oberdorf*, 930 F.3d 136; State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964 (W.D. Wis. 2019).

signaled change recognizes Amazon's role as more than just a neutral website or platform merely facilitating a transaction but rather as the entity most responsible for placing defective products into the stream of commerce. In holding Amazon liable for defective third-party products purchased through its online marketplace, these cases support a return to the truly "strict" liability advocated by Justice Traynor and embodied in the Restatement (Second) of Torts.[84]

A. Arguments for Insulating Amazon from Liability

Amazon asserts that it is not sufficiently responsible for placing defective products into the hands of consumers to be subjected to tort liability. The retail giant relies on its lack of oversight for, and distance from, third-party vendors as justification for disclaiming its own liability for injuries resulting from these products. Amazon has noted that it does not set the price of third-party vendors' products,[85] create the content of the product listings on its website, or possess title over the products, even when it packages and ships products under the FBA service.[86] As a result, Amazon argues that merely providing a website for use by other, independent sellers does not transform Amazon into a seller itself; rather, it merely acts as a facilitator of sales by third-party vendors under its fulfillment programs.[87]

1. Nonassumption of Title, Lack of Control

Amazon asserts as a threshold matter that it cannot constitute a "seller" within that term's ordinary meaning and thus cannot be subject to liability under state products liability laws that impose liability specifically on *sellers* of defective products. Under Amazon's reasoning, a "sale" requires the "transfer of ownership of and the title to property from one person to another for a price."[88] So where it does

84. RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

85. *See Allstate*, 2018 WL 3546197, at *8 (noting that the BSA mandates that "sellers set their own prices, constrained only by the prices they set in other channels").

86. *See, e.g.*, *Erie*, 925 F.3d at 142:

> Indeed, even as Amazon possessed the headlamp in its warehouse, Dream Light set the price for the sale of the product to purchasers, designed the product description for the website, paid Amazon for its fulfillment services, and ultimately received the purchase price paid by the purchaser. . . . Moreover, the agreement . . . contemplates that Dream Light, not Amazon, retained title to the goods . . . .

87. *Id.* at 144.

88. *Id.* at 141 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1097 (11th ed. 2007)).

not take title to third-party products offered through its website, Amazon cannot be transformed into the seller of the product.[89]

Recent case law supporting this position has similarly focused on the nonassumption of title and resulting lack of control that Amazon exercises over third-party products listed on its website. For example, the United States Court of Appeals for the Fourth Circuit recently held in *Erie Insurance Co. v. Amazon.com, Inc.* that Amazon could not be considered the seller of a defective headlamp under Maryland law, which defined "sale" as "the passing of title from the seller to the buyer for a price."[90] A customer had purchased the headlamp on Amazon's website, where it was listed as sold by third-party vendor Dream Light and fulfilled by Amazon.[91] According to transaction agreements such as the BSA, Amazon possessed the product in its warehouse, packaged the item, and ultimately shipped it to the purchaser.[92] Sometime later, the headlamp malfunctioned and set fire to the owner's home.[93] The court held that Amazon could not be liable for the product's defective condition because Maryland law imposes liability only on sellers who actually transfer ownership and title to purchasers of that property for a price.[94] Amazon successfully argued that since it never obtained title to the headlamp, it could not incur the liability attributable to sellers of defective goods under Maryland law.[95]

Similarly, the United States Court of Appeals for the Sixth Circuit held in *Fox v. Amazon.com, Inc.* that Amazon did not constitute a seller of a defective hoverboard under Tennessee law, even though the statute loosely defined a "seller" as "any individual or entity engaged in the business of selling a product."[96] The hoverboard had been purchased on Amazon's website, sold by a third-party vendor, and shipped from China, though the parties disputed whether the product had been part of the FBA service.[97] A few months later, customer complaints and investigations revealed a risk of fires or explosions involving similar hoverboards purchased on Amazon's website. Unfortunately for

89. *See id.* at 142 (reasoning that because under the BSA, if a vendor requested Amazon to dispose of certain products stored in Amazon's warehouse, "title to each disposed unit [would] transfer to [Amazon]," it indicated that title otherwise remained with the third-party vendor (alterations in original)).

90. MD. CODE ANN., COM. LAW § 2-106(1) (West 2020); *Erie*, 925 F.3d at 141.

91. For a discussion of Amazon's distribution methods, see *supra* Section I.B.1.

92. *Erie*, 925 F.3d at 138.

93. *Id.*

94. *Id.* at 141.

95. *Id.* at 142, 144.

96. TENN. CODE ANN. § 29-28-102(7) (2012); Fox v. Amazon.com, Inc., 930 F.3d 415, 422 (6th Cir. 2019).

97. Fox v. Amazon.com, Inc., No. 3:16–CV–03013, 2018 WL 2431628, at *2 (M.D. Tenn. May 30, 2018).

members of the Fox family, whose home burned down when the hoverboard's battery caught fire, the Sixth Circuit held that Amazon had not exercised sufficient control over the sale of the hoverboard to be held liable for the damage caused by the defective product.[98] Notably, however, the court rejected a narrow construction of the term "seller" that would limit the definition to entities engaged in the transfer of title to a product.[99] Still, the court emphasized the importance of control under Tennessee products liability law, concluding that liability is contingent upon the targeted entity exercising "a significant degree of control" over the product in the transaction.[100] Simply handling payment and communicating with customers was not a sufficient exercise of control for Amazon to be deemed a seller under Tennessee law.[101]

Reliance on a title requirement, however, is misplaced. Any requirement for a manufacturer, retailer, or distributor to hold title to a defective product in order to be subject to strict liability is absent from the Restatement and applicable case law.[102] Even where Amazon does not take title to products—as perhaps in the case of vendors who use the FBM service—Amazon still controls access to its website and the ability to list products online, bears the risk of loss when a product is in its inventory, regulates all buyer communications with vendors, and handles returns and customer service requests. For those vendors who take advantage of the FBA service, Amazon goes even further and ultimately stores, ships, and delivers the products to a buyer. In either case, aside from the formal transfer of title, Amazon holds the entire "bundle of sticks"—which is to say, all the apparent attributes of ownership.[103] Amazon has upended the traditional supply chain in the modern economy but has artificially insulated itself from the process by purposefully rejecting any assumption of title in order to avoid responsibility when something goes wrong—forcing consumers to bear the cost of injuries caused by defective products.[104]

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98. *Fox*, 930 F.3d at 425.

