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OUT-TECHING PRODUCTS LIABILITY: REVIVING STRICT PRODUCTS LIABILITY IN AN AGE OF AMAZON

Ryan Bullard*

From humble beginnings as an internet start-up in the mid–1990s, Amazon has transformed itself into the prodigious and omnipresent e-commerce Leviathan of the early twenty-first century, cashing in on a society and economy increasingly comfortable with—and dependent on—technology-based services. In addition to its recent forays into brick-and-mortar grocery stores, film and television production, fast-fashion, cloud computing, consumer data analytics, and delivery and logistics services, Amazon is most well-known as the force behind a multi-billion dollar online marketplace where its own products are listed for sale next to products listed by third-party vendors.

Grievous injuries and property damage resulting from defective third-party products sold through Amazon's marketplace have been the issue of a number of recent lawsuits alleging strict products liability against Amazon itself. The courts that heard these cases refused to extend strict liability to Amazon, but this recent development argues that these decisions run afoul of the spirit of the American strict products liability regime that emerged in the mid–twentieth century. American courts recognized that the imposition of strict liability on manufacturers, distributors, and retailers alike for injuries caused by defective products that they placed into the consumer marketplace had multiple desirable social purposes that warranted shifting the loss from consumers to members of the distribution chain.

After briefly surveying the history and intent behind the original American strict products liability regime, this recent development explores how Amazon "out-teched" products liability in four recent cases and considers why the current standard of negligence is insufficient to protect consumers in the modern economy. It

* J.D. Candidate, University of North Carolina School of Law, 2020.

concludes with an explanation of how and why courts should refocus their jurisprudence on the original policy goals expressed in the seminal products liability cases of the mid-twentieth century.

I. INTRODUCTION

First-year law students across the United States learn in their introductory torts classes that any entity in the manufacturing, distribution, or retail chain of a defective product can be held liable for injuries that result from that defective product.[1] This theory of strict liability for defective products, first articulated by California Supreme Court Justice Roger Traynor in 1944, was widely adopted in the United States throughout the mid-twentieth century.[2] This doctrine, as with tort law generally, showed a remarkable ability to evolve over time, adapting to a changing economy in order to most effectively protect consumers.[3] Over the past twenty years, an increasingly interconnected and modernizing global economy has given rise to e-commerce behemoths like Amazon.com. This incredible change in the consumer market calls for a corresponding evolution in the law of products liability; however, courts have so far failed to facilitate the legal progress necessary to protect consumers.

In a recent ruling from the Southern District of New York, Amazon was relieved of any test of strict liability for an allegedly defective product that a consumer bought through the online retailer's "Fulfillment By Amazon" service.[4] This is not the first instance in which Amazon has escaped strict products liability under similar circumstances, and a string of cases in the last two years has reinforced Amazon's position that it is merely an "online

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[1] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (AM. LAW INST. 1998).

[2] Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

[3] *See infra* notes 30, 48, and accompanying text.

[4] Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 400–01 (S.D.N.Y. 2018) (holding that Amazon was neither a seller nor distributor of the defective product because it never "held title" to the product, and therefore could not be held strictly liable for injuries caused by it).

marketplace," and not a product distributor responsible for placing defective products into consumers' hands.[5]

This recent development will consider why that analysis of Amazon's role in the modern economy is erroneous and results in judicial outcomes that are incongruous with the original intent and rationales behind the American strict products liability regime. Part II offers an in-depth discussion of the history of products liability in the United States. The string of four recent cases where Amazon outteched strict products liability will be discussed in Part III. The misapplication of legal standards in classifying Amazon's role in the distribution chain will be discussed in Part IV. In Part V, this recent development will revisit the larger policy goals of tort law, including deterrence, loss distribution, corrective justice, and fair compensation to victims of unintentional negligence, and it will show that the holdings in the cases described in Part III are antagonistic to those goals. Part VI will briefly conclude that courts should refocus their analysis to more closely adhere to the original policy intent of strict products liability.

II. PRODUCTS LIABILITY IN THE UNITED STATES

A. *History of Products Liability Law*

Originally, common law recovery for injuries caused by defective products depended upon the existence of privity between the injured party and the manufacturer.[6] This requirement came to

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[5] *See* Fox v. Amazon.com, Inc., No. 3:16–CV–03013, 2018 WL 2431628, at *3 (M.D. Tenn. May 30, 2018); *see also* Allstate N.J. Ins. Co. v. Amazon.com, Inc, No. 17–2738, 2018 WL 3546197 (D.N.J. July 24, 2018). *See generally* Oberdorf v. Amazon.com, Inc., 295 F. Supp. 3d 496 (M.D. Pa. 2017) (finding that Amazon was more like a newspaper classified ads section than a seller or distributor of goods).

[6] *See, e.g.*, Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. Ch. 1842) (foreseeing the possibility of an "infinity of actions . . . [because if] the plaintiff can sue [though lacking privity], every 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."); *see also Privity of Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The relationship between the parties to a

be a "fishbone in the throat of the law" that reflected the socioeconomic climate of the nineteenth century and a judicial hesitancy to place heavy burdens on the manufacturers that drove economic growth.[7] American courts latched onto the English common law principle that privity was required to maintain a tort action.[8] Exceptions soon developed, however, particularly for torts in relatively new or innovative industries which were often hazardous, such as pharmacology in the mid-1800s.[9] Further evolutions in the law occurred in the early 1900s as a result of *MacPherson v. Buick Motor Co.*[10] In that case, the New York Court of Appeals added an element of negligence, and 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 . . . . We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.[11]

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contract, allowing them to sue each other but preventing a third party from doing so. The requirement of privity has been relaxed under modern laws and doctrines of implied warranty and strict liability, which allow a third-party beneficiary or other foreseeable user to sue the seller of a defective product.").

[7] W. PAGE KEETON, ET AL., PROSSER & KEETON: THE LAW OF TORTS § 96, at 681 (5th ed. 1984).

[8] *See, e.g.*, The Germania, 10 F. Cas. 255 (S.D.N.Y. 1878) (No. 5360); *see also* The Mary Stewart, 10 F. 137, 139 (E.D. Va. 1881) ("[W]here a party is delinquent in a duty imposed by contract, no one but a party to the contract can maintain an action.").

[9] *See* Thomas v. Winchester, 6 N.Y. 397, 397 (1852) (finding a duty of care in the absence of privity). The pharmacist in question mislabeled a bottle containing poisonous *belladonna* as dandelion extract, which is harmless. *Id.* He then negligently provided the *belladonna* to Mrs. Winchester, who suffered substantial acute health complications. *Id*. The court ruled that the pharmacist put her life in "imminent danger," and her husband was allowed to bring suit. *Id.* The pharmacist owed the plaintiff a duty of care that was not dependent on a contractual relationship; instead, the duty arose from the danger of the pharmaceutical business and heightened safety concerns with respect to ingested products. *Id.*

[10] MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

[11] *Id*. at 1053.

The holding in *MacPherson* stood for the proposition that "the manufacturer was liable for negligence to a purchaser if he put forth a product which might reasonably be expected to be capable of inflicting substantial harm if it were defective."[12] *MacPherson* is significant because it conclusively removed the privity requirement as a barrier to recovery in defective products liability cases, at least in New York.[13] Thus, by the time *MacPherson* was decided, the general rule of nonliability for manufacturers, sellers, and distributors had been whittled away by a number of exceptions, largely leaving a showing of negligence as the plaintiff's only burden in a products liability case.

Eventually, a trio of products liability cases in California introduced a theory of strict liability for defective products. The first of these cases, *Escola v. Coca Cola Bottling Co. of Fresno*,[14] was the most influential for the theory of strict liability introduced in its concurring opinion.[15] Although the majority held that the defendant was liable on a negligence theory similar to the one in *MacPherson*, California Justice Roger Traynor's concurrence has been instrumental in the development of the strict products liability regime in the United States. His concurrence stated that "a manufacturer [should] incur[] an absolute 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."[16] His comprehensive articulation of the justifications for the imposition of strict liability on manufacturers for injuries caused by defective products was the basis for the

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[12] Francis J. O'Brien, *The History of Products Liability*, 62 TUL. L. REV. 313, 318 (1988).

[13] *See MacPherson*, 111 N.E. at 1055 (Bartlett, C.J., dissenting) (stating the majority was discarding 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").

[14] Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436 (Cal. 1944).

[15] *See id.*

[16] *Id.* at 461 (Traynor, J., concurring) (explaining why the concurrence sought to apply a strict theory of liability, as opposed to the theory of *res ipsa loquitur* that the controlling opinion in the case used to find liability).

opinions which later implemented an American strict products liability regime.[17]

Almost twenty years after his concurrence in *Escola*, Justice Traynor wrote the majority opinion in *Greenman v. Yuba Power Products*[18] to reflect the conclusions he had reached with respect to strict products liability.[19] In *Greenman*, the California Supreme Court held that "it was sufficient that plaintiff proved that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use."[20]

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[17] *See, e.g.*, East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 865–66 (1986) (applying the strict liability principles set forth in *Escola* to admiralty law); Putman v. Erie City Mfg. Co., 338 F.2d 911, 920–21 (5th Cir. 1964) (approving of Traynor's concurrence in *Escola*).

