Blinded by the Leash: Strict Products Liability in the Age of Amazon

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ABSTRACT

Defective products present a danger to society; they burn down homes, grievously injure consumers, and even sometimes kill. However, prior to the mid-twentieth century, tort law failed to adequately protect injured consumers. Tort law adjusted for this inadequacy through the adoption of strict products liability. Under strict products liability, an injured party must prove that the injury occurred while using a product in the way it was intended to be used, and that the injury resulted from a defect in the product's design or manufacture, of which the consumer was not aware.

Amazon, the omnipresent company best-known for its online marketplace, is often the target of lawsuits based on strict products liability. While Amazon is strictly liable for injuries caused by products it manufactures or designs, injured parties frequently attempt to hold Amazon strictly liable for products sold by third-party vendors on Amazon's marketplace. Until last summer, federal courts agreed that Amazon should not be held strictly liable in such cases. However, the Third Circuit's July 2019 decision in *Oberdorf v. Amazon* diverged from the majority and held Amazon strictly liable for a defective third-party product.

Contrary to the Third Circuit's recent decision, this Comment argues that courts should not hold Amazon strictly liable in third-party-sale situations. After surveying the history and policy reasons behind the doctrine of strict products liability, this Comment argues that holding Amazon strictly liable for defective third-party products does not fit within the intent of the doctrine. Courts should not characterize Amazon as a "seller" of third-party goods because Amazon does not play an integral role in placing the defective products into the stream of commerce. Therefore, this Comment ultimately argues that courts should

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limit strict products liability to sellers, distributors, manufacturers, and designers of goods, and not extend strict products liability to Amazon.

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I. INTRODUCTION

On December 2, 2014, Heather Oberdorf placed an order on Amazon.com,[1] an everyday practice for millions of people around the

1. Amazon.com, Inc. is a vast, internet-based enterprise that sells products directly to consumers and serves as a middleman between other vendors and Amazon's customers. *See* Mark Hall, *Amazon.com*, ENCYC. BRITANNICA (July 25, 2019), https://bit.ly/3fFlX3a.

world.[2] Unfortunately for Oberdorf, this order would forever change her life for the worse.[3] The product Oberdorf purchased, a dog collar, broke while she walked her dog, Sadie, causing the retractable leash attached to the collar to violently recoil into Oberdorf's eyeglasses.[4] Oberdorf was permanently blinded in her left eye as a result of using the defective collar.[5]

For as long as people have produced dangerous products, laws have attempted to hold manufacturers accountable when those products cause injury.[6] Dating back to the early days of the common law, statutes imposed penalties upon brewers, butchers, and cooks who supplied "corrupt" food and drink, regardless of whether it was negligently made.[7] In the late-nineteenth and early-twentieth centuries, courts expanded this special rule of strict liability beyond food and drink to also include other products that were considered inherently dangerous to life and limb.[8] Later, a series of landmark court decisions and favorable treatment by leading scholars led to the doctrine of strict liability spreading quickly throughout most of the United States.[9]

By holding parties strictly liable, courts relieve injured plaintiffs from needing to prove negligence.[10] Instead, plaintiffs must merely prove the injury occurred while using the product as it was intended to be used, and that the injury resulted from a defect in the product's design or manufacture, of which the plaintiff was not aware.[11] This doctrine applies to manufacturers, designers, sellers, and distributors of defective products.[12] Now, due to the advancement of technology, courts must consider whether parties that do not neatly fit into these categories should also be held strictly liable.[13]

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2. *See* Oberdorf v. Amazon.com Inc., 930 F.3d 136, 142 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 2020 U.S. App. LEXIS 17974 (3d Cir. June 2, 2020) (en banc). While the case was pending before the Pennsylvania Supreme Court, the parties settled. *See* Max Mitchell, *Products Liability Lawsuit Against Amazon Has Settled, Mooting Pa. Supreme Court Argument*, THE LEGAL INTELLIGENCER (Sept. 23, 2020, 6:21 PM), https://bit.ly/2SmVCgl.

3. *See Oberdorf*, 930 F.3d at 142.

4. *See id.*

5. *See id.*

6. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (AM. LAW. INST. 1965).

7. *See id.*

8. *See id.*

9. *See* Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 MARQ. L. REV. 555, 561 (2014).

10. *See* RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW. INST. 1965).

11. *See id.*

12. *See id.* cmt. f.

13. E-commerce companies like Amazon blur the lines between manufacturer, seller, and distributor by manufacturing and selling their own products alongside third-party vendors' products, all on the same online marketplace. *See* Ryan Bullard, Note,

One such technology company that defies categorization is Amazon.com, Inc. ("Amazon"). In recent years, courts have had numerous opportunities to determine whether Amazon should be held strictly liable for products sold on its popular online marketplace but have failed to come to a consensus.[14] While Amazon should clearly be held liable for Amazon-branded products sold by Amazon itself, the analysis becomes murkier regarding the millions of products sold by third-party vendors on Amazon's marketplace.[15]

Some courts conclude Amazon is a "seller" under Section 402A of the Restatement (Second) of Torts,[16] as adopted by many states through either common law or statute, because Amazon plays such a large role in the sales process.[17] For instance, in initially determining that Amazon was a seller, the Third Circuit focused on Amazon's "receiving customer shipping information, processing customer payments, relaying funds and information to third-party vendors, and collecting the fees it charges for providing these services."[18]

Other courts have adopted a narrower definition of "seller" and determined that Amazon's activities do not meet the requirements.[19] These courts made that determination, in part, because Amazon does not take title to third-party products as they pass from the vendor to the consumer.[20] These courts also view Amazon as a mere service provider that connects vendors to consumers and provides other ancillary services such as payment processing and warehousing.[21]

Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon, 20 N.C. J.L. & TECH. ON. 181, 193 (2019).

14. *See* Oberdorf v. Amazon.com Inc., 930 F.3d 136, 153 (3d Cir. 2019) (holding Amazon strictly liable), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 2020 U.S. App. LEXIS 17974 (3d Cir. June 2, 2020) (en banc). *But see* Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 781 (N.D. Ill. 2019) (relieving Amazon of liability).

15. Amazon falls squarely within the definition of a seller for Amazon-branded products because it produces or contracts to produce the product, transfers title to consumers, and profits from the transaction. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (AM. LAW. INST. 1965).

16. *See id.* (describing a seller as "any person engaged in the business of selling products for use or consumption," including wholesalers, retailers, distributors, and restaurant operators).

17. *See Oberdorf*, 930 F.3d at 153; *see also* Papataros v. Amazon.com, Inc., No. 17-9836 (KM) (MAR), 2019 U.S. Dist. LEXIS 144253, *2–3 (D.N.J. Aug. 26, 2019), *stayed pending reh'g of* Oberdorf *by Third Circuit*, 2019 U.S. Dist. LEXIS 170537 (D.N.J. Sep. 3, 2019).

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

19. *See* Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018); *see also* Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 142 (4th Cir. 2019).

20. *See Eberhart*, 325 F. Supp. 3d at 398.

21. *See id.* at 399; *see also Erie Ins. Co.*, 925 F.3d at 142 (stating that Amazon is no more liable for a defective product than a shipping company like UPS Ground).

This Comment supports the latter position, that Amazon is not a seller and thus should not be held strictly liable for defective third-party products sold through its online marketplace.[22] Rather, because in many cases Amazon never comes in meaningful contact with such products, courts should focus on holding the manufacturers and sellers of those products—the traditional targets of strict liability law—strictly liable.[23]

Part II of this Comment provides a brief history of the evolution of products liability law in the United States and explains the policy rationale behind the doctrine.[24] Then, Part II provides background on Amazon as a company and describes the main processes by which it fulfills orders.[25] Part II concludes by surveying four 2019 cases that confront in different ways the issue of strict products liability pertaining to third-party products.[26]

Part III of this Comment analyzes Section 402A of the Restatement (Second) of Torts and argues that Amazon should not be considered a seller under the Restatement definition.[27] Further, Part III contends that Amazon should also escape liability under the expanded supply chain view of liability because it does not participate significantly in the stream of commerce.[28] Finally, Part III reviews the policy goals undergirding strict products liability and explains why holding Amazon strictly liable would not achieve those goals.[29]

II. BACKGROUND

When a defective product injures someone, that person's recourse is to sue the product's manufacturer or the seller.[30] Until the mid-twentieth century, that injured person faced an uphill battle in the judicial system because injured plaintiffs were required to prove that the manufacturer or seller was negligent under traditional tort theories.[31] To remedy the inadequacies of negligence law, which were exacerbated by the mass production of goods in the twentieth century, courts began adopting the doctrine of strict products liability.[32]

22. *See infra* Section III.A.
23. *See infra* Section III.B.
24. *See infra* Sections II.A–II.B.
25. *See infra* Section II.C.
26. *See infra* Section II.D.
27. *See infra* Section III.A.
28. *See infra* Section III.B.
29. *See infra* Section III.C.
30. *See* Francis J. O'Brien, *Admiralty Law Institute Symposium: Products Liability in Admiralty: The History of Products Liability*, 62 TUL. L. REV. 313, 314 (1988).
31. *See* Graham, *supra* note 9, at 561–62.
32. *See id.* at 569–70.