99. *See id.* at 422–23 ("the [Tennessee Products Liability Act's] definition of 'seller' is not limited to any individual or entity regularly engaged in transferring title to a product for an agreed upon price, for livelihood or gain.").

100. *Id.* at 424.

101. *Id.* at 425.

102. *See generally* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (AM. L. INST. 1998); RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

103. *See* Edward J. Janger & Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller Not A Neutral Platform*, 14 BROOK. J. CORP. FIN. & COM. L. 259, 266–67 (2020) (explaining how once a product is sent to an Amazon fulfillment center by a third-party vendor, "Amazon handles every other part of the transaction with the consumer").

104. Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 144 (4th Cir. 2019) (Motz, J., concurring).

Further, Amazon's narrow focus on title and degree of control over products in the chain of distribution pointedly ignores the original goals of the strict products liability regime as adopted in the twentieth century and embodied in the Restatement (Second) of Torts.[105] By claiming a position outside the distribution chain, Amazon attempts to shirk the duty placed on manufacturers and retailers to guard against unreasonable risks of physical harm to its customers caused by products sold on its site. Amazon's arguments ignore the substantive policy justifications that originally supported the modern strict products liability regime and are not in line with the overarching, acknowledged policy goals of tort law, such as "deterrence, loss distribution, corrective justice, and social responsibility."[106]

2. Role as Facilitator

Amazon additionally asserts that entities that do not take title to products as part of the chain of distribution—but rather only "render services to facilitate that distribution or sale"—cannot be considered sellers under state products liability laws.[107] Amazon argues it should be characterized as merely a "facilitator" of the sale of products listed on its online marketplace.[108] Recent district court decisions have also rejected the application of strict liability to Amazon by focusing on its removed position in the chain of distribution stretching from manufacturer to buyer.[109] Such cases have similarly characterized Amazon as a "facilitator" or "provider of services"—services that include maintaining an online website, warehousing and shipping goods, and processing payments to vendors—and as an entity that stands *outside* the distribution chain, not subject to liability.[110]

Amazon claims that transferring possession of a product (for storage in Amazon's warehouse or shipment in Amazon-labeled boxes as part of its fulfillment program) merely facilitates the commercial

105. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring) ("[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.").

106. Bullard, *supra* note 65, at 232.

107. *Erie*, 925 F.3d at 141 (majority opinion).

108. Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *7 (D.N.J. July 24, 2018).

109. *See* Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 778 (N.D. Ill. 2019); Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 400 (S.D.N.Y. 2018).

110. *Eberhart*, 325 F. Supp. 3d at 397, 399 (emphasizing that strict liability applies only to those entities that are "within the distribution chain"); *see Garber*, 380 F. Supp. 3d at 780 (characterizing Amazon as a "marketplace provider outside the distributive chain"); *Allstate*, 2018 WL 3546197, at *7 (describing Amazon as a facilitator, rather than an active participant, in the sale of the defective product).

distribution of its products and does not give Amazon the requisite level of control over a product to transform it into a seller.[111] In labeling itself a "facilitator,"[112] however, Amazon downplays the integral role it plays in placing products into the stream of commerce.[113] Put simply, consumers would never obtain the defective products at issue without Amazon listing the product, putting consumers in contact with third-party vendors, completing the sale, and enabling the supply of the physical item to the consumer's doorstep.

Additionally, Amazon actively manages the sale of all products on its website, carefully curating which products are listed on the site or even directly suggested to consumers.[114] Sellers that wish to list products on Amazon must meet certain criteria and must adhere to the terms of service set out in the BSA.[115] As part of the BSA, Amazon controls the sale of products on its site because it retains the sole right to add or remove listings, process or withhold payments to vendors, and terminate its relationship with a vendor for any reason.[116]

3. Amazon as Neutral Platform

In support of its characterization as facilitator, Amazon analogizes its role to that of auctioneer, one who assists in the sale and "merely provide[s] a market as the agent of the seller."[117] Amazon asserts that "product distribution facilitators" are distinct from true sellers or distributors and that Amazon is more comparable to other web-based advertisers, sales personnel, or auctioneers under the former category.[118] There are important distinctions, however, between Amazon and other online "auctioneers" or *platforms* that similarly

111. Fox v. Amazon.com, Inc., 930 F.3d 415, 419 (6th Cir. 2019); *Allstate*, 2018 WL 3546197, at *8.

112. *Allstate*, 2018 WL 3546197, at *7.

113. *See* Vandermark v. Ford Motor Co., 391 P.2d 168, 171 (Cal. 1964) (en banc) (characterizing retailers as "an integral part of the overall producing and marketing enterprise").

114. Janger & Twerski, *supra* note 103, at 264–66 (discussing the array of strategies Amazon employs to signal certain products to buyers, such as sponsored products, "Amazon's Choice" and "Best Seller" designations, and the Amazon Prime mechanism).

115. *See supra* Section I.B.2.

116. Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 146 (3d Cir. 2019).