[18] Greenman v. Yuba Power Prod., 377 P.2d 897 (Cal. 1963).

[19] *See generally id*. Notably, the true first-in-time "strict products liability" majority opinion came in *Henningson v. Bloomfield*, 161 A.2d 69 (1960), where the New Jersey Supreme Court held that the driver of an automobile who was not the title-holder (and therefore not in privity with the manufacturer or dealer) could hold both the manufacturer and the dealer liable for injuries caused by a defective steering gear, even in the absence of negligence.

The two later California cases (*Greenman* and *Vandermark*) are notable chiefly due to their direct continuity from Justice Traynor's concurring opinion in *Escola*, which was the first concurrence to assert a theory of strict products liability. After *Escola*, but prior to *Henningson*, there were a series of cases that managed to assert strict products liability theories in dicta while also finding negligence or privity on the facts of the case. *See, e.g.*, B.F. Goodrich Co. v. Hammond, 269 F.2d 501, 506 (10th Cir. 1959) (holding that "[a] plaintiff's case does not fail for failure to allege and prove privity between the parties," but ultimately finding liability due to an implied warranty of fitness that ran to the decedent and was breached by the manufacturer); Beck v. Spindler, 99 N.W.2d 670, 680–83 (Minn. 1959) (holding that privity of contract is not required for liability to be found, but ultimately finding that the defendant-manufacturer was a party to the sale, giving rise to privity, and that the defendant negligently breached express and implied warranties to the plaintiff); Spence v. Three Rivers Bldg. & Masonry Supply, 90 N.W.2d 873, 880–81 (Mich. 1958) (discussing the potential benefits of abandoning the general rule of nonliability that has been "eaten away by exceptions," but ultimately finding the defendant liable for the plaintiff's injuries due to negligence).

[20] *Greenman*, 377 P.2d at 901.

In other words, the manufacturer was held strictly liable for the defective design and manufacture of its product.[21]

One year later, Traynor wrote the last of three seminal products liability opinions for a unanimous California Supreme Court in *Vandermark v. Ford Motor Co.*,[22] which held that non-manufacturing retailers and distributors can be strictly liable for improper assembly or adjustment during the manufacturing process.[23] Subsequent decisions have held other types of third-parties strictly liable for manufacturing or design defects, including some corporate successors,[24] franchisors,[25] and promoters.[26] In contrast, some courts have refused to apply strict liability to groups such as used-goods sellers[27] or companies that finance purchases made by others.[28] Additionally, courts have held that strict liability extends beyond the purchaser to parties like bystanders.[29]

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[21] *Id.*

[22] Vandermark v. Ford Motor Co., 391 P.2d 168 (Cal. 1964).

[23] *See id.* at 171–72 ("In some cases the retailer may be the only member of [the overall producing and marketing] 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*." (emphasis added)).

[24] *See* Ray v. Alad Corp., 560 P.2d 3, 11 (Cal. 1977).

[25] *See* Kosters v. Seven-Up Co., 595 F.2d 347, 351 (6th Cir. 1979).

[26] *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967).

[27] *See* Tillman v. Vance Equip. Co., 596 P.2d 1299, 1303 (Or. 1979); *see also* Wilke v. Woodhouse Ford, Inc., 774 N.W.2d 370, 381 (Neb. 2009) (holding that a used-goods seller can be held liable only if found to be negligent) ("[A] commercial dealer of used vehicles has a duty to conduct a reasonable inspection of the vehicle prior to sale in order to determine whether there are any patent defects which would make the vehicle unsafe for ordinary operation.").

[28] *See generally* Nath v. Nat'l Equip. Leasing Corp., 439 A.2d 633 (Pa. 1981) (refusing to apply strict liability in a suit brought by a worker whose hand was injured in the machine his employer had financed through the defendant).

[29] *See, e.g.*, Elmore v. Am. Motors Corp., 451 P.2d 84, 89 (Cal. 1969) ("If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable . . . . The public policy which protects the driver and passenger of the car should also protect the bystander, and where a driver or passenger of another car is injured due to

Regardless of judicial extension or constraint of the doctrine, the policy justifications set forth in Justice Traynor's original *Escola* concurrence were a constant force in the evolution of strict products liability.

B. *Policy and Law of Strict Liability*

When Justice Traynor wrote his influential concurrence in *Escola*, he recognized the need for products liability law to evolve over time as industrially modernized, mass-produced products became more prevalent and more dangerous, and public opinion shifted toward resisting the insulation of manufacturers from tort liability rather than prioritizing profit above all else.[30] In *Escola* and *Greenman*, Traynor was cognizant of the importance of loss-spreading, as well as a moralistic type of liability based on social responsibility.[31] Additionally, he noted the potential for a strict products liability regime to incentivize the creation of safer products.[32]

1. *Social Responsibility*

Traynor's principle policy justification for his concurrence in *Escola* was that liability should be fixed on the party most responsible for its introduction into the marketplace.[33] He asserted

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defects in the manufacture of an automobile and without any fault of their own, they may recover from the manufacturer . . . .").

[30] Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 364 (1965) ("It took time, a long stretch of it from 1842's *Winterbottom v. Wright* to 1916's *MacPherson v. Buick Motor Company*, for the courts to articulate their disquiet over the ever-widening zones in which the defective products of enterprise were set loose . . . . In many an opinion the question festered without satisfactory answer: Can enterprise hew to the line of the profit margin only by letting its victims fall where they may, redressing no more than the privity-privileged?").

[31] Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440 (Cal. 1944); *see also* Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 901 (Cal. 1963) ("The purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.").

[32] *Escola*, 150 P.2d at 440–41.

[33] *Id.* at 441 ("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

that the liability to the consumer is not fixed by contract or the "law of sales"; rather, "the warranty of the manufacturer to the consumer in absence of privity of contract rests on public policy."[34] "The consumer no longer has means or skill enough to investigate for himself the soundness of a product . . . and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing . . . ."[35] Therefore, he argued, it was just, from a policy perspective, to attach liability to the party who put a defective product on the open marketplace for consumers to purchase.[36]

2. *Loss-Spreading*

Moreover, Traynor argued that not only should losses fall on the parties most responsible for placing defective products on the consumer market, but there is a sound economic rationale for such burden shifting. Traynor expounded on this loss-spreading policy rationale in his *Escola* concurrence.[37] He wrote:

> Those who suffer injury from defective products are unprepared to meet its consequences. The cost of injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of the injury can be insured by the manufacturer and distributed among the public as a cost of doing business . . . . However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best suited to afford such protection.[38]

Traynor later stated in *Vandermark* that "strict liability on the manufacturer and retailer alike affords maximum protection to the

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upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.").

[34] *Id.* at 442 (citing, *inter alia*, Klein v. Duchess Sandwich Co., 93 P.2d 799, 803 (Cal. 1939); Ketterer v. Armour & Co., 200 F. 322, 323 (S.D.N.Y. 1912); and Decker & Sons v. Capps, 164 S.W.2d 828 (Tex. 1942)).

[35] *Id.* at 443.

[36] *See* Fischer v. Johns-Manville Corp., 512 A.2d 466, 473 (N.J. 1986) ("The overriding goal of strict products liability is to protect consumers and promote product safety. Manufacturers, by the act of marketing their products, are made responsible to the public for injuries caused by those products—the 'reparative' function.").

[37] *Escola*, 150 P.2d at 441.

[38] *Id.*

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."[39] Essentially, Traynor argued that it would be most economically efficient for manufacturers and retailers to bear the cost of risk due to defective products because they are best situated to account for such cost in the price of their goods.[40] This way, the risk can be thinly spread among a large number of consumers via nominal price increases.[41]

3. *Incentivizing a Safer Marketplace for Consumers*

The final policy rationale that Traynor identified for the imposition of a strict products liability regime is that it incentivizes safe products, not just reasonably careful manufacturing processes.[42] He argued that "[i]t 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 [impose strict liability]."[43]

Since Traynor's foundational concurrence in *Escola* and his opinions in *Greenman* and *Vandermark*, the Restatement's interpretation of the law has been that "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."[44] The Restatement closely matches the policy intent of *Escola*, *Greenman*, and *Vandermark*,

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[39] Vandermark v. Ford Motor Co., 391 P.2d 168, 172 (Cal. 1964) ("Retailers like manufacturers are engaged in the business of distributing goods to the public.").

[40] For a more complete discussion of the theories underlying the distributive rationales that underpin tort law generally, see Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1970). *But see* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (questioning whether distributive rationales are an appropriate basis for the imposition of liability, and instead arguing that corrective rationales may be fairer).

[41] *See* Calabresi, *supra* note 40, at 519.

[42] *Escola*, 150 P.2d at 441; *see also* Price v. Shell Oil Co., 466 P.2d 722, 725–27 (Cal. 1970) (discussing the promotion of safety as justification for strict products liability).

[43] *Escola*, 150 P.2d at 441.