A. A Brief History of Strict Products Liability

Before the widespread acceptance of the concept of strict products liability[33] across the United States, common law required privity of contract[34] between a party injured by a defective product and that product's manufacturer.[35] At the time, most U.S. courts followed the English Court of Exchequer's landmark decision in *Winterbottom v. Wright*.[36] The court in *Winterbottom* held that a postman who "became lamed for life" after being thrown from a defective mail coach lacked privity with the supplier of the coach and, therefore, could not bring suit.[37] The Court of Exchequer opined that if the suit was allowed to proceed, any passenger or pedestrian injured by a defective stagecoach could bring a similar action.[38] Thus, the court in *Winterbottom* confined products liability claims to parties joined by privity of contract.[39] The privity requirement greatly limited plaintiffs' abilities to hold manufacturers and sellers of dangerous products accountable.[40]

Exceptions to the privity requirement arose shortly thereafter, primarily for products seen as imminently dangerous to life or health, such as poisons, explosives, or drugs.[41] A leading case and oft-cited example of such an exception is *Thomas v. Winchester*, decided in 1852, in which a bottle of poison called "extract of belladonna" was mislabeled as a medicine called "extract of dandelion."[42] In *Winchester*, the court

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33. *See* Johnson v. Raybestos-Manhattan, Inc., 740 P.2d 548, 549 (Haw. 1987) (explaining strict products liability). The court stated:

> [A] strict products liability action does not require a showing that the defendant was negligent in manufacturing or distributing the product. Instead, the plaintiff need only show that the seller is engaged in the business of selling the product, that the product contains a defect dangerous to the user or consumer, and that the defect is the cause of the injury.

Id.

34. Privity of contract is the relationship between the contracting parties, allowing the parties to sue each other but preventing a third party from doing so. *See Privity of contract*, BLACK'S LAW DICTIONARY (11th ed. 2019).

35. *See generally* Winterbottom v. Wright (1842) 152 Eng. Rep. 402 (Exch.) (holding there must be privity of contract between parties to support a suit).

36. *See Winterbottom*, 152 Eng. Rep. at 402–05; *see also* Graham, *supra* note 9, at 563 n.47. The Court of Exchequer was an English superior court responsible primarily for adjudicating issues involving the revenues of the Crown and recovering the king's debts and duties. *See Court of Exchequer*, BLACK'S LAW DICTIONARY (11th ed. 2019).

37. *See Winterbottom*, 152 Eng. Rep. at 402–05.

38. *See id.*

39. *See id.* at 405.

40. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 96, at 681 (5th ed. 1984) (calling the privity requirement a "fishbone in the throat of the law").

41. *See* Huset v. J.I. Case Threshing Mach. Co., 120 F. 865, 870 (8th Cir. 1903) (explaining the various exceptions to the privity requirement).

42. *See* Thomas v. Winchester, 6 N.Y. 397, 405 (1852); *see also* Bishop v. Weber, 1 N.E. 154, 154 (Mass. 1885) (explaining that the Massachusetts Supreme Judicial Court

allowed the plaintiff's negligence suit to proceed, acknowledging *Winterbottom*'s reasoning but finding the rule to be inappropriate for situations where the product put human life in "imminent danger."[43]

Cases like *Winchester* created exceptions that eventually swallowed the rule requiring privity of contract.[44] This set the stage for the next major advancement in products liability law, the 1916 decision by the New York Court of Appeals in *MacPherson v. Buick Motor Company*.[45] In *MacPherson*, the plaintiff was injured when the car in which he was riding suddenly collapsed, throwing the plaintiff from the vehicle.[46] The plaintiff had purchased the car from an automobile dealer, who had previously purchased the car from Buick, the manufacturer.[47] Buick, who ultimately assembled the vehicle, did not manufacture the defective wheel that caused the collapse but purchased it from a supplier.[48] The plaintiff sued Buick under a theory of negligence, arguing that Buick should have discovered the defective wheel when inspecting the car, and that no such inspection occurred.[49]

Had the court followed *Winterbottom*, the plaintiff would have been without remedy because the plaintiff had purchased the vehicle from an intermediary and thus lacked privity of contract with Buick.[50] To avoid this injustice, the court, in an opinion by Judge Cardozo,[51] reasoned that the principle from *Winchester* should be extended beyond products that inherently put human life in "imminent danger" to products that are "reasonably certain to place life and limb in peril *when negligently*

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did not require privity in a case that involved "[t]he furnishing of provisions which endanger human life or health"); Schubert v. J. R. Clark Co., 51 N.W. 1103, 1104 (Minn. 1892) (stating that the Minnesota Supreme Court did not require privity in a case involving the manufacturer of ladders).

43. *See Winchester*, 6 N.Y. at 409–10 (reasoning that the manufacturer has a duty to users of its products if the products create imminent danger). The court explained:

> The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant, to avoid the creation of that danger by the exercise of greater caution? [O]r that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered?

Id. See also MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916) ("A poison falsely labeled is likely to injure any one who gets it. Because the danger is to be foreseen, there is a duty to avoid the injury.").

44. *See supra* note 42 and accompanying text.

45. *See MacPherson*, 111 N.E. at 1050.

46. *Id.* at 1051. Defective wood used to make one of the wheels crumbled into pieces, causing the collapse. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *See* Graham, *supra* note 9, at 565.

51. *See Cardozo is Named to the Supreme Court; Nomination Hailed*, N.Y. TIMES, Feb. 16, 1932, at 1 (reporting that Cardozo was appointed to the United States Supreme Court in 1932 by President Herbert Hoover).

made."[52] In *MacPherson*, the court ruled that an automobile manufacturer has a duty of vigilance because it must know danger is probable if the automobile is defectively constructed.[53] Because Buick had a duty to inspect the wheel and failed to do so, the Court of Appeals affirmed the lower court's verdict in favor of the plaintiff.[54]

Throughout the early-to-mid twentieth century, the vast majority of states adopted the *MacPherson* rule.[55] During that time, technological advances in transportation and manufacturing increased the distance between consumers and manufacturers, making instances of privity between the two even rarer.[56] Concurrently, consumers flocked to large stores and chain retailers who offered a wide range of items, but whose workers often knew little about the products and could not advise customers about their proper uses.[57] Although the *MacPherson* rule expanded the reach of liability for negligence to a greater number of cases, plaintiffs were still often left without remedy due to the difficulty of proving that a party in the supply chain failed to exercise due care.[58]

By the 1940s and 1950s, reformers began lobbying for a comprehensive strict-liability approach to address these problems of proof.[59] California Supreme Court Justice Roger Traynor gave strict liability credence in his influential concurring opinion in *Escola v. Coca Cola Bottling Co*.[60] The majority in *Escola* upheld the lower court's

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52. *MacPherson*, 111 N.E. at 1053 (emphasis added).

53. *See id.* (reasoning that a manufacturer has a duty to users regardless of privity of contract). The Court stated:

> If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. . . . If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.

Id.

54. *See id.* at 1055.

55. *See* Graham, *supra* note 9, at 567.

56. The late 1800s and early 1900s saw the rise of mass production and a transportation revolution which placed more distance between manufacturers and consumers. *See id.* at 565. These advancements limited consumers' ability to personally know the manufacturers and inquire into the quality of their goods. *See id.*

57. *See id.* at 566.

58. *See id.* at 568–69.

59. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 83 (1941). Prosser lamented the difficulty, circuity, and wastefulness of proving negligence and holding manufacturers accountable through *res ipsa loquitor* when reputable manufacturers should stand behind their products as good business policy. *See id.*

60. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring) ("I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one."); *see also* Graham, *supra* note 9, at 601 (explaining how William Prosser, who prepared drafts of

holding that the defendant, a Coca-Cola bottler, was negligent based on the theory of *res ipsa loquitor*.[61] The defendant had had exclusive control of the product causing the injury, an exploding bottle, and the accident was of such a nature that it would not normally have occurred in the absence of the defendant's negligence.[62] Justice Traynor concurred in the judgment, but believed the law should recognize that "a manufacturer incurs a[] . . . [strict] liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."[63]

Nearly twenty years later, Justice Traynor's conception of strict liability became law when he penned the majority opinion in the 1963 California Supreme Court decision in *Greenman v. Yuba Power Products, Inc.*[64] In *Greenman*, the court rejected implied warranty[65] as a satisfactory basis for liability and instead relied on strict liability in tort.[66] Under a theory of strict liability, a plaintiff can hold a product's manufacturer strictly liable if that plaintiff is hurt by using a product in the way it was meant to be used, and the plaintiff can point to a defect in how the product was designed or manufactured, which the plaintiff did not notice at the time of use.[67] One year later, Justice Traynor inked another opinion reaffirming strict products liability and extending the concept to retailers "engaged in the business of distributing goods to the public."[68]

After the substance of Justice Traynor's opinions were incorporated into the Restatement (Second) of Torts in 1964, the doctrine of strict products liability began to spread throughout the United States.[69] By 1986, 45 states had followed the Restatement and adopted Justice

§402A of the Restatement for the American Law Institute, relied on Justice Traynor's opinion in *Escola*).