117. *Id.* at 144 (citing Musser v. Vilsmeier Auction Co., 562 A.2d 279, 282 (Pa. 1989)).

118. *See* Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018) (noting that comment g to section 20 of the Restatement (Third) of Torts excludes such "facilitators" from the class of distributors subject to strict liability); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 20 cmt. g (AM. L. INST. 1998); *see also Musser*, 562 A.2d at 283 (holding that auctioneers are not "sellers").

disrupt the traditional distribution chain, such as eBay, Craigslist, or Etsy, which can more accurately be characterized as neutral.[119]

For example, online auction site eBay is clearly akin to an auctioneer, as it requires the activity of buyers to place bids on items for sale.[120] Amazon does not require buyers to place bids on its online products, and its careful control over product listings indicates it does more than "merely provide a market" for third-party vendors.[121] Or compare classified advertisement website Craigslist, where sellers must actively maintain their postings and personally provide the content, language, and photos for the products or services they post for sale. These sellers complete the transaction without any assistance from the platform itself—Craigslist, as a neutral entity, merely hosts the website, much like an online bulletin board or newspaper that publishes classified listings. Amazon, in contrast, closely controls and monitors the information presented for its online products listings.[122] Although third-party vendors provide the content, Amazon possesses significant editorial and publishing functions, "retain[ing] the right to edit the content and determine the appearance of product listings."[123]

Additionally, on neutral platforms such as eBay or Etsy, a seller's identity is more independently and distinctly presented, and the seller information is prominently located next to the products listed. Amazon, by comparison, only displays the designations "Sold by Seller" and "Fulfilled by Amazon" in small type under the so-called "buy-box," an information-dense area of the product page where users click to add a product to their shopping cart for purchase.[124] Through manipulation of this "buy-box," Amazon decides which vendor will appear, chooses whose inventory will be sold, and maximizes confusion for consumers

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119. Bullard, *supra* note 65, at 208.

120. *See* Adam Cohen, *'The Perfect Store'*, N.Y. TIMES (June 16, 2002), https://www.nytimes.com/2002/06/16/books/chapters/the-perfect-store.html [https://perma.cc/F7SD-QFLW] (noting that eBay was originally created as AuctionWeb, advertised as a "free web auction").

121. *Oberdorf*, 930 F.3d at 144 (citing *Musser*, 562 A.2d at 282); *see supra* note 114 and accompanying text.

122. Janger & Twerski, *supra* note 103, at 263.

123. Oberdorf v. Amazon.com, Inc., 295 F. Supp. 3d 496, 498 (M.D. Pa. 2017); *see also Oberdorf*, 930 F.3d at 141:

> Amazon formats the product's listing on its website. This function, too, is provided for in the [BSA], by which Amazon retains the right in its sole discretion to determine the content, appearance, design, functionality, and all other aspects of the Services, including by redesigning, modifying, removing, or restricting access to any of them. In fact, the [BSA] grants Amazon a royalty-free, nonexclusive, worldwide, perpetual, irrevocable right and license to commercially or noncommercially exploit in any manner, the information provided by third-party vendors.

124. Bullard, *supra* note 65, at 208.

as to the actual identity of the vendor.[125] Compare this to a site like Etsy, an online community for artists and crafters, where the identity of the seller is clearly and purposefully distinguishable, and sellers are encouraged to personalize their "virtual storefront" to attract potential customers.[126] On Etsy's platform, sellers are prominently presented as "small business owners"—each with their own unique personality, customized storefront appearance, and "branded design palette."[127] In contrast, Amazon's own branding is abundant throughout its site, with its own logo on product pages and shipping materials, and it maintains separate handling of the financial transaction, a distinct customer support messaging system, and, now, even its own brick-and-mortar storefronts.[128]

Finally, for truly neutral online platforms, the ability to communicate directly with sellers is easily available to buyers, unlike on Amazon where customer service requests and other inquiries for the vendor must proceed exclusively through Amazon customer support.[129] While Amazon contends it is a neutral platform that merely facilitates transactions between sellers and buyers, as is the case for other online retailers, it is clearly more than just a facilitator that provides a "means of marketing" for a seller.[130]

B. Arguments for Subjecting Amazon to Liability

More recent cases provide compelling arguments in favor of holding Amazon liable as a seller of defective products purchased through its online marketplace.[131] These arguments recognize

125. Janger & Twerski, *supra* note 103, at 267–70.

126. *See* Etsy Staff, *Customizing the Look of Your Shop Home*, ETSY (Jan. 1, 2020), https://www.etsy.com/seller-handbook/article/customizing-the-look-of-your-shop-home/358680450619 [https://perma.cc/JV58-GD63] (providing advice to sellers on how to build a strong "visual brand").

127. Etsy Staff, *The Ultimate Guide to Branding*, ETSY (July 10, 2018), https://www.etsy.com/seller-handbook/article/the-ultimate-guide-to-branding/350364246510 [https://perma.cc/9SJB-CJMS].

128. Anna Schaverien, *Five Reasons Why Amazon Is Moving into Bricks-And-Mortar Retail*, FORBES (Dec. 29, 2018, 11:05 AM), https://www.forbes.com/sites/annaschaverien/2018/12/29/amazon-online-offline-store-retail/ [https://perma.cc/J3D2-DA8H] (discussing Amazon's entrance into the bricks-and-mortar retail market with physical bookstores (Amazon Books) and grocery stores (following the acquisition of Whole Foods and opening of Amazon Go, its cashierless grocery store)).

129. *See Oberdorf*, 930 F.3d at 145 (noting that under the BSA, "third-party vendors can communicate with the customer only through Amazon").