[44] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB., *supra* note 1.

specifically in that it extends liability to any party that makes a defective product available to the marketplace.[45]

The modern strict products liability regime is the legacy of a forward-thinking judiciary responding to an evolving marketplace.[46] It took a considerable amount of time—over a century—for tort law to evolve to adequately protect consumers from the dangers of potentially defective products.[47] However, the pinnacle of this evolution—the adoption of a strict products liability regime in *Greenman*—should not necessarily represent the conclusion of tort law's adaptation to a changing economy.[48] The prevalence of e-commerce and new business models of increasing complexity and connection to the international economy presents a challenge to the capability of the strict products liability regime to continue to protect consumers as it did in the past.

III. OUT-TECHING PRODUCTS LIABILITY

A string of recent cases has tested whether Amazon can be held strictly liable for defective products advertised, purchased, and distributed through its website and fulfillment services. The judicial consensus thus far is that it cannot. However, this conclusion is not consistent with the policy goals outlined by Justice Traynor in

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[45] *Id.* § 1 cmt. e ("Liability attaches even when such nonmanufacturing sellers or distributors do not themselves render the products defective and regardless of whether they are in a position to prevent defects from occurring."); *see also id.* § 2 cmt. o ("[S]trict liability is imposed on a wholesale or retail seller who neither knew nor should have known of the relevant risks, nor was in a position to have taken action to avoid them, so long as a predecessor in the chain of distribution could have acted reasonably to avoid the risks.").

[46] *See* G. EDWARD WHITE, AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 247 (Oxford Univ. Press, 3rd ed. 2007) (describing Traynor as the "architect" of a progressive, yet controversial, judiciary).

[47] *See* Traynor, *supra* note 30, at 363–65 (noting that *Winterbottom*, which "ignored strict liability, made short shrift of the issue of the manufacturer's negligence, carried the injured plaintiff to the doorstep of privity of contract, and left him on the doorstep," was decided in 1842, and *Greenman*, which "rejected the fiction of warranty *in toto*, holding the manufacturer to strict liability in tort," was decided 121 years later, in 1963).

[48] For an overview of prior economic scholarship concerning the ability of the American common law to evolve over time, see generally David A. Reese, *Does the Common Law Evolve?*, 12 HAMLINE L. REV. 321 (1989).

Escola and the evolution of products liability over time. In light of an increasingly tech-based society and economy, the judiciary has a responsibility to modernize products liability in a way that will adequately protect consumers and promote safety in the common marketplace.

A. *Amazon's Distribution Methods for Third-Party Vendors*

Amazon is a multi-billion dollar e-commerce company that offers millions of products for sale on its website, Amazon.com.[49] Though some of these products are offered for sale by Amazon itself, many are offered for sale by third-party vendors who use Amazon's site to access a wider consumer market.[50] By placing their products on Amazon's site, third-party vendors receive access and exposure to Amazon's consumer base, and Amazon benefits by expanding the products it offers on its site without the cost of investing in additional inventory.[51] Before a third-party vendor's product is purchased using the Amazon Marketplace service, it is classified as either "Fulfilled by Amazon" ("FBA"), "Fulfilled by Merchant" ("FBM"), or "Seller-Fulfilled Prime" ("SFP"), depending on how the product will reach the consumer.[52]

1. *Fulfillment by Amazon*

If a vendor elects to use the FBA service, Amazon catalogs, warehouses, packages, ships, and handles customer service responsibilities for the vendor's products.[53] The FBA service also offers a suite of software services that allows sellers to track sales

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[49] *See* Amazon.com, Inc., 2018 Annual Report (Form 10-K) (Feb. 1, 2019).

[50] Letter from Jeffrey P. Bezos, CEO of Amazon.com, Inc., to its shareholders (2017) (on file with author) ("In 2017, for the first time in our history, more than half of the units sold on Amazon worldwide were from our third-party sellers, including small and medium-sized businesses (SMBs)."); *see also* Press Release, Amazon.com, Inc., Sellers on Amazon are Thriving: Fulfillment by Amazon Delivered More than 2 Billion Items for Sellers Worldwide in 2016 (Jan. 4, 2017) (on file with author).

[51] *See* Reuters, *Amazon's Third-Party Sellers Had Record-Breaking Sales in 2016*, FORTUNE (Jan. 4, 2017), http://fortune.com/2017/01/04/amazon-marketplace-sales/.

[52] *Fulfillment by Amazon*, AMAZON, https://amzn.to/2V5FDCG (last visited Mar. 5, 2019).

[53] *Id.*

performance, maintain inventory levels, and launch advertising campaigns through Amazon.[54] Additionally, Amazon handles payment processing by accepting money from buyers and then remitting the net cost of the product back to the third-party vendor.[55] In return, Amazon collects extensive fulfillment fees and storage fees.[56] FBA can be especially attractive to third-party vendors because it allows them to pay Amazon to handle basic distribution services without the need to make significant capital investments in warehousing or supply-chain logistics themselves.

Perhaps most importantly, though, is that third-party vendors using FBA are able to market their products to Amazon's "Prime" members. Prime members pay $12.99 per month (or, for an annual subscription, a discounted yearly payment of $119.99) to receive a number of benefits from Amazon, including free shipping.[57] A 2018 report estimated Amazon's Prime membership included 95 million people, and that Prime members spend, on average, approximately $1,400 per year on merchandise bought through Amazon (compared to $600 of yearly spending on the site for the average non-Prime customer).[58]

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[54] *Fulfillment by Amazon Programs*, AMAZON, https://amzn.to/2NM5Za1 (last visited Mar. 5, 2019).

[55] *How Fulfillment by Amazon Works*, AMAZON, https://amzn.to/2e1QLLJ (last visited Mar. 5, 2019).

[56] For Amazon's listing of their FBA fees, see *Fulfillment by Amazon (FBA) Fees and Rate Structure*, AMAZON, https://services.amazon.com/fulfillment-by-amazon/pricing.html (last visited Feb. 13, 2019).

[57] *Amazon Prime*, AMAZON, https://amzn.to/2HhMmWr (last visited Mar. 5, 2019) (illustrating that, in general, Prime members can expect free two-day shipping on Prime products, but some Prime members can receive free same-day delivery or one-day shipping on certain qualifying orders).

[58] *Amazon Prime Membership Growth Slows*, CONSUMER INTEL. RES. PARTNERS (July 20, 2018), https://www.cirpllc.com/blog/2018/9/25/amazon-prime-membership-growth-slows; *cf.* MICHAEL R. LEVIN & JOSHUA N. LOWITZ, CONSUMER INTEL. RESEARCH PARTNERS, AMAZON PRIME HITS 90 MILLION US MEMBERS (Oct. 18, 2017) (reporting that the average gap between Prime member spending and non-Prime consumer spending on Amazon was roughly $600 in 2017, which shows that the gap between Prime member spending and non-Prime consumer spending widened between 2017 and 2018 by as much as 16 percent, while Prime membership increased by approximately 5.5 percent over the same period).

2. *Fulfillment by Merchant*

At the other end of the spectrum—when a product is FBM—the third-party vendor is responsible for packing and shipping its product to the buyer, and Amazon only handles payment processing.[59] The obvious drawbacks to FBM are that the third-party vendor must store its own inventory, package its own products, pay for shipping and handling, and perform customer service responsibilities, including product returns and exchanges.[60] However, this could be a beneficial arrangement if the third-party vendor can perform these services for itself at a lower cost than Amazon's FBA fees. Additionally, some research suggests that third-party vendors choosing FBM distribution are at a marketing disadvantage when it comes to the "buy-box."[61] Perhaps the biggest disadvantage to third-party vendors that choose FBM is that they are not able to market directly to Amazon's high-spending Prime

[59] John E. Lincoln, *Fulfillment by Amazon vs. Fulfillment by Merchant vs. Seller-Fulfilled Prime (The Ultimate Guide)*, IGNITE VISIBILITY, https://ignitevisibility.com/fulfillment-amazon-vs-fulfillment-merchant-vs-seller-fulfilled-prime-ultimate-guide/ (last visited Feb. 13, 2019).

[60] *Id.*

[61] The "buy-box" is the area on an Amazon product page that includes the "Add to Cart" button and the information surrounding it. When a third-party vendor is said to have "won" the buy-box, it means that when a purchaser clicks "Add to Cart," the winning third-party vendor's product will be automatically placed in the purchaser's cart before other third-party vendors' products will. All other products sold by third-party sellers are grouped into a link that says "[*x* number] new from [$*x* price]," which leads to a listing of all third-party vendors offering that particular product. Competition for the buy-box only occurs where multiple third-party vendors offer the same unused product for sale (i.e., "private label sellers," or sellers who are the exclusive sellers of a particular product, automatically win the buy-box for their products (with a few exceptions under certain circumstances); resellers of such products would have to be sought out by purchasers by clicking the "[*x* number] *used* from [$*x* price]" button). Oftentimes, the buy-box is simply won by the third-party vendor offering the lowest price, but this is not always the case. It is difficult to beat Amazon itself in a competition for the buy-box, but it is possible in rare circumstances. For an excellent discussion of the algorithm behind winning Amazon's buy-box, see Le Chen et al., *An Empirical Analysis of Algorithmic Pricing on Amazon Marketplace*, *in* WWW '16 PROCEEDINGS OF THE 25TH INTERNATIONAL CONFERENCE ON WORLD WIDE WEB 1339–49 (2016), http://www2016.ca/proceedings.html.

members, but sellers can reach those consumers by opting into SFP distribution.