61. *Res ipsa loquitur*, Latin for "the thing speaks for itself," is a tort doctrine providing that the mere fact that an injury occurred raises an inference of negligence because such an injury would not ordinarily occur absent negligence. *Res ipsa loquitur*, BLACK'S LAW DICTIONARY (11th ed. 2019).

62. *See Escola*, 150 P.2d at 438.

63. *Id.* at 440 (Traynor, J., concurring).

64. *See* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963).

65. An implied warranty is a promise by the seller of goods that the good being sold is as represented or promised. *See Warranty*, BLACK'S LAW DICTIONARY (11th ed. 2019).

66. *See Greenman*, 377 P.2d at 900. The court concluded that the law governing implied warranties did not do enough to protect uninformed consumers who lack contracts or prior dealings with manufacturers. *See id.*

67. *See id.* at 901.

68. Vandermark v. Ford Motor Co., 391 P.2d 168, 172 (Cal. 1964). In *Vandermark*, a car dealership and auto manufacturer were co-defendants. *See id.* The dealership argued only manufacturers could be held strictly liable under *Greenman*, but the court disagreed, holding that retailers should also bear the cost of injuries resulting from defective products. *See id.*

69. *See* Graham, *supra* note 9, at 577–79.

Traynor's tort-based theory of strict products liability.[70] Only five states, viewing their consumer protection laws in terms of warranty,[71] continue to hold out to this day.[72]

B. Policy Rationale for Strict Products Liability

Justice Traynor set out four main rationales in support of strict products liability: (1) deterrence, (2) reliance, (3) insurance, and (4) administrative costs.[73]

First, strict liability provides an incentive for the party with superior knowledge and the ability to prevent or minimize product accidents to do so, thus deterring the production of defective products.[74] Public policy demands responsibility be affixed to the party that "will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[75] Generally, the manufacturer of a product will be the party with the most specialized knowledge and ability to prevent the manufacture of defective products.[76]

Second, Justice Traynor recognized that in the era of mass production, "the close relationship between the producer and consumer of a product has been altered."[77] Justice Traynor meant that consumers no longer purchased hand-made products from people they knew, but instead *relied* on manufacturers whose processes were generally unknown to the consumer.[78] Justice Traynor reasoned that:

> The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the

70. *See id.* at 579.

71. Under a theory of warranty, plaintiffs can sue for breach of implied warranty of merchantability by proving the product they purchased was not reasonably fit for ordinary use. *See id.* at 570. However, important defenses exist under warranty theory that do not exist under strict products liability; warranties may be disclaimed by the seller as part of a contract for sale, and plaintiffs must provide sellers with reasonable notice of any breach of warranty. *See id.* at 571.

72. *See id.* at 579. The five holdouts are Delaware, Massachusetts, Michigan, North Carolina, and Virginia. *See id.*

73. *See* Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2463 (2013).

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

75. *Id.*

76. *See id.* at 440–41.

77. *Id.* at 443.

78. *See id.*

> steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks.[79]

This lulling effect compels manufacturers to take responsibility for consumers.[80]

Third, strict liability is seen as a kind of insurance because it spreads the risks of injuries caused by defective products to manufacturers instead of to the injured party, who is likely unprepared to assume such risk.[81] Justice Traynor considered manufacturers the better party to absorb the risk of injuries caused by defective products because manufacturers can pass its additional costs to the public as a cost of doing business.[82] In this sense, when consumers buy a product, they are also buying an insurance policy because they can sue the manufacturer for monetary damages in the event of an injury.[83]

Fourth, a party injured by a defective product is rarely equipped to provide evidence of a lack of due care in the manufacturing process.[84] Consequently, in the absence of strict liability, litigation would become costly and time-consuming, as plaintiffs would be forced to rely on expert testimony and burdensome discovery.[85] For example, under a negligence theory the defendant can dispel the inference of negligence by an affirmative showing of proper care.[86] The defendant must make this showing through evidence that is "clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved," a standard bordering on strict liability.[87] Instead of taking this circuitous route, Justice Traynor would simply skip this step and impose strict liability, thus reducing administrative costs associated with resolving the case.[88]

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79. *Id.* (first citing Thomas v. Winchester, 6 N.Y. 397 (1852); then citing Baxter v. Ford Motor Co., 12 P.2d 409 (Wash. 1932); and then citing Crist v. Art Metal Works, 243 N.Y.S. 496 (N.Y. App. Div. 1930)).

80. *See* Dalehite v. United States, 346 U.S. 15, 51–52 (1953) (Jackson, J., dissenting) ("These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being.").

81. *See Escola*, 150 P.2d at 441 (Traynor, J., concurring). An injury to one's health and earning capacity can be overwhelming to the injured person; instead, that cost could be absorbed by the manufacturer and passed on to the public as a cost of doing business. *See id.*

82. *See id.*

83. *See* Hylton, *supra* note 73, at 2465.

84. *See Escola*, 150 P.2d at 441.

85. *See id.*

86. *See id.*

87. *Id.* (quoting Blank v. Coffin, 126 P.2d 868, 870 (Cal. 1942)) (internal quotation marks omitted).

88. *See id.* Justice Traynor would prefer to skip this step because it relies on a jury deciding whether the inference of negligence has been overcome by affirmative evidence of proper care. *See id.*

Many states have incorporated Justice Traynor's four rationales into strict liability statutes and common law tests, but courts are now applying these laws to circumstances that Justice Traynor could likely never have foreseen, such as e-commerce.[89]

C. Background of Amazon.com, Inc.

Amazon, the now-ubiquitous technology giant, had humble beginnings as an online bookseller based out of founder Jeff Bezos's garage in 1994.[90] Since then, Amazon has expanded beyond books and now provides a massive variety of products, which includes everything from cloud computing to groceries.[91] In the fourth quarter of 2019 alone, Amazon reported revenue exceeding $87 billion.[92] Experts estimate that Amazon accounts for 37–49% of online commerce in the United States.[93]

1. The Amazon Marketplace

Amazon retails its own products, along with products from over one million third-party vendors, through Amazon's online marketplace.[94] Third-party vendors pay Amazon various fees in return for Amazon's placing the vendor's product on the marketplace, collecting order information from customers, and processing payments.[95] Third-party vendors must assent to Amazon's Services Business Solutions Agreement (the "Agreement") to use Amazon's services.[96]

Once the third-party vendor has assented to the Agreement, the vendor chooses which products it would like to sell on the marketplace.[97]

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89. *See, e.g.*, Oberdorf v. Amazon.com Inc., 930 F.3d 136, 144 (3d Cir. 2019) (applying a four-factor test that assesses accessibility of defendant to plaintiff for redress, whether strict liability incentivizes safer behavior, whether defendant can remove unsafe products from the market, and whether defendant can better absorb the costs of compensating for injuries), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 2020 U.S. App. LEXIS 17974 (3d Cir. June 2, 2020) (en banc).

90. *See* Hall, *supra* note 1.

91. *See id.*

92. *See* J. Clement, *Net Revenue of Amazon from 1st Quarter 2007 to 4th Quarter 2019 (In Billion U.S. Dollars)*, STATISTA (May 4, 2020) https://bit.ly/2ptrNzS. By 2014, book sales accounted for only seven percent of Amazon's revenue; Jeff Bercovici, *Amazon Vs. Book Publishers, by the Numbers*, FORBES (Feb. 10, 2014, 2:49 PM), https://bit.ly/2SqS3Go.

93. *See* Matt Day & Spencer Soper, *Amazon U.S. Online Market Share Estimate Cut to 38% from 47%*, BLOOMBERG (June 13, 2019, 3:44 PM), https://bloom.bg/31AQngf. *But see* Ingrid Lunden, *Amazon's Share of the US E-commerce Market is now 49%, or 5% of All Retail Spend*, TECHCRUNCH (July 13, 2018, 12:57 PM), https://tcrn.ch/2JlPBt6.

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

95. *See id.* at 141.

96. *See id.*

97. *See id.*

The vendor then provides Amazon with information about the product, including its brand, model, dimensions, and weight, which Amazon formats into a product listing on the marketplace.[98]

Amazon offers two ways for third-party vendors to deliver their products to customers: the products can be (1) fulfilled by Amazon, or (2) fulfilled by the third-party vendor, referred to by Amazon as "fulfilled by merchant."[99]

2. Fulfillment by Amazon ("FBA")

When a third-party vendor chooses "Fulfillment by Amazon" ("FBA"), the vendor first ships their products to an Amazon warehouse.[100] When a customer places an order through the online marketplace, Amazon picks, packs, and ships the product directly to the customer.[101] Additionally, Amazon handles post-sale customer support, which includes around-the-clock management of customer inquiries, refunds, and returns.[102] In exchange for Amazon's services, Amazon collects sales commission fees, storage fees, and fulfillment fees.[103] A major advantage for vendors that choose FBA is access to sell through Amazon Prime, Amazon's popular subscription service that provides fast and free shipping to its over 65 million subscribers.[104]

3. Fulfillment by Merchant ("FBM")

When a third-party vendor chooses to pack and ship a product sold through the Amazon marketplace directly to the customer, that process is termed "Fulfillment by Merchant" ("FBM").[105] FBM allows the third-party vendor to avoid many of the fees Amazon charges for FBA, but the vendor must invest in their own storage, shipping, handling, and customer service.[106] Thus, FBM makes the most sense for established vendors who have already invested in such infrastructure, but the infrastructure investments required for FBM deter less established vendors from choosing this option.[107]

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98. *See id.*

99. *See id.*

100. *See Fulfillment by Amazon*, AMAZON, https://amzn.to/2e1QLLJ (last visited Oct. 12, 2019).