130. Oberdorf v. Amazon.com, Inc., 295 F. Supp. 3d 496, 500 (M.D. Pa. 2017) (quoting Musser v. Vilsmeier Auction Co., 562 A.2d 279, 282 (Pa. 1989)).

131. *See, e.g.*, State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964 (W.D. Wis. 2019). As of September 2020, Amazon still faces multiple lawsuits seeking to hold it responsible for damage or injuries caused by defective third-party products sold on its website. Pennsylvania's

Amazon's integral role in the chain of distribution and the necessity of holding Amazon strictly liable as the entity most responsible for the overall placement of products into the consumer marketplace.

Oberdorf v. Amazon.com, Inc. serves as a flagship case signaling this shift in the U.S. strict products liability regime.[132] As previously discussed, *Oberdorf* involved a plaintiff rendered permanently blind in one eye after an accident involving a defective dog leash purchased from a third-party vendor through Amazon.[133] The Third Circuit examined four factors from Pennsylvania precedent in determining whether Amazon should constitute a seller: (1) whether the actor is the only entity available for redress; (2) whether the imposition of strict liability would serve as an incentive to safety; (3) whether the actor is in a better position to prevent the circulation of defective products; and (4) whether the actor could distribute the costs associated with incurring liability to others.[134] The court found all four factors weighed in favor of imposing strict liability on Amazon under Pennsylvania law.[135] The majority emphasized the exclusive role that Amazon serves in communicating and interacting with customers, its ability to regulate the products that appear and transactions that occur on its platform, and the existing provisions for indemnification and fees that Amazon imposes in its relationships with third-party vendors.[136] Especially where third-party vendors participate in the FBA program, the court determined Amazon's role extends beyond that of a "sales agent" or a mere participant in the marketplace.[137] FBA is the predominant method by which third-party vendors, including the vendors in *Allstate*[138] and *Eberhart*,[139] place their products into the market. *Oberdorf*, however, stands as a rare exception: the third-party vendor in this case opted for the FBM method of fulfillment.[140] As a result, Amazon never took

and Ohio's top courts were recently considering the issue, and federal appeals courts are weighing cases under California and Texas law. *See Oberdorf*, 930 F.3d at 136; Stiner v. Amazon.com, Inc., No. 2020-Ohio-4632, 2020 WL 5822477 (Oct. 1, 2020); McMillan v. Amazon.com, Inc., No. 20-20108 (5th Cir. filed Mar. 2, 2020). As these cases proceed, there continue to be promising developments in strict products liability for online retailers. *See, e.g.*, Bolger v. Amazon.com, LLC, 267 Cal Rptr. 3d 601, 627–28 (Cal Ct. App. 2020) (holding Amazon strictly liable for injuries caused by an exploding laptop battery sold by a third-party vendor, because Amazon had played a "pivotal" role in the distribution chain bringing the product to the consumer).

132. 930 F.3d at 136.

133. *Id.* at 140.

134. *Id.* at 144 (citing *Musser*, 562 A.2d at 282).

135. *Id.* at 147–48.

136. *Id.* at 145–47.

137. *Id.* at 149.

138. Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *3 (D.N.J. July 24, 2018).

139. Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 396 (S.D.N.Y. 2018).

140. 930 F.3d at 142, 154.

physical possession of the dog collar, which the Furry Gang had shipped directly to Oberdorf.[141] And yet, the court still considered Amazon the seller because it "exert[ed] substantial market control over product sales by restricting product pricing, customer service, and communications with customers."[142]

In *State Farm v. Amazon.com, Inc.*, the United States District Court for the Western District of Wisconsin similarly held Amazon strictly liable for damage caused when a defective bathtub faucet, purchased from a third-party vendor on Amazon, failed and caused flooding in the purchaser's home.[143] The court focused on the role Amazon played in providing the defective product to the market, endorsing the principle that "strict liability derives from the act of putting the defective product into the stream of commerce."[144] As in most cases, the third-party vendor participated in the FBA program, substantially increasing Amazon's role in placing the defective faucet into the plaintiff's home.[145] The court held Amazon liable as the seller and distributor of the defective bathtub faucet, serving as the proxy for the unreachable manufacturer, because 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."[146]

1. The Unreachable Problem

The four-part test applied in *Oberdorf* and reasoning emphasized in *State Farm* together echo the rationales originally put forth by Justice Traynor in *Escola* justifiying the imposition of strict tort liability on both sellers and manufacturers of defective products. The most practical reason for imposing strict liability on sellers is present in many cases involving Amazon: the problem of the unknown or unreachable third-party vendor or manufacturer, who is unable to be contacted or not subject to process in the United States. In both *Allstate* and *State Farm*, for example, the third-party vendors who supplied the defective products to Amazon were not subject to process within each respective state.[147] And in *Fox*, the plaintiffs obtained a default

141. *Id.*

142. *Id.* at 149.

143. State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 973–74 (W.D. Wis. 2019).

144. *Id.* at 972.

145. *Id.* at 967.

146. *Id.* at 972.