3. *Seller-Fulfilled Prime*

SFP combines the all-important access to Amazon's high-spending Prime members with the extra control over shipping and warehousing costs afforded by FBM.[62] While access to Prime members could substantially increase revenue for a third-party vendor, it must foot the bill for any inventory storage overhead or shipping and handling costs; these costs will not be outsourced to Amazon like they would be under FBA.[63] However, not all third-party vendors will qualify for SFP, especially because the criteria for qualification are extensive.[64] For example, third-party vendors must first complete a SFP trial period in which they are required to process orders with a zero-day handling time.[65] Once the trial period is complete, they must offer premium shipping options, ship greater than 99 percent of their orders on time, have an order cancellation rate of less than 0.5 percent, use certain Amazon-approved carriers, and still must allow Amazon to handle all customer service inquiries.[66]

B. *The Implication of Distribution Methods on Amazon's Liability for Defective Products*

Note that in the cases below, FBA is the predominant method by which the third-party vendors have placed their products into the hands of consumers.[67] The exception is *Oberdorf v. Amazon.com*,

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[62] *Seller Fulfilled Prime*, AMAZON, https://services.amazon.com/services/seller-fulfilled-prime.html (last visited Feb. 13, 2019).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] No case law has emerged regarding defective products fulfilled by SFP, though if it had, this recent development might argue that it would be less appropriate (though not totally inappropriate) for strict liability to attach to Amazon through SFP products than it would be for it to attach to Amazon through FBA products. *See, e.g.*, discussion *infra* Part IV.A, V.A, and V.D. This recent development does not argue that strict liability should attach to Amazon for defective products fulfilled by the FBM method.

Inc.,[68] where the third-party seller used FBM and assumed responsibility for shipping and warehousing the defective product in question.[69] This factually distinguishes *Oberdorf* from *Allstate*,[70] *Fox*,[71] and *Eberhart*,[72] in which the third-party sellers used the FBA service.[73] The sellers' use of FBA substantially increased Amazon's role in placing the defective products into consumers' hands. For example, Amazon took charge of warehousing, packing, shipping, handling, customer service, and, in some cases, it assumed the responsibility to notify purchasers of potentially hazardous defects in products sold by third-parties.[74] Additionally, the sellers' use of FBA economically benefitted Amazon. For example, in each of the cases where the seller utilized FBA, Amazon collected significant fees from them for using the FBA service, increased the Prime product offerings on its site, and received advertising benefits from shipping the defective products in Amazon-branded boxes sealed with Amazon-branded tape.[75]

1. Oberdorf v. Amazon.com, Inc.

The earliest case in this series is *Oberdorf v. Amazon.com, Inc*.[76] In *Oberdorf*, the plaintiff "suffered severe and permanent injuries to her left eye when the retractable leash she was using suddenly malfunctioned" and "violently" struck her in the face.[77] Oberdorf purchased the leash on the Amazon Marketplace from a third-party

[68] 295 F. Supp. 3d 496 (M.D. Pa. 2017).

[69] *Id.* at 498.

[70] Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197 (D.N.J. July 24, 2018).

[71] Fox v. Amazon.com, Inc., No. 3:16–CV–03013, 2018 WL 2431628 (M.D. Tenn. May 30, 2018).

[72] Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 395 (S.D.N.Y. 2018).

[73] *See Allstate*, 2018 WL 3546197, at *3; *Fox*, 2018 WL 2431628, at *2 (explaining that Amazon disputes that the third-party vendor used FBA, even though plaintiff presented evidence that it did; the court did not find this fact dispositive nor material in either light); *Eberhart*, 325 F. Supp. 3d at 395.

[74] *See, e.g.*, *Allstate*, 2018 WL 3546197, at *7.

[75] *See* discussion *supra* Part III.A.1.

[76] Oberdorf v. Amazon.com, Inc., 295 F. Supp. 3d 496 (M.D. Pa. 2017).

[77] *Id.* at 497.

vendor called "The Furry Gang."[78] The Furry Gang opted for the FBM method of fulfillment, and Amazon was minimally involved in placing the leash on the market.[79] As a result, the court granted summary judgment in Amazon's favor, concluding that "[t]he Amazon Marketplace serves as a sort of newspaper classified ad section, connecting potential consumers with eager sellers in an efficient, modern, streamlined manner."[80] The court found that "an online sales listing service like Amazon Marketplace" does not qualify as a "seller" and thus cannot be held strictly liable for product defects.[81] The ruling is currently under appeal.[82]

Oberdorf is significant because other courts have cited it as authority to conclude that Amazon is not strictly liable for defective products sold through the FBA service, even though the third-party vendor in *Oberdorf* was highly distinguishable from the other third-party vendors in Part III because it used the FBM method of distribution.[83] Further, the ruling of the district court in *Oberdorf* still raises substantial policy questions regarding the ability of injured plaintiffs to recover when third-party sellers prove to be unreachable.[84] This recent development does not argue that Amazon

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[78] *Id.* at 497–98 (also noting that plaintiffs were unable to contact "The Furry Gang" or the true manufacturer of the offending leash following the accident).

[79] *Id.* at 498.

[80] *Id.* at 501.

[81] *Id.* (citing Musser v. Vilsmeier Auction Co., 562 A.2d 279 (Pa. 1989)).

[82] An online recording of the oral arguments of this appeal can be found at: Online audio file: Oral Arguments, Oberdorf v. Amazon.com, Inc., CV 18–1041, held by the U.S. Court of Appeals for the 3rd Circuit (Oct. 3, 2018), https://www2.ca3.uscourts.gov/oralargument/audio/18-1041HeatherR.Oberdorf,etal.v.Amazon.Com,Inc.mp3 (on file with author).

[83] *See, e.g.*, Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 399 (S.D.N.Y. 2018) ("[I]t appears that every court to consider the question of Amazon's liability has concluded that Amazon is not strictly liable for defective products sold on its marketplace.") (citing, *inter alia*, *Oberdorf*, 295 F. Supp. 3d at 499–501; Fox v. Amazon.com, Inc., No. 3:16–CV–03013, 2018 WL 2431628, at *8 (M.D. Tenn. May 30, 2018); Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *5–12 (D.N.J. July 24, 2018)); *see also Fox*, 2018 WL 2431628, at *7 ("The Court notes that the conclusion reached here is consistent with that reached by other courts addressing the liability of Amazon under other products liability statutes.") (citing *Oberdorf*, 295 F. Supp. 3d at 496); *Allstate*, 2018 WL 3546197, at *10 (finding *Oberdorf* persuasive, but not controlling).

[84] *See infra* notes 163–72 and accompanying text.

should be held strictly liable for FBM products; instead, it argues that Amazon's complacency in allowing third-party vendors to escape accountability for defective products sold through its online marketplace implicates negligence theories of liability and suggests a potential need for more effective consumer protection laws.[85]

2. Allstate New Jersey Insurance Company v. Amazon.com, Inc.

The second case involves a defective laptop battery that plaintiff's insured (Ms. Wilmot) purchased through the Amazon Marketplace from a third-party vendor using the FBA service.[86] Ms. Wilmot, however, argued that she reasonably believed that Amazon was the true seller of the battery because Amazon charged to her credit card the purchase price of the battery.[87] Additionally, the "Prime" designation of the product (allowing Ms. Wilmot to take advantage of free expedited shipping) and the branding of the packaging in which the battery arrived (an Amazon-branded box sealed by Amazon-branded tape) supported the reasonableness of her belief.[88] While Ms. Wilmot was away, the laptop battery caught fire.[89] Ms. Wilmot's house burned down, and though she was able to save her dog from the blaze, her cats did not survive.[90] "After the fire at issue, the Amazon Product Safety Department sent Ms. Wilmot an email advising her of a potential fire hazard with the laptop battery. Amazon processed a refund for Ms. Wilmot in the

[85] *See infra* notes 205–26 and accompanying text.

[86] *Allstate*, 2018 WL 3546197, at *1 (D.N.J. July 24, 2018) (stating that the action was brought on behalf of Ms. Wilmot by her insurance company for claims associated with injuries sustained by her which were caused by the defective laptop battery).

[87] *Id.* (noting that the factual dispute over the reasonableness of Ms. Wilmot's belief that Amazon was the true seller of the laptop battery was immaterial to whether or not it should be held strictly liable for the battery) ("While the consumer's subjective belief about the identity of the seller is not determinative, there may be instances where Amazon's interaction with the consumer might transform it into a 'product seller.'").

[88] *Id.*

[89] *Id.* at *2.