101. *See* Hall, *supra* note 1.

102. *See id.*

103. *See Oberdorf*, 930 F.3d at 141–42 (stating that sales commission fees typically range from 7% to 15%).

104. *See* John E. Lincoln, *Fulfillment by Amazon vs. Fulfillment by Merchant vs. Seller-Fulfilled Prime (The Ultimate Guide)*, IGNITE VISIBILITY (July 25, 2017), https://bit.ly/2JgpQei.

105. *See id.*

106. *See id.*

107. *See id.*

D. Survey of Recent Strict Products Liability Cases Involving Amazon

In a number of recent cases, plaintiffs have attempted to hold Amazon strictly liable for defective products sold through Amazon's online marketplace.[108] Historically, courts have held that Amazon is not a "seller" under state statutory products liability law or judicially-created common law, thereby absolving Amazon of liability for defective products sold by third-party vendors on the Amazon marketplace.[109] However, on July 3, 2019, the Third Circuit Court of Appeals ruled that Amazon was a "seller" under the Restatement (Second) of Torts, as adopted by Pennsylvania, and held Amazon strictly liable for a defective dog collar sold and fulfilled by a third-party through Amazon's online marketplace.[110] The decision has created ripples throughout the country as other federal courts follow suit.[111] In 2020, the Third Circuit sitting en banc reheard oral arguments in the case and certified the question to the Pennsylvania Supreme Court.[112] While the case was pending before the Pennsylvania Supreme Court, however, the parties settled, and the case was dismissed.[113] Thus, the underlying question remains unanswered.

Interestingly, courts have generally decided cases involving FBM products and FBA products similarly, even though the amount of contact Amazon has with the product differs greatly between the two fulfillment methods.[114] This section surveys four 2019 products liability cases against Amazon: three cases demonstrating the traditional approach, relieving Amazon from liability, and one case demonstrating the

108. *See* Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 144 (4th Cir. 2019); Fox v. Amazon.com, Inc., 930 F.3d 415, 425 (6th Cir. 2019); State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 974 (W.D. Wis. 2019).

109. *See Erie Ins. Co.*, 925 F.3d at 144; *Fox*, 930 F.3d at 425 (affirming Amazon is not a "seller" but reversing on other grounds).

110. *See* Oberdorf v. Amazon.com Inc., 930 F.3d 136, 153 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 2020 U.S. App. LEXIS 17974 (3d Cir. June 2, 2020) (en banc).

111. *See State Farm Fire & Cas. Co.*, 390 F. Supp. 3d at 974; *see also* Papataros v. Amazon.com, Inc., No. 17-9836 (KM) (MAR), 2019 U.S. Dist. LEXIS 144253, *44–45 (D.N.J. Aug. 26, 2019) *stayed pending reh'g of* Oberdorf *by the Third Circuit*, 2019 U.S. Dist. LEXIS 170537 (D.N.J. Sep. 3, 2019).

112. *See* Oberdorf v. Amazon.com Inc., No. 18-1041, 2020 U.S. App. LEXIS 17974, *9 (3d Cir. June 2, 2020). The question certified was, "[u]nder Pennsylvania law, is an e-commerce business, like Amazon, strictly liable for a defective product that was purchased on its platform from a third-party vendor, which product was neither possessed nor owned by the e-commerce business?" *Id.*

113. *See* Mitchell, *supra* note 2.

114. *See Erie Ins. Co.*, 925 F.3d at 144 (order fulfilled by Amazon, but Amazon not held strictly liable); Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 773 (N.D. Ill. 2019) (order fulfilled by merchant and Amazon not held strictly liable).

emerging approach, holding Amazon liable for defective products sold through its online marketplace.[115]

1. *Carpenter v. Amazon* — Relieved from Liability

In *Carpenter v. Amazon.com, Inc.*, the Carpenter family sought to hold Amazon liable for a defective hoverboard they had purchased through Amazon's website.[116] In November 2015, David and Kim Carpenter purchased the hoverboard through Amazon as a Christmas gift for their daughter.[117] Unfortunately, their joy was short-lived, as the hoverboard allegedly started a fire that burned down the family's home.[118] Although the item was purchased through Amazon.com, the order was fulfilled by a third-party vendor based in China.[119] Nonetheless, the Carpenters sued Amazon, seeking to hold Amazon liable under a theory of strict products liability.[120]

In applying California's common law doctrine of strict products liability,[121] the district court noted that the doctrine applied not only to manufacturers, but also to parties involved in the vertical distribution chain such as distributors, marketers, and transporters.[122] However, the court stated that the strict products liability doctrine does not apply to every link in the distribution chain.[123] To be subject to strict liability, the party must "play more than a random and accidental role in the overall marketing enterprise of the product in question."[124] To determine whether Amazon played such a role in the "overall marketing enterprise," the court applied a three-factor test based on whether:

> (1) the defendant received a direct financial benefit from its activities and from the sale of the product;

115. *See infra* Sections II.D.1–II.D.4.

116. *See* Carpenter v. Amazon.com, Inc., No. 17-cv-03221-JST, 2019 U.S. Dist. LEXIS 45317, at *2 (N.D. Cal. Mar. 19, 2019).

117. *See id.*

118. *See id.* Hoverboards, which do not actually hover but are more appropriately described as self-balancing scooters, were the top selling tech-gadget during the 2015 holiday season. *See* Barbara Booth, *Bans and Injuries Aside, Hoverboards Top 2015 Wish Lists*, CNBC (Dec. 2, 2015, 11:08 AM), https://cnb.cx/2oX5yBQ.

119. *See Carpenter*, 2019 U.S. Dist. LEXIS 45317, at *2. This order was fulfilled through FBM. *See id.*

120. *See id.*

121. California does not have a strict products liability statute but instead relies on common law decisions, dating back to Justice Traynor's decision in *Greenman*. *See id.* at *10.

122. *See id.* at *11.

123. *See id.*

124. *Id.* (quoting Garcia v. Halsett, 82 Cal. Rptr. 420, 423 (Cal. Ct. App. 1970)) (internal quotation marks omitted).

> (2) the defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and
>
> (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process.[125]

The court found that, even assuming Amazon satisfied the first and third factors, the plaintiffs failed to produce enough evidence to raise a genuine issue of material fact regarding the second factor.[126] The plaintiffs were unable to produce evidence that Amazon "played a dominant role in creating the market" for hoverboards.[127] Further, Amazon did not assist hoverboard manufacturers in marketing the hoverboards and were not the only sellers of hoverboards at the relevant time.[128] As a result, the district court ruled that Amazon was not strictly liable because all three factors of the "overall marketing enterprise" test were not satisfied.[129]

2. *Garber v. Amazon* — Relieved from Liability

Similar to *Carpenter*, *Garber v. Amazon.com, Inc.* stemmed from a hoverboard purchased on Amazon in November 2015 that later caught fire and caused extensive damage to the plaintiff's home.[130] The plaintiffs purchased the hoverboard on Amazon.com from Shenzhen, a third-party vendor based in China, who sold the hoverboard and fulfilled the plaintiff's order; in other words, the order was FBM.[131] However, the plaintiffs incorrectly believed they were purchasing the hoverboard directly from Amazon.[132] The plaintiffs sued both Shenzhen and Amazon under a theory of strict products liability.[133]

Illinois applies the doctrine of strict products liability by state statute, replicated from Section 402A of the Restatement (Second) of Torts: "[i]n a products liability action, all persons in the distributive chain are liable for injuries resulting from a defective product, including suppliers, distributors, wholesalers, and retailers."[134] Interestingly, the

125. *Id.* at *12–13 (quoting Bay Summit Community Assn. v. Shell Oil Co., 51 Cal. Rptr. 2d 322, 330 (Cal. Ct. App. 1996)) (internal quotations marks omitted).

126. *See id.* at *13.

127. *See id.*

128. *See Carpenter*, 2019 U.S. Dist. LEXIS 45317, at *15.

129. *See id.* at *16–17.

130. *See* Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 773 (N.D. Ill. 2019).

131. *See id.*

132. *See id.* The court noted that plaintiffs offered no evidence to support this contention beyond mere speculation and subjective belief. *See id.*

133. *See id.* at 774.