147. *Id.* at 969; Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *4 (D.N.J. July 24, 2018) (finding that "the record does not reflect that [the vendor], a Hong Kong based company, was subject to process in this country.").

judgment against the third-party seller because it failed to appear and because the manufacturer of the defective product could not be identified.[148] Finally, in *Oberdorf*, neither party was able to locate or contact the third-party vendor that listed the defective dog collar online.[149] In those cases where a third-party vendor is so far removed from the consumer as to be unreachable, or where a manufacturer is unknown or not subject to process, strict liability should attach instead to an online marketplace like Amazon as the member of the broader production and distribution chain most reasonably available to the consumer.[150]

The court in *Oberdorf* also noted that Amazon generally takes no precautions to ensure that third-party vendors are in good legal standing in the country where their business is registered, nor does it have any vetting process to ensure that vendors are amenable to legal process.[151] And in cases such as *Fox* and *Allstate*, the plaintiffs asserted that they reasonably believed they were purchasing the products directly from Amazon.[152] Regardless of how accurate this belief was, it was more than reasonable in light of the pervasive role Amazon plays in placing the product into the hands of consumers. If third-party vendors are to remain unreachable and unaccountable for the injuries caused by their defective products, then Amazon appropriately stands as the "only member of the marketing chain available to the injured plaintiff for redress."[153]

2. Incentivizing Safety

Public policy additionally supports imposing strict liability on an entity such as Amazon as the party that "will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[154] Incentivizing a safer consumer marketplace is a strong rationale for strict products liability.[155] In the modern e-commerce industry, Amazon is better situated, perhaps more than any other

148. Fox v. Amazon.com, Inc., No. 3:16–CV–03013, 2018 WL 2431628, at *1, *6 (M.D. Tenn. May 30, 2018) ("[T]he manufacturer of the hoverboard at issue is unknown.").

149. Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 145 (3d Cir. 2019).

150. Bullard, *supra* note 65, at 225–26; *see also* Frank J. Cavico, Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 NOVA L. REV. 213, 246 (1987) ("[I]f a manufacturer cannot be effectively sued and a judgment enforced, the reseller should be held to the liability status of the manufacturer. Such secondary liability is necessary to minimize a plaintiff being left without a liable and solvent defendant.").

151. *Oberdorf*, 930 F.3d at 145.

152. *Fox*, 930 F.3d at 418; *Allstate*, 2018 WL 3546197, at *11.

153. *Oberdorf*, 930 F.3d at 145.

154. Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

155. *See* Bullard, *supra* note 65, at 215–16.

entity, to efficiently and effectively construct a safer internet marketplace for consumers.[156] More than a mere "conduit" for products between manufacturer and consumer, Amazon exerts substantial control over third-party vendors and their goods through agreements such as the BSA.[157] For example, the BSA grants Amazon the right to remove product listings, withhold payments to vendors, impose transaction limits, and terminate service to a vendor for any reason.[158] And in cases such as *Erie* where third-party vendors use the FBA service, Amazon's role in placing a defective product into the market is substantially increased. Amazon may take charge of the warehousing, packaging, shipping, handling, and even customer service for a product[159] and thus possesses the capability to remove unsafe products from its marketplace.[160] The need and potential for continuing sales encourages an ongoing relationship between third-party vendors and Amazon, providing a basis for indirect influence over the condition and safety of products offered on its website.[161] Amazon thus enjoys a great deal of leverage and could exert more pressure on third-party vendors in order to verify and encourage the quality and safety of the products sold on its website.[162] Amazon wields sufficient market power to regulate every aspect of the distribution and sales of products listed on its website and could be effectively motivated by the threat of strict liability to better supervise its relationships with third-party vendors.

Unfortunately, immunizing Amazon from tort liability for defective products leads to the proliferation of the sale of dangerous products.[163] The adoption of strict liability for nonmanufacturing sellers was designed to create "incentives for them to deal only with reputable, financially responsible manufacturers and distributors, thereby helping to protect the interests of users and consumers."[164] The entity best able to provide that protection is Amazon.

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156. *Id.* at 216.

157. *See* Cavico, *supra* note 150, at 227; *see supra* Section I.B.2.

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

159. Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 138 (4th Cir. 2019).

160. *See Oberdorf*, 930 F.3d at 146 ("Amazon is fully capable, in its sole discretion, of removing unsafe products from its website.").

161. *See id.* (describing the indirect influence Amazon has over third-party vendors via the terms of Amazon's agreement).

162. Bullard, *supra* note 65, at 216.

163. *See* Alexandra Berzon, Shane Shifflett & Justin Scheck, *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products*, WALL ST. J. (Aug. 23, 2019, 9:56 AM), https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990 [https://perma.cc/V6JK-97FW] (documenting the pervasive and growing problem of Amazon products that have been declared "unsafe by federal agencies, are deceptively labeled or are banned by federal regulators").

164. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (AM. L. INST. 1998).

3. Distribution of Costs

Considering its ever-growing influence and income, Amazon also stands in the best position to distribute the costs of compensating for potential liability. While it is true that Amazon does not directly or initially set the price of products sold on its marketplace,[165] according to the terms of the BSA, it does exert significant control over prices by collecting a variety of fees from third-party vendors, which affects the overall product price put forth by vendors.[166] Therefore, Amazon is capable of adjusting these fees in order to compensate for potential liability.

Amazon could also increase such fees in order to pay for increased costs of liability insurance against this expanded liability. In general, products liability insurance functions as an effective mechanism for shifting risk from the seller to the insurer, distributing the cost among other policyholders, and providing further protections for vulnerable customers.[167] Amazon could advance the policy goal of loss spreading by passing on some of the insurance costs to be borne by third-party vendors.[168]

4. Social Responsibility

Finally, the imposition of strict products liability is justified because Amazon should bear the social responsibility of making defective products available to consumers. As the leading online marketplace in the United States, Amazon plays an "integral role in placing potentially dangerous products into consumers' hands."[169] The purpose of strict products liability is to ensure that the costs of injuries

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165. *See* Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 396 (S.D.N.Y. 2018) ("Under the terms of the BSA, third-party sellers are responsible for deciding what to sell, sourcing their products, providing product descriptions, *setting the prices for their products*, and packaging their products . . . ." (emphasis added)); Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *8 (D.N.J. July 24, 2018) (similarly describing how Amazon's agreements with third-parties limit the control that it has over the third-parties' products).