[90] *Id.*

form of a gift card and advised her to dispose of 'the defective battery.'"[91] Additionally, Amazon's "A-to-Z Guarantee" states:

> We want you to buy with confidence anytime you make a purchase on the Amazon.com website . . . ; that's why we guarantee purchases from third-party sellers when payment is made via the Amazon.com website . . . . The condition of the item you buy and its timely delivery are guaranteed under the Amazon A-to-Z Guarantee.[92]

Despite the extensive involvement Amazon had in the process that ultimately led to the defective battery being placed in Ms. Wilmot's possession, including warehousing, marketing, transaction handling, branding, shipping, customer service, defective product notification, and the provision of guarantees as to the safety of products sold on its site, the court here found Amazon *not* strictly liable for the substantial damages caused by the defective battery.[93] In defending its conclusion, the court stated that Amazon is not a "product seller" under the New Jersey Products Liability Act ("N.J. PLA").[94]

The N.J. PLA allows a plaintiff to hold the "manufacturer or seller" of a defective product strictly liable for his or her injuries caused by that defective product.[95] The Act defines "product seller" as "any [entity] who [in the normal course of business] sells;

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[91] *Id.* (internal citations omitted).

[92] *Id.* at *3. Ambiguity in Amazon's A-to-Z guarantee could be reasonably construed as an express warranty that a product sold by a third-party vendor will not be defective, but this recent development will not explore that possibility.

[93] *Id.* at *7–8.

[94] *Id.* (holding that Amazon is not a "product seller" in spite of the expansive definition of "product seller" under the N.J. PLA) ("By the PLA's broad language, 'any party involved in placing a product in the line of commerce' can meet the definition of a 'product seller.' This language is consistent with the principles of New Jersey strict products liability law, which hold that, generally, a consumer injured by a defective product may bring a strict liability action against any business entity in the chain of distribution . . . In that regard, although a distributor and a retailer may be innocent conduits in the sale of the defective product, they remain liable to the injured party . . . Thus, an entity can be within the chain of distribution even without taking possession of the product . . . The absence of the original manufacturer or producer does not deprive the injured party of a cause of action . . . . Here, Amazon may have technically been a part of the chain of distribution, but it never exercised control over the product sufficient to make it a 'product seller' under the PLA." (internal citations omitted)).

[95] N.J. STAT. ANN. § 2A:58C-2 (2019).

distributes . . . packages; labels; markets; . . . or otherwise is involved in placing a product in the line of commerce."[96] It excludes sellers of real property, providers of professional services when the essence of the transaction is the "furnishing of judgment, skill or services," and persons who act solely in a financial capacity with respect to the defective product.[97]

The court dispensed with strict liability under the N.J. PLA by holding that Amazon never exercised control over the defective product.[98] Notwithstanding the absence of any control requirement in the N.J. PLA, New Jersey courts have maintained this requirement, which is rooted in a 1979 products liability case in which a New Jersey Appellate Court held that "even when there is 'no doubt' that a party is 'in the chain of distribution and contributed to placing the product in the stream of commerce,' it, nonetheless, 'must be shown that [the party] exercised control over the product.'"[99] However, this control requirement is a judicial invention that was never meant to become a test for whether an entity is a seller.[100] In the 1979 case, *Lyons v. Premo Pharm. Labs, Inc.*,[101] the defendant was a broker, and brokers are already excluded from the N.J. PLA.[102] Regardless of whether it is actually appropriate to use control as a test for whether an entity is a seller, Amazon

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[96] N.J. STAT. ANN. § 2A:58C-8 (2018); see *infra* note 106 for the full text of the statute.

[97] *Id.*

[98] *Allstate*, 2018 WL 3546197, at *7–8.

[99] *Id.* (quoting Lyons v. Premo Pharm. Labs, Inc., 406 A.2d 185, 191–92 (N.J. Super. Ct. App. Div. 1979), *cert. denied*, 412 A.2d 774 (N.J. 1979)).

[100] *See Lyons*, 406 A.2d at 191–92 (holding that a broker was not strictly liable for a defective product because it never "exercised control" over the product) ("It is undisputed that [the defendant] never had physical control over the [defective product]. It merely arranged the sale; the [product] was shipped directly from [the manufacturer] to [the plaintiff]."); *see also* Scanlon v. Gen. Motors Corp., Chevrolet Motor Div., 326 A.2d 673, 678 n.3 (N.J. 1974) ("Proof that a product was defective while in the control of the manufacturer also establishes that it was defective while in the control of the retailer. However, the converse obviously is not true.").

[101] 406 A.2d 185 (N.J. Super. Ct. App. Div. 1979), *cert. denied*, 412 A.2d 774 (N.J. 1979).

[102] N.J. STAT. ANN. § 2A:58C-8 (2018); see *infra* note 106 for the full text of the statute.

performed functions that the court in *Lyons* specifically noted that the broker did not perform.[103] Amazon performs many functions through its FBA service that go beyond "merely arrang[ing] the sale."[104] Additionally, Amazon performs multiple roles through FBA that are specifically enumerated under the N.J. PLA as roles which would classify an entity as a seller.[105] By the plain language of the statute (i.e., by disregarding the statutorily-absent control requirement and considering the plain language of the statute as applied to Amazon's role in fulfilling FBA products), Amazon should be held strictly liable for defective FBA products.[106]

In any event, a strong argument can still be made that Amazon exercised some degree of control over the product. Apart from the fact that Amazon was in physical contact with the product while it was warehoused at an Amazon facility and when it was being packed and shipped to Ms. Wilmot, it also exercised control over whether the product was "recommended" to her by its internal algorithms.[107] For products that are being sold by multiple third-

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[103] *Lyons*, 406 A.2d at 191–92.

[104] *Id.*; *see also* Laidlow v. Hariton Mach. Co., 762 A.2d 311, 320 (N.J. Super. Ct. App. Div. 2000) (holding that courts should look to whether the defendant's role "was that of a facilitator rather than an 'active participant' in the transaction," with particular focus on whether the defendant "[ever] had physical control of the product [or] had merely arranged the sale"); *see Fulfillment by Amazon Programs*, *supra* note 54.

[105] *See* Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *7 (D.N.J. July 24, 2018) (specifically, Amazon distributed, packaged, labeled, marketed, and otherwise was involved in the placing of the defective product in the line of commerce); *see also supra* notes 95–96 and accompanying text.

[106] *See* N.J. STAT. ANN. § 2A:58C-8 (2018) ("'Product seller' means any 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. The term 'product seller' does not include: (1) A seller of real property; or (2) A provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill or services; or (3) Any person who acts in only a financial capacity with respect to the sale of a product.").

[107] For an in-depth discussion of Amazon's recommender system, called item-based collaborative filtering, see generally Brent Smith & Greg Linden, *Two*

party vendors, Amazon also uses an internal algorithm to determine who will win the buy-box; i.e., its algorithms determine from which entity a consumer will purchase a particular item when they click "add to cart."[108] This dual-control over what a consumer is exposed to is analogous to a shop-owner rotating his stock so that his customers only see the products he wants them to buy, pushing the rest to the back of the shelf. The algorithmic control over product visibility, combined with its physical control over the defective laptop battery during certain stages of the distribution process, is representative of a degree of overall control that should place Amazon squarely within the "control" requirement described by the *Allstate* court, qualifying it as a seller subject to strict liability under the N.J. PLA.

3. Fox v. Amazon.com, Inc.

In the next case, *Fox*, the eponymous plaintiff used Amazon to purchase a hoverboard for her son as a Christmas gift in late 2015.[109] As in *Oberdorf* and *Allstate*, the plaintiff purchased the product through the Amazon Marketplace from a third-party vendor allegedly using the FBA service.[110] Amazon charged the entire amount of the hoverboard to the plaintiff's credit card, and the receipt was sent to the plaintiff by Amazon.[111] When the product arrived, it was in an Amazon-branded box sealed by Amazon-branded tape.[112] The box containing the product displayed no information about the third-party seller or the manufacturer of the product.[113] A few weeks after Christmas, the hoverboard caused a

Decades of Recommender Systems at Amazon.com, 21 IEEE INTERNET COMPUTING 12 (2017).

[108] *See* Chen et al., *supra* note 61.

[109] Fox v. Amazon.com, Inc., No. 3:16–CV–03013, 2018 WL 2431628, at *1 (M.D. Tenn. May 30, 2018).

[110] *Id.* at *2 (Amazon disputes that the third-party vendor used FBA, but plaintiff presented evidence that it did, specifically that the box the hoverboard arrived in "contained the trademark 'Amazon' on the outside." The court did not find this fact dispositive nor material in either light.).

[111] *Id.* (noting that, had Fox requested a refund, it would have been processed through and paid by Amazon).