134. *Id.* at 775 (quoting Hammond v. N. Am. Asbestos Corp., 454 N.E.2d 210, 216 (Ill. 1983)) (internal quotation marks omitted).

plaintiffs did not assert that Amazon was a supplier, distributor, or retailer, but instead argued that Amazon and Shenzhen were "sellers" of the hoverboard.[135]

Therefore, the main issue for the court to decide was whether Amazon should be considered a "seller" of a product sold and fulfilled by a third-party through Amazon's online marketplace.[136] Neither Illinois courts nor the Restatement define the term "seller," but under Illinois law a "'sale' consists of passing a title from the seller to the buyer for a price."[137] Although title to the hoverboard passed directly from Shenzhen to the Garbers, the court did not find this fact dispositive.[138] Rather, the court stated that the inquiry into who is a "seller" should not be limited to the transfer of title.[139]

The court pointed to an Illinois Supreme Court decision where a defendant whose "role in marketing . . . asbestos" was sufficient to be considered a "seller" for purposes of strict liability.[140] In that case, the court analyzed whether there was a direct sales agreement between the customer and the defendant, and whether the defendant was the exclusive seller of the particular product.[141] In *Garber*, the plaintiff failed to produce any evidence showing Amazon had an agreement to sell the hoverboard to the Garbers, or that Amazon was the exclusive seller of Shenzhen hoverboards.[142] Accordingly, the court found that Amazon's role in the sales process was as a venue and marketplace for third-party sellers to connect with buyers.[143] According to the court, Amazon's role

135. *See id.* at 776. Plaintiff probably did not proceed under a theory that Amazon was the distributor of the hoverboard because the order was FBM. *See id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.* (referencing *Hammond*, 454 N.E.2d at 216–17) (internal quotation marks omitted). In *Hammond*, the defendant was a wholly-owned subsidiary of a British company that served as a contact point for the company's North American customers. *See Garber*, 380 F. Supp. 3d at 776. Although the defendant never had control over the asbestos and merely served as a broker, the court found the defendant's role to be sufficient to impose strict liability. *See id.* The court found it compelling that the defendant "agreed to sell and deliver" the asbestos to the customer and represented that it was the only entity authorized to sell certain types of asbestos offered by the parent company. *See id.* at 776–77.

141. *See Garber*, 380 F. Supp. 3d at 777. Like in *Carpenter*, an important factor for the court was whether Amazon was the exclusive seller of the product. *See* Carpenter v. Amazon.com, Inc., No. 17-cv-03221-JST, 2019 U.S. Dist. LEXIS 45317, at *15 (N.D. Cal. Mar. 19, 2019).

142. *See Garber*, 380 F. Supp. 3d at 777. The Garbers failed to present any sales paperwork listing Amazon as a purchaser or seller of the defective hoverboard. *See id.* The only documents in the record showed the hoverboard was "sold by" and "fulfilled by" Shenzhen and that Shenzhen was the "seller of record." *Id.*

143. *See id.* at 778.

as online facilitator did not classify it as a "seller" for purposes of establishing strict liability.[144]

But finding that Amazon was not a "seller" did not end the district court's analysis. The court noted that the Illinois Supreme Court extended strict liability beyond the distribution chain to those who "play an integral role in the marketing enterprise of an allegedly defective product and participate in the profits derived from placing the product into the stream of commerce."[145] But the court in *Garber* found that Amazon did not play an integral role in the marketing enterprise of the hoverboard because Amazon failed to satisfy the Illinois Supreme Court's three-part test.[146] Under that test, a party should be held strictly liable if it: "(1) participated in the manufacture, marketing and distribution of an unsafe product, (2) derived economic benefit from placing the unsafe product in the stream of commerce, and (3) was in a position to eliminate the unsafe character of the product and prevent the loss."[147]

Amazon derived an economic benefit by collecting a commission for the sale of the hoverboard, satisfying the second component of the test.[148] However, Amazon did not manufacture, market, or make any statements or representations about the hoverboard, thus failing the first part of the test.[149] Further, the court found that Amazon did not satisfy the third part of the test because it was not in a "position to eliminate the unsafe character" of the product, due to the sheer number of third-party offerings on the site and the impossibility of Amazon judging the quality of each one.[150]

3. *Oberdorf v. Amazon* — Held Strictly Liable

The first major departure from the *Carpenter* and *Garber* line of cases came in 2019 from the Third Circuit Court of Appeals in *Oberdorf*

144. *See id.*

145. *Id.* at 779 (citing Bittler v. White & Co., 560 N.E.2d 979, 981 (Ill. App. Ct. 1990)) (internal quotation marks omitted).

146. *See Garber*, 380 F. Supp. 3d at 779. This test is similar to the one used in *Carpenter*. *See* Carpenter v. Amazon.com, Inc., No. 17-cv-03221-JST, 2019 U.S. Dist. LEXIS 45317, at *12 (N.D. Cal. Mar. 19, 2019).

147. *Garber*, 380 F. Supp. 3d at 779 (citing Hebel v. Sherman Equip., 442 N.E.2d 199, 204–05 (Ill. 1982)).

148. *See id.*

149. *See id.* The third-party vendor provided the statements on Amazon's website about the hoverboard and Amazon merely formatted the description to fit the website's template. *See id.*

150. *Id.* at 780 (quoting *Hebel*, 442 N.E.2d at 204–05) (internal quotation marks omitted).

v. Amazon.com, Inc.[151] Oberdorf purchased a dog collar through Amazon for her dog, Sadie.[152] The collar was sold by a third-party vendor, The Furry Gang, and shipped directly from The Furry Gang to Oberdorf; in other words, it was FBM.[153] While Oberdorf was walking Sadie one day, the collar's D-ring, where the leash attached to the collar, unexpectedly broke and the retractable leash recoiled into Oberdorf's glasses, causing permanent blindness in her left eye.[154]

Oberdorf sued Amazon in federal court[155] under a strict products liability theory.[156] For strict products liability claims, the Pennsylvania Supreme Court follows Section 402A of the Restatement (Second) of Torts.[157] Like the court in *Garber*, which also interpreted Section 402A, the court in *Oberdorf* recognized that strict products liability is limited to "sellers" of products.[158] The Third Circuit, applying Pennsylvania law, employed a four-factor test to determine whether a party is a "seller":

> (1) Whether the actor is the "only member of the marketing chain available to the injured plaintiff for redress";
>
> (2) Whether "imposition of strict liability upon the [actor] serves as an incentive to safety";
>
> (3) Whether the actor is "in a better position than the consumer to prevent the circulation of defective products"; and
>
> (4) Whether "[t]he [actor] can distribute the cost of compensating for injuries resulting from defects by charging for it in his business, i.e., by adjustment of the rental terms."[159]

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151. *See* Oberdorf v. Amazon.com Inc., 930 F.3d 136, 140 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 2020 U.S. App. LEXIS 17974 (3d Cir. June 2, 2020) (en banc).

152. *See id.* at 142.

153. *See id.*

154. *See id.* Although not technically the leash's fault in this case, many veterinarians discourage the use of retractable leashes due to the lack of control they afford dog owners. *See* Patty Khuly, *Why This Veterinarian Really Can't Stand Retractable Leashes*, VETSTREET (Oct. 21, 2013), https://bit.ly/2p1CZTR.

155. *See Oberdorf*, 930 F.3d at 142. Neither Oberdorf nor Amazon was able to locate a representative of The Furry Gang. *See id.*

156. *See id.* Oberdorf put forth two theories of strict products liability: "(1) failure to provide adequate warnings regarding the use of the dog collar, and (2) defective design of the dog collar." *Id.* at 142.

157. *See id.* at 150.

158. *See id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A (Am. Law. Inst. 1965)) ("[A]n actor can only be subject to strict liability for selling a defective product if he is a 'seller . . . engaged in the business of selling such a product'").

159. *See Oberdorf*, 930 F.3d at 144. (citing Musser v. Vilsmeier Auction Co., 562 A.2d 279, 282 (Pa. 1989)). In *Musser*, the court found an auction house could not be considered a "seller" of a defective tractor and thus could not be held strictly liable. *See Musser*, 562 A.2d at 282.

The court concluded that the first factor weighed in favor of holding Amazon strictly liable.[160] Noting that neither party was able to locate representatives of The Furry Gang, the court cited numerous other cases in which third-party vendors of products sold on Amazon were unable to be found.[161] The court was also troubled by Amazon Vice President of Marketing Business's admission that Amazon takes no precautions to ensure that third-party vendors are in good standing under the laws of their country, nor does Amazon have a vetting process to ensure vendors are amenable to legal process.[162]

The court concluded that the second factor, whether imposing strict liability would "serve[] as an incentive to safety," also favored imposing strict liability on Amazon.[163] Although Amazon does not have direct control over the design and manufacturing of third-party products,[164] the court reasoned that Amazon does have substantial control over third-party *vendors*, who in turn have direct control over those products.[165] Thus, the court concluded that Amazon could remove unsafe products from its site at any time, and imposing strict liability would encourage this proactive behavior.[166]

The court concluded that the third factor, whether Amazon "is in a better position than the consumer to prevent the circulation of defective products," also weighed in favor of holding Amazon strictly liable.[167] Unlike, for instance, an auctioneer that lacks an ongoing relationship with the manufacturer, the court reasoned that Amazon's business model incentivizes continuing sales, and therefore encourages an ongoing relationship between Amazon and third-party vendors.[168] Through this ongoing relationship, Amazon receives reports of defective products and customer feedback, which enables Amazon to remove unsafe products

160. *See Oberdorf*, 930 F.3d at 144–45.

161. *See id.* at 145.