166. *See Selling on Amazon Fee Schedule*, AMAZON: SELLER CENT., https://sellercentral.amazon.com/gp/help/external/200336920 (last visited Jan. 1, 2021) [https://perma.cc/MN4V-R6NQ] (stating the variety of fees incurred by sellers on Amazon).

167. *See* Cavico, *supra* note 150, at 229 ("The imposition of strict tort liability upon non-manufacturers is based on the significant rationale that retailers and wholesalers are entitled to indemnity from the manufacturer.").

168. *See* Vandermark v. Ford Motor Co., 391 P.2d 168, 172 (Cal. 1964) (en banc) ("Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.").

169. Bullard, *supra* note 65, at 218; *see Vandermark*, 391 P.2d at 171 (noting that retailers, like manufacturers, "are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products").

caused by defective products are borne by "the [entities] that put such products on the market rather than by the injured persons who are powerless to protect themselves."[170] Not only has Amazon made these products available to the marketplace but it arguably created that very market—"a market that plausibly would not have existed but for its distinctive efforts."[171]

To establish Amazon's liability, it should be sufficient for a plaintiff to prove they were injured while using a defective product they received through Amazon's marketplace. If Amazon can shirk its "special responsibility" for the sale of unsafe and defective products—transactions for which it collects significant fees, capital, and reputation—the existing strict products liability regime would be strict no longer.[172] It would be hypocritical for Amazon to exercise absolute control over so many, if not all, aspects of a transaction and its relationship with both vendors and buyers but claim no responsibility whatsoever for the consequences of that transaction.[173] As commentators have noted, "[c]onsumers no longer approach products warily but accept them on [faith], relying on the reputation of the manufacturer or the [trademark]."[174] The fact that Amazon undoubtedly benefits economically and reputationally from its dominant role in the marketplace further compels the imposition of tort liability.[175] This role, whether as manufacturer, retailer, wholesaler, or distributor, whether for "personal profit or other benefit," calls for the imposition of strict liability.[176]

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170. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963) (en banc).

171. Edelman & Stemler, *supra* note 60, at 190.

172. RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (AM. L. INST. 1965).

173. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (en banc) (Traynor, J., concurring):

> It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.

174. *Id.* at 443.

175. *See* Bullard, *supra* note 65, at 219 (examining Amazon's role in distributing defective products and the benefits Amazon gains from this role).

176. Kasel v. Remington Arms Co., 101 Cal. Rptr. 314, 323 (Cal. Ct. App. 1972); *see* Cavico, *supra* note 150, at 221 ("[A]lthough not responsible for the manufacture and production of the product, retailers, wholesalers, and distributors occupy a position in, and derive benefits from, the marketing chain, which is sufficient to impose strict tort liability.").

III. SOLUTION: A RETURN TO TRUE STRICT PRODUCTS LIABILITY

The policy shift in products liability law that originated with *MacPherson* and *Escola* was a response to the changing economies and production systems of the twentieth century.[177] However, in cases such as *Erie* and *Fox*, courts have failed to recognize the increasingly dominant role of e-commerce and internet retailers in the modern economy and, as a result, have discounted Amazon's significant role in placing defective products into the marketplace.[178] Public policy considerations such as those discussed above, and recognition of the unique role that Amazon plays in the modern internet economy, justify a change in the law following the recent examples of *Oberdorf* and *State Farm*.[179] Passing such legislation would make it explicitly clear to both buyers and sellers that injured consumers can sue online marketplaces for defective or dangerous products, just as they traditionally would be able to sue manufacturers or brick-and-mortar retailers.[180] Without such legislation, the risk remains that Amazon, with its increasingly deep pockets, would continually push injured consumers to go to court and encounter unsettled case law.

Generally, in the United States, there is no federal products liability common law; rather, the contours of products liability standards are determined by each state.[181] States have enacted comprehensive products liability statutes, some of which are modeled

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177. *See Escola*, 150 P.2d at 443 (Traynor, J., concurring) ("As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered.").

178. *See supra* Section II.A.

179. *See* Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 144–45 (4th Cir. 2019) (Motz, J., concurring) ("Amazon disrupts the traditional supply chain. . . . [C]onsiderations of public policy may justify a change in the common law when, 'in light of changed conditions or increased knowledge, the former rule has become unsound in the circumstances of modern life.' "). *See also Escola*, 150 P.2d at 443 (Traynor, J., concurring) ("[The seller's] obligation to the consumer must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more intermediaries.").

180. Brick-and-mortar retailers have long been subject to product liability laws, but online marketplaces like Amazon have been able to avoid the same level of liability for defective products sold through their websites. As a promising example, California recently considered a bill that would specifically hold "electronic retail marketplaces" to the same liability standards as applied to brick-and-mortar retailers. The bill broadly defined "electronic retail marketplace" as an online entity "engaged in the business of placing or facilitating the placement of products into the stream of commerce[.]" Assemb. B. 3262, 2019-2020 Leg., Reg. Sess. (Cal. 2020). Though the California Senate did not ultimately vote on the bill after it was passed by the State Assembly, the legislation is expected to be reintroduced in 2021.

181. *See* Randolph J. Stayin, *Status and Prospects of Federal Product Liability Legislation in the United States*, 15 CAN.-U.S. L.J. 99, 99 (1989) ("The varying product liability legal standards in the fifty different states and the District of Columbia create a product liability system in which manufacturers are confused and unable to predict the scope of their product responsibility and liability.").

after the Model Uniform Products Liability Act or which contain adopted provisions of the Restatement.[182] Although commentators have argued that the uniform applicability of a federal products liability law could result in substantially lower legal costs and risks to product manufacturers and sellers as they navigate the varying legal standards in different states,[183] the feasibility and details of such a supreme act by Congress are beyond the scope of this Note. Federal reform of the products liability regime merits deeper discussion, but this Note's solution does not advocate for the adoption of federal products liability legislation. Put simply, tort law has traditionally been the province of the states. Therefore, this Note recommends a statutory solution for *states* to adopt, with the goal of products liability reform specifically for online retail marketplaces.