[112] *Id.*

[113] *Id.*

fire that destroyed the plaintiff's home and caused physical and psychological injuries to her and her family.[114]

Unlike *Oberdorf* and *Allstate*, Amazon was directly aware of the safety risks posed by the hoverboard in question.[115] On November 30, 2015, in the midst of a three-month investigation into the safety of hoverboards purchased on the Amazon website, Amazon CEO Jeff Bezos received an email informing him of a hoverboard, purchased from the same third-party vendor that Fox purchased from, that "burst into flames" with "fireworks-like explosions."[116] A December 10, 2015 report written by the safety team overseeing the investigation "identified at least 17 complaints of hoverboard fires or explosions in the United States alone from hoverboards sold on Amazon's website."[117] The leader of the safety team felt that all hoverboards being sold on the Amazon site were potentially dangerous because the risk of "fires and explosions were spread across many manufacturers, many brands, and many component parts."[118] In describing Amazon's reaction to the safety team's report, the court wrote:

> Amazon decided to recommend the international sales team suspend all hoverboard sales. During that meeting, Amazon also decided to send a "non-alarmist" email to United States hoverboard purchasers. After being told of the decision to suspend all hoverboard sales worldwide, the third highest Amazon executive sent an email on December 10, 2015, cautioning other Amazon employees that the email to customers would be "headline news." [The email stated "There have been news reports of safety issues involving products like the one you purchased that contain rechargeable lithium-ion batteries."] Amazon stopped selling hoverboards in the United States and worldwide starting on December 11, 2015.[119]

Again, as in *Allstate*, the court here ruled that Amazon was not strictly liable for defective products sold through its Marketplace and delivered using its FBA service.[120] Though the Tennessee

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[114] *Id.* at *1.
[115] *Id.* at *4.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at *4–5 (internal citations omitted).
[120] *Id.* at *7.

Products Liability Act, like the N.J. PLA, requires strict liability for sellers and distributors of defective products, the court held that Amazon was neither a seller nor a distributor.[121] However, in summarizing the policy arguments made by the plaintiff to extend strict liability to Amazon, the court noted that "[a]lthough one might agree these policy implications justify extending liability to businesses like Amazon, that decision is for the Tennessee legislature as it would require, in the Court's view, an expansion of the Act's current definition of 'seller.'"[122]

4. Eberhart v. Amazon.com, Inc.

The most recent products liability suit brought against Amazon, *Eberhart*, follows a fact pattern similar to *Allstate* and *Fox*. The plaintiff in *Eberhart* ordered a French press coffeemaker that was displayed for sale by a third-party vender on Amazon's website using the FBA service.[123] He alleged that while washing the coffeepot, which was labeled as the "CoffeeGet 6 cup 27 oz. French Press Coffee Maker with thick heat resistant glass," the glass shattered and caused significant lacerations to his hand, resulting in permanent nerve damage.[124] Although the third-party vendor paid Amazon to warehouse and deliver its products through FBA services, the court noted that Amazon never took title of the coffeemaker, nor did it write, edit, or substantively review the information contained on the product detail page it hosted on its website.[125]

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[121] *Id.* at *6 (holding that Amazon was not a seller because it never took title to the hoverboard, notwithstanding the absence of any title requirement in statute, precedent, or persuasive authority); *see also* TENN. CODE ANN. § 29-28-102(7) ("'Seller' includes a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product whether such sale is for resale, or for use or consumption.").

[122] *Fox*, 2018 WL 2431628, at *8 n.4 ("To the extent Plaintiffs suggest the court should apply the spirit of the law rather than the actual text, the Court declines to do so.").

[123] Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 395 (S.D.N.Y. 2018).

[124] *Id.*; *see also Coffeeget 6 Cup 27 Oz French Press Coffee Maker with Thick Heat Resistant Glass by coffeeGet: Kitchen and Dining*, AMAZON, https://amzn.to/2CNSPoI (last visited Apr. 1, 2019) (showing that the product is no longer available through Amazon).

[125] *Eberhart*, 325 F. Supp. 3d at 395–96.

The law in New York, as in Pennsylvania, New Jersey, and Tennessee, is that a "manufacturer of defective products . . . may be held strictly liable for injuries caused by its products, regardless of privity, foreseeability, or due care," and that strict liability is also extended to "certain sellers, such as retailers and distributors."[126] Although the court in *Eberhart* cited a New York case that identified the lack of a concrete definition for "distributor" as it applies to strict products liability, it ruled that "the failure to take title to a product places an entity on the outside [of the chain of distribution]."[127] The court acknowledged that the *Restatement (Third) of Torts: Products Liability* does not include a title requirement, but dismissed this complication by stating that "the Restatement excludes 'product distribution facilitators' . . . —such as advertisers, sales personnel, and auctioneers—from the definition of distributors."[128] Amazon's relationship to the distribution of the coffeemaker, however, goes far beyond the exclusions in the Restatement, and the *Eberhart* court's reliance on a title requirement is misplaced. The misapplied legal foundations in the cases above are merely the disturbing fountainhead to the eventual erosion of the strict products liability regime in the modern economy.

IV. LEGAL CONSIDERATIONS

The courts in *Eberhart*, *Fox*, and *Allstate* may have overgeneralized the implications of the ruling in *Oberdorf* and relied on it too much in the absence of other case law directly dealing with Amazon's potential liability for defective products. However, there are significant and material factual differences between Amazon's

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[126] *Id.* at 397 (citing Finerty v. Abex Corp., 51 N.E.3d 555 (2016), *and* Sukljian v. Charles Ross & Son Co., 503 N.E.2d 1358 (1986)).

[127] *Id.* at 398 (citing McCormack v. Safety-Kleen Sys., Inc., No. 110733/10, 2011 WL 1643590, at *4 (N.Y. Sup. Ct. Apr. 5, 2011) ("Neither of the parties has provided the court with a New York definition of 'distributor' as it applies to strict products liability, and the court could not find a statute or case on point."). *But see* Brumbaugh v. CEJJ, Inc., 152 A.D.2d 69, 70–72 (N.Y. App. Div. 1989) (holding that a manufacturer's "exclusive marketing agent" was strictly liable for injuries caused by a defective product, even though the agent had never taken "actual possession, title, or control").

[128] *Id.* (citing RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 20 cmt. g (AM. LAW INST. 1998)).

role in the distribution of the defective dog leash in *Oberdorf* and its role in the distribution of products it fulfills through the FBA service.[129] Chiefly, the courts in *Eberhart*, *Fox*, and *Allstate* understated Amazon's involvement in placing defective products on the consumer market. They also problematically fixated on the idea that Amazon must have taken title to the defective product in order to be found strictly liable for injuries resulting from it.

A. *Amazon: Merely an Online Marketplace?*

The most troublesome mistake that the courts in *Allstate*, *Fox*, and *Eberhart* made when analyzing Amazon's potential liability is that they all cited to *Oberdorf* to support the assertion that Amazon is merely an online marketplace, playing a role analogous to that of a flea market, auctioneer, broker, or newspaper classified-ads section.[130] Although these analogies are more accurate based on the facts in *Oberdorf* because the third-party vendor in that case used FBM, they do not translate as smoothly onto the facts of the other three cases in which third-party vendors utilized FBA.

The court in *Oberdorf* accurately pointed out that Amazon is more akin to an auctioneer, or to a newspaper's classified-ads section, in its potential liability for the defective dog leash sold and fulfilled by a third-party vendor on its site.[131] However, it is unmistakable that Amazon's direct involvement in the introduction of FBA products into the common marketplace is far greater than the examples the court alludes to in *Oberdorf*.[132] In *Oberdorf*, Amazon had no physical interaction with the defective dog leash, and its role did not extend far beyond the provision of a platform for the third-party vendor, "The Furry Gang," to list its product to potential buyers and facilitate payment by the purchaser to The

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[129] *See supra* notes 67–75 and accompanying text.

[130] Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *10 (D.N.J. July 24, 2018); Fox v. Amazon.com, Inc., No. 3:16–CV–03013, 2018 WL 2431628, at *7 (M.D. Tenn. May 30, 2018); *Eberhart*, 325 F. Supp. 3d at 399.

[131] Oberdorf v. Amazon.com, Inc., 295 F. Supp. 3d 496, 501 (M.D. Pa. 2017).

[132] *See* discussion *supra* Part III.A for an analysis of the major differences in distribution methods available to third-party sellers.

Furry Gang.[133] This is highly analogous to the service provided by Craigslist or a traditional newspaper classified ads section.

However, it would be a grievous error to treat this analysis of Amazon's role in FBM transactions as a blanket generalization applicable to Amazon's role in SFP or FBA transactions. Clearly, Amazon is more involved in, and receives more benefit from, directly facilitating the distribution of FBA products.[134] There are also general distinctions between Amazon and other online auctioneers or classified ads sites that transcend commonly-used distribution methods. When its interface is compared to other online-auctioneers, Amazon is clearly distinguishable. For example, eBay is much more similar to an auctioneer because it requires interactivity on the part of buyers placing active bids.[135] Additionally, the "seller information" is prominently located next to the bidding area in eBay's user interface. Amazon, on the other hand, only displays "Sold by [Seller] and Fulfilled by Amazon" in small-type under the area indicating whether the item is in stock or not, buried in an information-dense area of the user-interface called the "buy-box."[136] Similarly, when compared to online classified ad services, such as Craigslist, Amazon is again clearly distinguishable.[137] Although seller information is not directly

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[133] *Oberdorf*, 295 F. Supp. 3d at 501.