162. *See id.* The Vice President of Marketing Business was not named in the case. *See id. See also* Harold Brubaker, *A Dog Collar Bought on Amazon Failed, Now this Pennsylvania Woman is Blind in One Eye. Who's Liable?*, PHILA. INQUIRER (Dec. 2, 2019), https://bit.ly/38MXs18 (stating that even Amazon's private investigator was unable to locate the owner of the Furry Gang).

163. *Oberdorf*, 930 F.3d at 145–46.

164. *See id.* at 146.

165. *See id.* That "substantial control" comes from Amazon's ability to suspend, prohibit, or remove product listings, withhold payments to third-party vendors, and terminate or suspend service to third-party vendors "for any reason at any time." *See id.* These terms are in Amazon's Services Business Solutions Agreement, to which every vendor must assent before listing products on the site. *See id.*

166. *See id.* The court reasoned that Amazon's dominant market position allowed it to pressure third-party vendors to conform to its safety standards. *See id.*

167. *Id.* at 145–47 (internal quotation marks omitted).

168. *See id.* at 146.

from circulation.[169] Additionally, Amazon limits the ability of third-party vendors to communicate directly with customers, making it more difficult for vendors to monitor customer feedback directly.[170]

Lastly, the court concluded that the fourth factor, whether Amazon could "distribute the cost of compensating for injuries resulting from [product] defects," weighed in favor of imposing strict liability.[171] Amazon's Agreement included an indemnification clause allowing Amazon to recoup costs from its third-party vendors.[172] The court also determined that Amazon could distribute these costs by collecting a higher commission from vendors for products sold through its website.[173]

Despite concluding that all four factors weighed in favor of imposing strict liability, the court did not rest its decision solely on these factors; the court also analyzed other on-point Pennsylvania cases.[174] The court cited *Hoffman v. Loos & Dilworth, Inc.*,[175] in which the Pennsylvania Superior Court held that a participant in the sales process can be held strictly liable, even if the participant does not take title or possession of the products being sold.[176] In *Hoffman*, the court imposed liability on a sales agent who transmitted orders from a packager to a distributor because the agent's role amounted to being "'in the business of selling or marketing merchandise,' rather than performing a 'tangential' role."[177] In *Oberdorf*, the court concluded that Amazon's role exceeded that of the sales agent in *Hoffman* because Amazon not only accepts and arranges orders for shipment, but also "exerts substantial market control over product sales by restricting product pricing, customer service, and communications with customers."[178] Given the four-factor test and Pennsylvania case law in *Hoffman*,[179] the court held that Amazon is a seller for purposes of Section 402A of the Restatement (Second) of Torts, and thus subject to Pennsylvania strict products liability law.[180]

169. *See id.*
170. *See id.* at 147.
171. *Oberdorf*, 930 F.3d at 147–48.
172. *See id.*
173. *See id.*
174. *See id.* at 148.
175. *See* Hoffman v. Loos & Dilworth, Inc., 452 A.2d 1349, 1355 (Pa. Super. Ct. 1982).
176. *See Oberdorf*, 930 F.3d at 148 (referencing *Hoffman*, 452 A.2d at 1355).
177. *Id.*
178. *Id.* at 149.
179. *See id.* at 153.
180. The Court also determined that Oberdorf's claim that Amazon failed to provide or edit adequate warnings regarding the use of the dog collar was barred by Section 230 of the Communications Decency Act (CDA). *See id.* Congress passed the CDA after a controversial New York state court decision allowed defamation claims to proceed against a website host. *See id.* Congress was worried such liability would stunt

4. *State Farm Fire & Casualty Co. v. Amazon* — Relieved from Liability

Despite the ruling in *Oberdorf*, the U.S. District Court for the District of Arizona applied Section 402A of the Restatement in a similar case but came to the opposite conclusion of *Oberdorf*.[181] In *State Farm Fire & Casualty Co. v. Amazon.com, Inc.*, Abdul Albaloushi ordered two hoverboards on Amazon.com from a third-party vendor, Super Engine, and the order was FBA.[182] Albaloushi sold the hoverboards to Mohamed Zeitoun, and after Zeitoun took the hoverboards home to charge, they burst into flames, igniting a fire which severely damaged Zeitoun's home.[183]

The largest difference between *State Farm* and *Oberdorf* is that in *State Farm*, Amazon fulfilled the hoverboard order itself, meaning it picked the product from its warehouse, boxed the hoverboard for shipping, and provided it to a carrier for delivery.[184] However, even with Amazon's heightened level of involvement in the sales process, the district court found that Amazon "exercise[d] an insufficient degree of control over such products" to apply strict products liability.[185] Like many other states, Arizona follows Section 402A of the Restatement (Second) of Torts,[186] which "imposes strict liability o[n] manufacturers and sellers of defective products," as well as others involved in the distribution chain like "lessors of products, donors of products, and dealers of used goods."[187] However, not all members of the distribution chain are subject to strict liability.[188] Rather, Arizona only extends strict

the growth of the internet and prevent the free flow of speech online. *See id.*; *see also* 47 U.S.C.S. § 230(a)–(b) (LexisNexis 2020). The court held that the CDA barred Oberdorf's failure to warn claim because Amazon's alleged failure to provide or to edit adequate warnings were activities protected by the CDA. *See Oberdorf*, 930 F.3d at 148. The CDA, however, did not bar claims that relied on Amazon's role as a seller. *See id.*

181. *See* State Farm Fire & Cas. Co. v. Amazon.com, Inc., No. CV-17-01994-PHX-JAT, 2019 U.S. Dist. LEXIS 168734, at *16–17 (D. Ariz. Sep. 26, 2019).

182. *See id.* at *2.

183. *See id.* Zeitoun was insured by State Farm, who paid for the subsequent fire investigation and damages. *See id.* State Farm sued Amazon as Zeitoun's subrogee. *See id.*

184. *See id.*

185. *See id.* at *16–17.

186. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (AM. LAW. INST. 1965).

187. *See State Farm*, 2019 U.S. Dist. LEXIS 168734, at *4–5 (quoting Torres v. Goodyear Tire & Rubber Co., 786 P.2d 939, 942, 943 (Ariz. 1990)) (internal quotation marks omitted).

188. *Id.* at *5.

liability to those who "participate significantly in the stream of commerce."[189]

To determine whether entities participate significantly in the stream of commerce, Arizona courts consider seven factors.[190] In weighing these factors, the court concluded that Amazon did not significantly participate in the stream of commerce that brought the hoverboards to the consumer:

> Despite bearing some responsibility for third-party vendors' products during transit, Amazon provides no warranty for them, does not have a meaningful ability to inspect them for defects, never takes title to them unless asked to, derives only a slight economic benefit from transactions involving them, exerts only indirect pressure on product design or manufacturing processes, and does not foster significant consumer reliance by facilitating the transaction.[191]

Like the courts that analyzed whether Amazon should be subject to strict products liability when the products are FBM, the court in *State Farm* held that Amazon is generally not subject to strict products liability, even when Amazon fulfills the orders.[192]

The disparity between the result in *Oberdorf* and the majority of other courts to consider the issue presents a problem to future litigants.[193] If future courts follow *Oberdorf*, Amazon and other online marketplace providers will be exposed to liability that would have been hard to imagine a half-century ago when the strict liability doctrine was first adopted. Therefore, courts must carefully consider whether Amazon is truly a seller according to state common law adaptations of the Restatement, and whether the policy rationales behind strict liability support such a conclusion.

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189. *Id.* (first citing Grubb v. Do It Best Corp., 279 P.3d 626, 627 (Ariz. Ct. App. 2012); and then citing Antone v. Greater Ariz. Auto Auction, 155 P.3d 1074, 1077 (Ariz. Ct. App. 2007)) (internal quotation marks omitted).

190. *See id.* at *6. The seven factors are whether the entities:

> (1) provide a warranty for the product's quality; (2) are responsible for the product during transit; (3) exercise enough control over the product to inspect or examine it; (4) take title or ownership over the product; (5) derive an economic benefit from the transaction; (6) have the capacity to influence a product's design and manufacture; or (7) foster consumer reliance through their involvement.

Id. at *6–7 (citing *Grubb*, 279 P.3d at 629).

191. *See id.* at *16.

192. *See id.* at *17.

193. *Compare* Oberdorf v. Amazon.com Inc., 930 F.3d 136, 151 (3d Cir. 2019) (holding Amazon strictly liable), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 2020 U.S. App. LEXIS 17974 (3d Cir. June 2, 2020) (en banc), *with* Carpenter v. Amazon.com, Inc., No. 17-cv-03221-JST, 2019 U.S. Dist. LEXIS 45317, at *17 (N.D. Cal. Mar. 19, 2019) (relieving Amazon of liability).