A. Proposed Statutory Language

The Restatement (Second) of Torts provides a useful model for the sort of absolute, strict liability advocated by Justice Traynor in *Escola* that would appropriately subject an online marketplace like Amazon to liability for injuries caused by defective products purchased on its website.[184] States should adopt statutory language echoing the Restatement that would return to truly "strict" products liability, extending liability to *any* party that is responsible for placing a defective product into the stream of commerce, in order to provide a method of recourse for consumers injured by defective products that would not be reliant on the courts. As Justice Traynor concurred, an entity should incur liability for defective products it "placed on the market" that cause injury to consumers.[185] Rather than proving negligence, privity of contract, assumption of title, or attempting to label an entity's role in the distribution chain, such statutory language should mimic the strict liability theory of section 402A of the Restatement. State legislatures should afford neither manufacturers nor retailers—whether traditional or online—protection from liability

182. The U.S. Department of Commerce published the Model Uniform Products Liability Act ("MUPLA") in 1979 in an attempt to encourage uniform procedures for responding to products liability torts. It is worth noting that section 102 of the MUPLA defines "seller" similarly to section 402A of the Restatement (Second) of Torts, to include any person "engaged in the business of selling" as well as manufacturers, wholesalers, distributors, or retailers. MODEL UNIF. PROD. LIAB. ACT § 102 (U.S. DEP'T OF COM. 1979).

183. Stayin, *supra* note 181, at 101.

184. *Escola*, 150 P.2d at 440.

185. *Id.*

when a product is unreasonably dangerous and causes harm to the ultimate user or consumer.[186]

Many states already have products liability statutes that successfully echo the language of the Restatement,[187] but courts have misguidedly focused on other, alternative definitions of "seller" that require assumption of title or degree of control over a product—requirements that are absent from the Restatement and applicable case law.[188] Plainly, the Restatement defines a seller as any person "engaged in the business of selling."[189] Tennessee's products liability statute, at issue in *Fox*, almost identically and broadly defines a "seller" as "any individual or entity engaged in the business of selling a product."[190] And New Jersey's products liability statute, at issue in *Allstate*, contains an effective example of a comprehensive, formal definition for "product seller":

> [A]ny person who, in the course of a business conducted for that purpose: sells; distributes; leases; installs; prepares or assembles a manufacturer's product according to the manufacturer's plan, intention, design, specifications or formulations; blends; packages; labels; markets; repairs; maintains or otherwise is involved in placing a product in the line of commerce.[191]

Georgia's products liability statute provides a similar, expansive definition of seller:

> [A] person who, in the course of a business conducted for the purpose leases or sells and distributes; 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.[192]

With these models in mind, state products liability statutes should adopt a formal definition of "seller" that would include all nonmanufacturing commercial retailers, wholesalers, and distributors and that would assign liability to any individual or entity "engaged in the business of selling products for use or consumption."[193] This definition should not reference, nor imply the necessity of, obtaining or possessing title to a product in order to qualify as a seller (for example,

186. RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

187. Titus, *supra* note 56 (noting that "state courts in at least 15 jurisdictions" had adopted section 402A just five years after its promulgation).

188. *See generally* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (AM. L. INST. 1998); RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

189. RESTATEMENT (SECOND) OF TORTS § 402A(1) (AM. L. INST. 1965).

190. TENN. CODE ANN. § 29-28-102(7) (2012); Fox v. Amazon.com, Inc., 930 F.3d 415, 422 (6th Cir. 2019).

191. N.J. STAT. ANN. § 2A:58C-8 (West 2018).

192. GA. CODE ANN. § 51-1-11.1(a) (2020).

193. RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (AM. L. INST. 1965).

as required by the Maryland law at issue in *Erie*).[194] Rather than including a title requirement or emphasizing the degree of control that a particular entity exercises over a product,[195] states should adopt an expansive definition of "seller" to impose strict liability on any party that "places or facilitates the placement of a defective product into the stream of commerce." Under this definition, an online marketplace like Amazon would accordingly not be considered a mere intermediary; it would be considered the true seller of products purchased on its website because it has placed (or facilitated the placement of) those products into the internet "web-stream" of commerce.

For states that adopt comparable definitions, this theory of strict liability would still require that the business entity exist in the defective product's chain of distribution. The definition should also focus the relevant inquiry on whether the seller's conduct justifies concluding that the seller has undertaken the "special responsibility for the safety of the public" that those who are "engaged in the business of selling" accept.[196] Rather than listing out possible qualifications or elements of liability—such as the business entity's possession or transfer of title, or the degree of control exercised over the transaction or product—the phrase "one who sells"[197] should be broadly interpreted to mean "one who places into the stream of commerce."[198] In fact, the only practical limitation on "one who sells" in the language of section 402A excludes the "occasional seller of food or other such products who is not engaged in that activity as a part of his business."[199] Such a limitation clearly would not exclude nonmanufacturing parties such as distributors or online retailers who are dominant entities in the chain of distribution.[200]

B. Effect on Other Online Retailers

Amazon has become an uncontested giant as an online marketplace, and the imposition of strict products liability on such a

194. MD. CODE ANN., COM. LAW § 2-106 (1975); Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 141 (4th Cir. 2019).

195. *See* Barth v. B.F. Goodrich Tire Co., 71 Cal. Rptr. 306, 320 (Cal. Ct. App. 1968) (noting that "neither the transfer of title to the goods nor a sale is required" for imposing strict liability on both manufacturers and retailers).

196. RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (AM. L. INST. 1965).

197. *Id.* § 402A(1).

198. Charles E. Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 GONZ. L. REV. 205, 213 (1990).

199. RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (AM. L. INST. 1965).

200. Jason R. Burt, *The Effects of Judicial Immunization of Passive Sellers in* Sanns v. Butterfield Ford *and a Proposal for the Shifting Nature of Fault*, 2005 BYU L. REV. 477, 484–85 (2005).

player would obviously have great effect on other online retailers in the modern web economy. Amazon is more responsible, however, for the marketing, distribution, and placement of products into the stream of commerce than a mere "auctioneer" or neutral platform like eBay, Etsy, or Craigslist.[201] Such online platforms need not be threatened by any expansion of liability under the proposed return to a true, strict products liability regime.[202]

Under the proposed statutory solution, Amazon would assume liability as seller because of its conduct in placing defective products into the stream of commerce. Amazon exercises "substantial market control over product sales by restricting product pricing, customer service, and communications with customers" and is best positioned to allocate the risks of defective products causing harm to consumers.[203] Neutral platforms, in contrast, would not qualify as sellers under the proposed statutory language—and therefore would not assume liability for products displayed on their websites—because they would not be considered as "engaged in the business of selling."[204] Rather, they are in the business of *hosting*. Much like an auction company that provides a market for sellers,[205] neutral online platforms provide the technology to connect modern buyers and sellers. They simply serve up the electronic content—the ones and zeroes—that enables the transaction; it is the seller who actually lists, maintains, physically possesses, and ultimately places the product into the stream of commerce. So where online retailers merely provide a website for consumers to visit in the course of processing transactions with vendors, they would not be considered engaged in the business of selling. Where the identity of

201. *See supra* Section II.A.3.

202. Online retailers such as Etsy and eBay have voiced criticism of Amazon for expressing conditional support of California's A.B. 3262, which sought to hold "electronic retail marketplaces" to the same liability standards applied to brick-and-mortar retailers. *See supra* note 180. In a surprise announcement, Amazon expressed it would support the bill if it were to include "all online marketplaces regardless of their particular business models." Brian Huseman, *Amazon Stands Ready to Support AB 3262 if All Stores Are Held to the Same Standards*, ABOUTAMAZON (Aug. 21, 2020), https://www.aboutamazon.com/news/policy-news-views/amazon-stands-ready-to-support-ab-3262-if-all-stores-are-held-to-the-same-standards [https://perma.cc/W8XW-CW74]. Opponents of the bill have argued that such consumer protection legislation would burden small businesses with higher legal costs and stifle competition. Etsy's CEO, for example, has claimed that Amazon is using the guise of consumer safety to crush competitors, "by promoting complex, hard-to-comply-with legislation that only they can afford to absorb." Josh Silverman, *A Wolf in Sheep's Clothing: California's AB 3262 "Consumer Protection" Bill Will Empower Amazon to Put Small Businesses Out of Business*, MEDIUM (Aug. 25, 2020), https://medium.com/etsy-impact/a-wolf-in-sheeps-clothing-california-s-ab-3262-consumer-protection-bill-will-empower-amazon-to-c131ffedc3dd [https://perma.cc/A5SC-V6PG].

203. Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 149 (3d Cir. 2019).

204. RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (AM. L. INST. 1965).

205. *Oberdorf*, 930 F.3d at 144 (citing Musser v. Vilsmeier Auction Co., 562 A.2d 279, 282 (Pa. 1989)).

sellers is apparent and distinguishable; where sellers provide, edit, and publish their own product information content and set their own prices; where sellers pursue independent relationships with consumers and exclusively ship products directly to buyers; and where consumers communicate and inquire freely with sellers without limitations—then an online retailer would appropriately be considered a neutral platform, merely providing the "means of marketing" for sellers but not a seller itself.

Further developments and expansions in the world of e-commerce might justify a larger evolution in strict products liability theory, one that could someday subject *all* online platforms to some form of liability for defective products that pass through their web pages. This Note's solution, however, does not propose such an extreme advancement. Instead, it advocates a *return* to the theory of "absolute" strict products liability espoused by Justice Traynor and articulated in the Restatement (Second) of Torts that extends liability to any party responsible for placing a defective product into the stream of commerce. This original formulation of strict products liability is the one that best respects an e-commerce seller's obligations to its consumers in the context of the modern internet economy.

CONCLUSION

Brick-and-mortar stores struggle to compete with e-commerce entities as consumers are no longer purchasing products directly from manufacturers or in person from stores. In the modern internet economy, products move through complex online retail chains of distribution, with manufacturers, packagers, shippers, warehousers, distributors, vendors, and purchasers each interacting with products at different points in this new World Wide Web-stream of commerce. Existing law must accommodate (or rather, *re*accommodate) these economic and technological realities. States should embrace a products liability regime that would appropriately hold an online marketplace like Amazon liable as seller for injuries caused by the defective products it places into the stream of commerce. Amazon should not be free to profit from the bursting digital economy while absorbing none of the risks imposed on buyers associated with the internet sale and purchase of defective products. The theory of strict products liability offered in the Restatement (Second) of Torts and the public policy rationales espoused by Justice Traynor in *Escola* provide a useful model for properly assigning liability for defective products to Amazon and

similarly situated online retail marketplaces.[206] Courts and state legislatures alike should continue to recognize Amazon's integral market role and its powerful position relative to consumers, and hold Amazon to a comparable legal standard of responsibility.[207]

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206. Escola v. Coca Cola Bottling Co., 150 P.2d 436, 460–61 (Cal. 1944) (Traynor, J., concurring).

207. *Id.*

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