[134] For instance, Amazon collects fees from third-party vendors to warehouse, catalog, ship, pack, handle, and facilitate payment services and customer service responsibilities. *See* discussion *supra* Part III.A.1.

[135] *See* Inman v. Technicolor USA, Inc., No. 11-666, 2011 WL 5829024, at *5–6 (W.D. Pa. Nov. 18, 2011) (holding that eBay is not strictly liable for defective products because it is not a "seller"). There are some items on eBay where bids are not necessary in order to purchase them; however, eBay is *most* similar to an auctioneer when it facilitates bids on behalf of sellers.

[136] *See generally* Le Chen et al., *supra* note 61 (offering an economic analysis of the "buy-box").

[137] *See* McDonald v. LG Elecs. USA, Inc., 219 F. Supp. 3d 533, 536 (D. Md. 2016) (holding that Amazon was distinguishable from Craigslist because Amazon does not have immunity under 47 U.S.C. § 230 for defective products sold on its website, because although § 230 "would immunize Amazon from liability for 'objectionable *written content*' . . . § 230 does not state anything about protecting websites that sell, and profit from the sale of, defective products") (citations omitted); *cf.* Gibson v. Craigslist, Inc., No. 08 Civ. 7735(RMB), 2009 WL 1704355, at *3 (S.D.N.Y. June 15, 2009) (holding that Craigslist is immunized by

available through Craigslist, the means to directly contact the seller are available, unlike on Amazon where customer service requests and inquiries go through Amazon customer support. The essential role played by the Facebook Marketplace is merely to facilitate contact between buyer and seller, and the seller's information is more openly available to purchasers than on Craigslist. Additionally, the nonprofessional listings on Craigslist and Facebook make clear that Craigslist and Facebook themselves are not the seller, whereas Amazon branding is abundant throughout the Amazon site.[138]

Apart from these general distinctions, the fact remains that Amazon is not *merely* an online company or product-listing platform.[139] Its physical reach is extensive—it owns or leases more than 250 million square feet of space, including space for warehousing, fulfillment centers, and physical stores.[140] Statistics from the United States Department of Commerce show that e-commerce represented thirteen percent of total retail sales in the United States, and Amazon alone accounted for nearly half of e-

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47 U.S.C. § 230 in a defective warning products liability suit, because "[t]he alleged handgun advertisement identified in the [Amended] Complaint was provided by another information content provider, not Craigslist"; and "the [Amended] Complaint on its face improperly seeks to treat Craigslist as the publisher or speaker of the alleged advertisement").

[138] *See infra* note 189.

[139] *See generally* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (illustrating that Amazon is more than just an online marketplace by describing its business activities, conduct, and structure from an antitrust perspective).

[140] Amazon.com, Inc., 2017 Annual Report (Form 10-K) at 16 (Jan. 24, 2018); *see also* Esther Fung, *Amazon to Shut All U.S. Pop-Up Stores as It Rethinks Physical Retail Strategy*, WALL ST. J. (Mar. 6, 2019), https://on.wsj.com/2WFVJU3 (subscription required) (reporting that Amazon is set to open additional locations of physical Amazon bookstores and "four star stores"); Esther Fung & Heather Haddon, *Amazon to Launch New Grocery-Store Business*, WALL ST. J. (Mar. 1, 2019), https://on.wsj.com/2GSfkwG (subscription required) ("Amazon.com, Inc. is planning to open dozens of grocery stores in several major U.S. cities . . . ."); Heather Haddon & Laura Stevens, *Amazon Tests Its Cashierless Technology for Bigger Stores*, WALL ST. J. (Dec. 2, 2018), https://on.wsj.com/2Q5TACm (subscription required) (reporting that Amazon is considering expanding "cashierless" transaction capability in physical retail locations).

commerce sales.[141] Furthermore, Amazon is increasingly involved in the delivery of products, taking on the role of a common carrier in some instances.[142] In fact, it listed "companies that provide fulfillment and logistics services" as competitors on its 2018 annual report.[143] In 2019, Amazon made significant investments in expanding last-mile delivery services as well as its Prime Air delivery system.[144] Currently, Amazon is developing its drone delivery capabilities, and CEO Jeff Bezos predicted that such a delivery method could be commonplace as soon as 2022.[145]

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[141] Fareeha Ali, *U.S. Ecommerce Sales Grow 15.0% in 2018*, DIGITAL COM. 360 (Feb. 28, 2019), https://www.digitalcommerce360.com/article/us-ecommerce-sales/ (reporting that Amazon was responsible for 40 percent of U.S. e-commerce sales and 43.3 percent of U.S. e-commerce gains in 2017); Jack Nicas & Laura Stevens, *Wal-Mart and Google Team Up to Challenge Amazon*, WALL ST. J. (Aug. 23, 2017), https://on.wsj.com/2xsh4DQ (subscription required); Patrick Sisson, *9 Facts About Amazon's Unprecedented Warehouse Empire*, CURBED (Nov. 19, 2018), https://www.curbed.com/2017/11/21/16686150/black-friday-2018-amazon-warehouse-fulfillment.

[142] *See, e.g.*, James Chrisman, *Amazon Can Now Deliver All Your Packages on the Same Day*, THRILLIST (Feb. 28, 2019), https://www.thrillist.com/news /nation/amazon-day-feature-packages-delivered-same-time (showing Amazon's increasing role in the logistics of product delivery); James Vincent, *Amazon has Made its Own Autonomous Six-Wheeled Delivery Robot*, VERGE (Jan. 23, 2019), https://www.theverge.com/ 2019/1/23/18194566/amazon-scout-autonomous-six-wheeled-delivery-robot (showing Amazon's emphasis on beginning to deliver products itself); Elizabeth Weise & Mike Snider, *Amazon is Testing its Own Delivery Service. If it Succeeds, Expect a Price War*, USA TODAY (Feb. 9, 2018), https://www.usatoday.com/story/tech/news/2018/02/09/amazon-reportedly-developing-delivery-service-compete-fedex-and-ups/322725002/ (discussing an Amazon pilot program that would pick up FBA products from sellers and deliver them to Amazon fulfillment centers for warehousing until they are sold).

[143] Amazon.com, Inc., 2018 Annual Report (Form 10-K) (Feb. 1, 2019).

[144] Adam Levy, *Amazon is Looking More and More Like a Shipping Company*, MOTLEY FOOL (Feb. 19, 2019, 9:32 PM), https://www.fool.com/investing /2019/02/19/amazon-is-looking-more-and-more-like-a-shipping-co.aspx ("The company's recent efforts to grow its fleet of cargo planes, expand its network of air hubs, and boost its investments in solving the last-mile delivery problem are a big indication that it's not just looking to supplement FedEx and UPS capacity anymore . . . . Amazon is starting to consider itself a shipping business.").

[145] David Streitfeld, *Amazon Is Now Second to Cross $1 Trillion Line*, N.Y. TIMES, Sept. 5, 2018, at B1.

The lasting applicability of old-media comparisons or pre-internet age analogies is tenuous; the integration of the modern economy with internet services and e-commerce websites is continuous and unlikely to regress.[146] It is important that courts not parse language to cleave a large and growing section of the economy out of the American strict products liability regime. Exempting e-commerce entities from this regime, while still imposing it on other entities with comparable roles in the distribution of potentially defective products, raises substantial horizontal equity concerns that could have drastic long-term consequences.

B. *The Improper Fixation on "Title" in* Eberhart, Fox, *and* Allstate

The rulings in *Eberhart* and *Fox* are predicated on the theory that non-assumption of title of a defective product insulates an entity that would otherwise be considered a distributor, seller, or retailer from strict liability.[147] However, this is a misguided application of the law.[148] Any requirement for a retailer or distributor to hold title in a defective product in order for it to be subject to strict liability is absent from products liability statutes, from the Restatement and from relevant case law.[149]

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[146] For a discussion of the future of e-commerce with respect to 5G technology, see Nir Kshetri, *5G in E-Commerce Activities*, IT PROF., July–Aug. 2018, at 73. For a general discussion of the importance of e-commerce to the success of small- and medium-sized enterprises, see generally Qingyi Chen & Ning Zhang, *Does E-Commerce Provide a Sustained Competitive Advantage? An Investigation of Survival and Sustainability in Growth-Oriented Enterprises*, 7 SUSTAINABILITY 1411 (2015).

[147] *See* Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018); Fox v. Amazon.com, Inc., No. 3:16–CV–03013, 2018 WL 2431628, at *6 (M.D. Tenn. May 30, 2018).

[148] *See* Oberdorf v. Amazon.com, Inc., 295 F. Supp. 3d 496, 498 (M.D. Pa. 2017) (noting specifically the distinction between the distribution method in *Oberdorf* and the FBA service) ("Unless the third-party vendor participates in a special 'Fulfillment by Amazon' program (which was not the case here), Amazon has no interaction with the third-party vendor's product at any time.").