III. ANALYSIS

The court's initial conclusion in *Oberdorf* that Amazon should be held strictly liable for defective third-party products sold through its site is incorrect. Courts should not consider Amazon a seller under Section 402A of the Restatement because Amazon does not take title to the products sold through its site. Further, the public policy rationales for extending liability beyond sellers do not support extending liability to Amazon.[194]

A. Amazon is Not a Seller Under Section 402A

Courts should not consider Amazon a "seller" under Section 402A of the Restatement (Second) of Torts because, although it sounds counterintuitive, Amazon is not "engaged in the business of selling products for use or consumption."[195] In analyzing this definition provided by the Restatement, most courts have held that Amazon is not a "seller."[196]

One key factor in determining if a party is a seller is whether title passed from that party to a buyer for a price.[197] The court in *Garber* found it persuasive that the third-party hoverboard vendor, Shenzhen, passed title directly to the plaintiff, as is the usual procedure for FBM orders.[198] Amazon makes it clear to merchants that it does not transfer title. Under the terms of Amazon's Agreement, Amazon does not take title to third-party products, even when the products are housed in Amazon warehouses and included in orders fulfilled by Amazon.[199] Another court found the lack of title transfer fatal to the plaintiff's claim because "the failure to take title to a product places that entity on the outside" of the distribution chain.[200] Although other jurisdictions do not

194. *See Oberdorf*, 930 F.3d at 154 (Scirica, J. dissenting); *see also* Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 777 (N.D. Ill. 2019).

195. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (AM. LAW. INST. 1965) (discussing who is in the "business of selling").

196. *See Garber*, 380 F. Supp. 3d at 777 (stating that Amazon lacked a relationship with the third-party vendor as the exclusive seller of its hoverboards, and Amazon did not have a sales agreement with the Garbers to sell them the hoverboard, leading the court to rule that Amazon was not a seller); *see also* Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 142 (4th Cir. 2019) (ruling that although Amazon facilitated the sale, Amazon never took title of the product, leaving the third-party vendor, not Amazon, as the seller).

197. *See Garber*, 380 F. Supp. 3d at 776.

198. *See id.*

199. *See Erie Ins. Co.*, 925 F.3d at 141–42.

200. Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018).

find taking title to be the sole determinative factor, the lack of title transfer weighs heavily in Amazon's favor.[201]

The Restatement does not limit the definition of "seller" to parties that transfer title to buyers, yet courts are, correctly, reluctant to consider Amazon a seller.[202] Along with the lack of title transfer, the court in *Garber* was persuaded that Amazon is not a seller because Amazon does not enter into sales agreements with its customers.[203] Amazon does not even purport to be the seller in transactions involving third-party vendors.[204] In such transactions, the third-party vendor is always listed as the seller in the "sold by" line on Amazon's website.[205] Thus, any agreement between buyer and seller is simply between the customer and the party listed on the "sold by" line.[206] Amazon's transparency in listing the vendor as the seller of third-party products, which allows customers to recognize with whom they are entering into a sales agreement, further reinforces the claim that Amazon is not a seller.[207]

States that follow Section 402A should not consider Amazon a seller because Amazon does not transfer title of third-party products to customers and does not enter into sales agreements with customers for these products; but those facts do not end the inquiry. Some states extend strict products liability beyond Section 402A's definition of a seller to parties that "participate significantly in the stream of commerce."[208] To determine whether a party's participation is significant, a multi-factor test is used, such as the four-factor test in *Oberdorf* or the seven-factor test in *State Farm*.[209] These tests are largely policy-based, weighing the costs of imposing strict liability against the benefits originally outlined

201. *See Garber*, 380 F. Supp. 3d at 775. *But see Eberhart*, 325 F. Supp. at 398 (finding Amazon's failure to take title key in decision that Amazon is not a seller under New York's common law strict products liability regime).

202. *See Garber*, 380 F. Supp. 3d at 776 (explaining that the Illinois Supreme Court does not limit its inquiry into whether a party is a seller solely to transfer of title).

203. *See id.* at 777.

204. *See id.*

205. *See* Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 138 (4th Cir. 2019); *see also* Fox v. Amazon.com, Inc., 930 F.3d 415, 419 (6th Cir. 2019).

206. *See Garber*, 380 F. Supp. 3d at 777.

207. *See id.* at 773 (noting that plaintiff's unsubstantiated belief that they bought their hoverboard from Amazon did not make Amazon the seller).

208. State Farm Fire & Cas. Co. v. Amazon.com, No. CV-17-01994-PHX-JAT, 2019 U.S. Dist. LEXIS 168734, at *5 (D. Ariz. Sep. 26, 2019) (first citing Grubb v. Do It Best Corp., 279 P.3d 626, 627 (Ariz. Ct. App. 2012); and then citing Antone v. Greater Ariz. Auto Auction, 155 P.3d 1074, 1077 (Ariz. Ct. App. 2007)) (internal quotation marks omitted); *see also* Carpenter v. Amazon.com, Inc., No. 17-cv-03221-JST, 2019 U.S. Dist. LEXIS 45317, at *11 (N.D. Cal. Mar. 19, 2019).

209. *See* Oberdorf v. Amazon.com Inc., 930 F.3d 136, 144 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 2020 U.S. App. LEXIS 17974 (3d Cir. June 2, 2020) (en banc); *State Farm*, 2019 U.S. Dist. LEXIS 168734, at *5.

by Justice Traynor, such as deterrence and cost-spreading.[210] Yet, *Oberdorf*'s initial conclusion that Amazon satisfied all four factors and should be held strictly liable was an aberration that should be corrected by courts in future cases.

B. Policy Rationales Support Shielding Amazon from Strict Liability

The application of multi-factor policy tests, like those used in Pennsylvania and Arizona, to strict products liability claims against Amazon should relieve Amazon of liability. Most tests seek to determine whether Amazon played an "integral role" in placing the defective product into the stream of commerce.[211] The integral-role test is then broken into at least four factors: (1) whether Amazon derived a financial benefit from the transaction; (2) whether Amazon's conduct was a necessary factor in bringing the product to the initial customer market; (3) whether Amazon had the ability to influence the manufacture or design of the product; and (4) whether Amazon was in a position to eliminate the unsafe character of the product or prevent it from entering the market.[212] While some of these factors weigh slightly in favor of holding Amazon strictly liable, in sum the factors strongly cut against holding Amazon strictly liable for defective products sold on its online marketplace, regardless of whether the product is FBA or FBM.

1. Amazon's Financial Benefit from Third-Party Transactions is Not Reason Enough to Impose Strict Liability

First, Amazon does derive a financial benefit from third-party products sold on its marketplace. However, this factor alone is not enough to impose strict liability.[213] If any party that received payment as part of a sale could be held strictly liable, the scope of strict products liability would know no bounds. For instance, while couriers such as the U.S. Postal Service and FedEx receive payment for shipping products all over the world, they lack control over the manufacture and design of the

210. *See, e.g.*, *Oberdorf*, 930 F.3d at 144 (stating one factor as whether "imposition of strict liability upon the [actor] serves as an incentive to safety"); *see also Garber,* 380 F. Supp. 3d at 779 (stating a factor as whether the entity was "in a position to eliminate the unsafe character of the product and prevent the loss").

211. *See State Farm*, 2019 U.S. Dist. LEXIS 168734, at *5; *Garber,* 380 F. Supp. 3d at 779.

212. *See Garber*, 380 F. Supp. 3d at 779; *see also State Farm*, 2019 U.S. Dist. LEXIS 168734, at *6; Carpenter v. Amazon.com, Inc., No. 17-cv-03221-JST, 2019 U.S. Dist. LEXIS 45317, at *12–13 (N.D. Cal. Mar. 19, 2019).

213. *See Carpenter*, 2019 U.S. Dist. LEXIS 45317, at *13 (holding that even assuming Amazon receives financial benefit for the transactions, the other factors do not support imposing strict liability).

products they handle and are undoubtedly not positioned to eliminate a product's unsafe character.[214] Yes, Amazon profits from third-party vendors' sales on its marketplace, but holding Amazon liable must also satisfy the policy considerations that originally spawned strict liability.[215] Holding Amazon liable would not satisfy policy considerations such as enhancing product safety and removing unsafe products from the market because Amazon, like FedEx, lacks control over how a product is manufactured or designed.

2. Amazon is Not a Necessary Link in the Distribution Chain

Second, Amazon's conduct is not a necessary factor in bringing most products to market. For instance, Amazon was not the only technology company operating an online marketplace where hoverboards were sold during the 2015 Christmas season, when most of the defective-hoverboard injuries occurred.[216] Although Amazon accounts for almost half of online commerce in the United States, it does not play a *necessary* role in connecting buyers and sellers.[217] Other online retailers like Walmart.com, eBay.com, and Overstock.com offer many of the same products as Amazon, and traditional brick-and-mortar stores still make up the vast majority of retail sales in the United States.[218] To extend strict liability, the entity must be "'the sole conduit by which [defective products] enter the marketplace' such that 'it is fair to say that [the marketer] is a mandatory link in [the] distributive chain.'"[219] The court in *Garber* reaffirmed this conclusion when it recognized that Amazon was not the exclusive seller of the brand of hoverboards that damaged the plaintiff's house.[220] While Amazon offers a wide array of products through its marketplace, Amazon is not the "sole conduit" or a "mandatory link" in the chain between consumers and third-party

214. *See* Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 399 (S.D.N.Y. 2018) (citing multiples cases holding that courts should not hold parties that simply transport goods strictly liable).

215. *See Carpenter*, 2019 U.S. Dist. LEXIS 45317, at *11–12 ("[S]trict liability is not imposed even if the defendant is technically a 'link in the chain' in getting the product to the consumer market if the judicially perceived policy considerations are not satisfied.") (quoting Arriaga v. CitiCapital Commercial Corp., 85 Csl. Rptr. 3d 143, 151 (Cal. Ct. App. 2008)).

216. *See id.* at *15 (mentioning that hoverboards were available on other websites such as Overstock.com).

217. *See* Day & Soper, *supra* note 93.

218. *See* J. Clement, *United States: E-commerce Share of Retail Sales 2013-2021*, STATISTA (July 23, 2019) https://bit.ly/2O2nynT.

219. Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 399 (S.D.N.Y. 2018) (quoting Brumbaugh v. Cejj, 152 A.D.2d 69, 71 (N.Y. App. Div. 1989)).

220. *See* Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 777 (N.D. Ill. 2019).

products. Therefore, the second factor of the integral-role test is not satisfied and weighs against imposing strict liability on Amazon.

3. Amazon Lacks Direct Influence over Third-Party Manufacturers

Third, Amazon lacks the ability to directly influence the manufacture or design of products sold by third-party vendors on its marketplace. Amazon neither designs nor manufactures such products; the third-party vendors are free to design and manufacture their products as they see fit.[221] The only influence that Amazon does wield is indirect, through Amazon's Agreement with its vendors that sets out the terms of their ongoing relationship.[222] Amazon's Agreement bars vendors from charging higher prices on the Amazon marketplace than they charge on other sites, requires vendors to provide some level of customer support and product information, and allows Amazon to remove products from the marketplace upon receiving information relating to a product's safety.[223] However, Amazon does not have "a unilateral ability to force any vendor or manufacturer to adopt any particular design or manufacturing method."[224] The third-party vendor still retains the right to decide what to sell, decides from where to source the product, and ensures that the product is properly packaged and conforms with all applicable laws.[225] Amazon's marketplace provides a great opportunity for vendors to market their products to an enormous customer base, but the vendors could always take their business elsewhere if they do not want to conform with Amazon's terms.[226]

Amazon's lack of control over its third-party vendors makes imposing strict liability an ineffective remedy. According to Justice Traynor, strict liability is intended to provide an incentive for the party with the most knowledge and ability to prevent product accidents or minimize their occurrence to do so.[227] Amazon lacks the ability to influence the manufacturing and design of the millions of third-party products sold on its site, meaning it cannot ensure safety, even if a court imposes strict liability on it.[228] Therefore, courts should not impose strict

221. *See id.* at 779.

222. *See* State Farm Fire & Cas. Co. v. Amazon.com, No. CV-17-01994-PHX-JAT, 2019 U.S. Dist. LEXIS 168734, at *12–13 (D. Ariz. Sep. 26, 2019).

223. *See id.* at *13.

224. *See id.* at *14.

225. *See* Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738 (FLW) (LHG), 2018 U.S. Dist. LEXIS 123081, at *22 (D.N.J. July 24, 2018).

226. *See State Farm*, 2019 U.S. Dist. LEXIS 168734, at *14.

227. *See supra* Section II.B.1.

228. *See* Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 779 (N.D. Ill. 2019).

liability for defective products on Amazon because the aims of the doctrine would not be furthered.

4. Amazon Must Rely on Third-Party Vendors to Eliminate Unsafe Products

Fourth, Amazon is limited in its ability to eliminate the unsafe character of third-party products sold on its site. While Amazon can remove products from its marketplace and require third-party sellers to show proof of compliance with certain safety standards, over one million third-party vendors offer products on Amazon's marketplace and Amazon cannot realistically be expected to judge the quality of every single product sold by these vendors.[229] Amazon's marketplace is entirely open, meaning all sellers who meet Amazon's terms may offer their products for sale.[230] Amazon's current business model does not involve selecting the products to be offered on its marketplace and investigating them for dangerousness.[231]

The majority in *Oberdorf* mentions Amazon's collecting and posting customer feedback as a way to eliminate unsafe products from the marketplace,[232] but that reliance on consumer reviews is the exact reason why strict liability should not be imposed. Instead of merely posting such feedback on its site for the convenience of other customers,[233] Amazon would need to closely monitor millions of reviews for claims of unsafe products, independently verify each claim, and then determine whether it should pull the product from its site. The sheer size and scope of this endeavor is hard to imagine.

One might be able to envision a new business model, where Amazon proactively researches and reviews each product for possible defects and then bars vendors from selling products that are harmful.[234] However, such a change would be extremely costly.[235] Consumers' choices would likely be limited if vendors found themselves under heightened scrutiny. Over-cautiousness could lead Amazon to decide to exclude risky or unproven vendors and products.[236] In theory, such a high standard could be set for any party within a product's distribution chain, but legislators and courts have decided against this by repeatedly

229. *See id.* at 779–80.

230. *See* Oberdorf v. Amazon.com Inc., 930 F.3d 136, 164 (3d Cir. 2019) (Scirica, J. dissenting), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 2020 U.S. App. LEXIS 17974 (3d Cir. June 2, 2020) (en banc).

231. *See id.*

232. *See Oberdorf*, 930 F.3d at 146.

233. *See id.* at 164 (Scirica, J. dissenting).

234. *See id.*

235. *See id.*

236. *See id.* at 165.

defining specific roles, like "seller," which should be subject to strict liability.[237]

C. Shifting the Cost of Injuries to Amazon Will Hurt Consumers

In addition to Amazon's ability, or lack thereof, to influence and police third-party vendors, courts look at which parties are available to redress consumers' injuries and who has the ability to redistribute these costs.[238] These factors also weigh against applying strict liability on Amazon.[239] While Amazon may be easier to locate and sue than the product's manufacturer or seller, plaintiffs always run the risk of the defendant being defunct, insolvent, or impossible to locate.[240] But, "[t]o assign liability for no reason other than the ability to pay damages is inconsistent with our jurisprudence."[241] Further, courts should be careful in expanding liability when doing so would "impose a substantial economic burden on these businesses and individuals, without necessarily achieving the goal of enhanced product safety."[242] While Amazon is an easy target for injured plaintiffs, the mere fact that it has deep pockets does not support the application of strict liability.

Furthermore, Justice Traynor's insurance rationale falls flat when injured consumers are already protected by their actual insurers. Many of the products liability cases against Amazon are brought by insurance companies seeking to subrogate their losses by suing Amazon.[243] Instead of holding Amazon strictly liable and then forcing the company to seek indemnification from its third-party vendors, relieving Amazon of liability would promote direct action against the third-party vendors that sold the product in the first place.

IV. CONCLUSION

The doctrine of strict products liability was created to remove the barriers to recovery erected by traditional negligence and warranty

237. Hence the focus on determining whether a party is a "seller," "supplier," or has a significant role in placing the product in the stream of commerce. *See, e.g.*, Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 778–80 (N.D. Ill. 2019).

238. *See Oberdorf*, 930 F.3d at 147.

239. *See id.* at 164 (Scirica, J. dissenting).

240. *See id.*

241. *See id.* (citing *Cafazzo*, 668 A.2d at 526).

242. *See* Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738 (FLW) (LHG), 2018 U.S. Dist. LEXIS 123081, at *37 (D.N.J. July 24, 2018) (quoting Zaza v. Marquess & Nell, 675 A.2d 620, 636 (N.J. 1996)) (internal quotation marks omitted).

243. *See id.* at *1; *see also* Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 135 (4th Cir. 2019); State Farm Fire & Cas. Co. v. Amazon.com, 2019 U.S. Dist. LEXIS 168734, at *1 (D. Ariz. Sep. 26, 2019); Phila. Indem. Ins. Co. v. Amazon.com, Inc., No. 17-CV-03115 (DRH)(AKT), 2019 U.S. Dist. LEXIS 209144, at *1 (E.D.N.Y. Dec. 4, 2019).

regimes.[244] Four main policy considerations support strict liability: deterrence, reliance, insurance, and administrative costs.[245] When applied to traditional parties in the chain of distribution, these rationales often support the application of strict liability, but Amazon does not fit the traditional mold.[246]

States that adopt Section 402A of the Restatement (Second) of Torts apply strict liability to sellers of defective products, but Amazon's role as an online marketplace does not fit the Restatement's definition of a seller.[247] Amazon does not transfer title to the third-party products sold on its site and does not enter into sales agreements with consumers of these products.[248] Many states also impose strict liability on parties that participate significantly in the stream of commerce that delivers defective products to consumers.[249] Nevertheless, expanded liability must serve the ultimate goal of fulfilling the public policy purposes behind strict liability.

Holding Amazon strictly liable would not satisfy these purposes.[250] Therefore, courts should avoid imposing strict liability on providers of online marketplaces like Amazon and instead focus on the parties directly responsible for placing dangerous products in the market to begin with: manufacturers and third-party vendors.

244. *See* Graham, *supra* note 9, at 568–69.
245. *See supra* Section II.B.
246. *See supra* Part III.
247. See *supra* Part III.
248. *See supra* Section III.A.
249. *See supra* Section III.B.
250. *See supra* Sections III.B.1–III.B.4.