[149] *See, e.g.*, N.J. STAT. ANN. § 2A:58C-8 (2018) (see *supra* note 106 for the full text of the statute); TENN. CODE ANN. § 29-28-102(7) (2018) (see *supra* note 121 for the relevant text of the statute); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB., *supra* note 1; *see also* Barth v. B.F. Goodrich Tire Co., 71 Cal. Rptr. 306,

The *Eberhart* court defended the title requirement on the grounds that the "vast majority of opinions" in New York refer to distributors only in the context of an entity who in-fact sold the defective product.[150] The problem with this defense is that simply because there have only been opinions holding distributors who have taken title to a defective product strictly liable, the definition of distributor does not necessarily preclude entities that have not taken title. In fact, the plain language of the Restatement and precedent in other jurisdictions supports the assertion that distributors *do* include entities that have not taken title.[151]

In *Fox*, Amazon argued that it was not a "seller" under Tenn. Code Ann. § 29-28-102(7) because it never took title to the defective hoverboard.[152] The court did not necessarily find the lack of title

320–21 (Cal. Ct. App. 1968) (holding that "neither the transfer of title to the goods nor a sale is required" for the application of the doctrine of strict liability); Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179, 186–87 (N.J. 1982) ("[Courts] have clearly rejected the requirement that a technical sale occur before strict liability will be imposed.") (citing Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 778–79 (N.J. 1965)); c*f.* Gray Line Co. v. Goodyear Tire & Rubber Co., 280 F.2d 294 (9th Cir. 1960) (holding a tire company, which never transferred title to the defective tire, liable to the plaintiff bus company for injuries resulting from use of the tire); Greyhound Corp. v. Brown, 113 So.2d 916 (Ala. 1959) (holding a tire company, which never transferred title to the defective tire, liable to the plaintiff bus company for injuries resulting from use of the tire); Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965) (holding a lessor liable for injuries resulting from a defective product it leased to the plaintiff's employer); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 792 (Tex. 1967) (holding that a formal sale is not required to impose strict liability) ("One who delivers an advertising sample to another with the expectation of profiting therefrom through future sales is in the same position as one who sells the product.").

[150] *Eberhart*, 325 F. Supp. 3d at 398–400 (citing McCormack v. Safety-Kleen Systems, Inc., No. 110733/10, 2011 WL 1643590, at *5 (N.Y. Sup. Ct. Apr. 5, 2011) (holding that the defendant was not strictly liable because it was more accurately classified as a common-carrier of the defective product than as a distributor)).

[151] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB., *supra* note 1; *see also Barth*, 71 Cal. Rptr. at 320 ("Neither the transfer of title to the goods nor a sale is required" for the application of the doctrine of strict liability).

[152] Fox v. Amazon.com, Inc., No. 3:16–CV–03013, 2018 WL 2431628, at *7 (M.D. Tenn. May 30, 2018); *see also* TENN. CODE ANN. § 29-28-102(7) (2018) (see *supra* note 121 for the relevant text of the statute).

dispositive, but in conjunction with the court's finding that Amazon did not set the price of the hoverboard nor write the product description displayed on the product page, the court declined to label Amazon a "seller" for Tennessee PLA purposes.[153] However, like in *Eberhart*, the court cites no authority which requires assumption of title for the imposition of strict liability.[154] A close review of statutory language and citations to the Tennessee PLA reveals no authority that mentions a title requirement.[155]

In *Allstate*, the court dispensed with the notion that Amazon was a "product seller" under the N.J. PLA because it never exercised control over the defective product.[156] It noted that title is a highly significant factor in the determination of whether a seller exercised control; though the factor is not dispositive, if an entity takes title of a defective product, it is more likely that it exercised some control over the product.[157] The logic in the *Allstate* court's opinion is fallacious for the same reason that it is fallacious in *Eberhart*: taking title may substantially inflate the likelihood that an entity exercised

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[153] *Fox*, 2018 WL 2431628, at *7; *see also infra* notes 194–96 and accompanying text (discussing why Amazon *did*, at least to some extent, set the price of the hoverboard).

[154] *See Fox*, 2018 WL 2431628.

[155] *See, e.g.*, TENN. CODE ANN. § 29-28-102.

[156] *See supra* notes 107–08 and accompanying text. This recent development argues that Amazon actually *did* exert sufficient control over the defective product in *Allstate* to be subject to strict liability under the N.J. PLA, given its extensive physical and algorithmic control over the battery (even though the court's requirement that Amazon must have had control over the product to be subject to strict liability was erroneous from the outset).

[157] *See, e.g.*, Straley v. United States, 887 F. Supp. 728 (D.N.J. 1995) (applying New Jersey law) (holding that an entity that actually took title to a truck before selling it was a "seller" within the meaning of New Jersey products liability law); Agurto v. Guhr, 887 A.2d 159, 163 (N.J. Super. Ct. App. Div. 2005) ("Strict liability may also apply to a broker who takes possession of goods, or exercises control over them, and then transfers them to a buyer."). *But see* Laidlow v. Hariton Mach. Co., 762 A.2d 311, 321 (N.J. Super. Ct. App. Div. 2000) (holding that a broker who *did* take title to the defective product was *not* strictly liable for injuries resulting from it).

control, but it does not imply that a failure to take title exonerates an entity from strict products liability.[158]

This outsized fixation on a requirement that an entity must have held title to a defective product before it can be held liable for injuries resulting from the product is improper given prior case law which distinguishes title as merely one factor among many in determining whether strict liability is appropriate.[159] The most appropriate legal conclusion, based on the facts, is that Amazon should be held strictly liable for third-party products fulfilled through its FBA service, given Amazon's extensive and inextricable role in directly facilitating the distribution of defective products.[160] This problematic misinterpretation of the law behind strict products liability is a troubling preamble to the judicial indifference toward its policy underpinnings.

V. POLICY CONSIDERATIONS

The holdings in the four Amazon cases described in Part III understate the importance of the larger policy goals of tort law and mark a resistance to the natural evolution of tort law in tandem with the evolution of a modernizing economy.[161] The policy shift that started with *MacPherson* and *Escola* was a response to the changing

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[158] *See* Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179, 186–87 (N.J. 1982) (noting that New Jersey courts "have clearly rejected the requirement that a technical sale occur before strict liability will be imposed"); *see also* Ketterer v. Armour & Co., 200 F. 322, 323 (S.D.N.Y. 1912) ("The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales.").

[159] *See supra* note 157 and accompanying text.

[160] *See, e.g.*, Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *7 (D.N.J. July 24, 2018) (illustrating that, specifically, even though it did not actually take title of the defective laptop battery, Amazon distributed, packaged, labeled, marketed, and otherwise was involved in the placing of the battery in the line of commerce); *cf.* N.J. STAT. ANN. § 2A:58C-8(7) (2018) (see *supra* note 106 for the full text of the statute).

[161] For a discussion of the evolution of tort law as a response to a modernizing economy, see generally Cornelius J. Peck, *Negligence and Liability without Fault in Tort Law*, 46 WASH. L. REV. 225, 240 (1971) ("[Strict liability] is a principle with adaptability to serve the needs of society in a variety of situations."); *see also* John W. Wade, *The Continuing Development of Strict Liability in Tort*, 22 ARK. L. REV. 233 (1968).

economy of the twentieth century.[162] Here, with *Eberhart* and its predecessors, courts have failed to recognize the outsize role of e-commerce and online retail in the modern economy, as well as Amazon's specific role in placing potentially defective products into the marketplace and thus into contact with consumers.

A. *Incentivizing a Safer Marketplace for Consumers*

One of the most common rationales given for strict products liability is that it tends to promote product safety.[163] The actual efficacy of the strict products liability regime to incentivize product safety is debatable, at best.[164] There are some industries, such as automobile manufacturing, where there is at least some correlation between the imposition of a more stringent products liability regime and increased safety in those products over time.[165] Notwithstanding the apparent lack of empirical evidence to support or refute strict

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[162] Peck, *supra* note 161, at 240 ("Problems of proof in suits against manufacturers for harm done by defective products became more severe as the composition and design of products and the techniques of manufacture became less and less matters of common experience; this was certainly a factor bringing about adoption of a strict liability standard.").

[163] *See, e.g.*, Hoven v. Kelble, 256 N.W.2d 379, 391 (Wisc. 1979) ("Strict liability is an effective deterrent; it deters the creation of unnecessary risks, or to put it positively, strict liability is an incentive to safety."); Harry Kalven, Jr., *Tort Watch*, 34 J. AM. TRIAL L. ASS'N 1, 57 (1972) ("The first characteristic is thought to make him a good target for the deterrence of the tort sanction. Liability is imposed in the quest for safety and accident prevention . . . .").

[164] *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1436 (2010) (arguing that market forces and government regulation are at least as likely to cause increasing product safety as strict products liability). *Compare* George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981) (arguing that consumers are often the most efficiently situated to insure against defective products), *with* William C. Whitford, *Comment on A Theory of the Consumer Product Warranty*, 91 YALE L.J. 1371 (1982) (finding fault in the methodology of the former's analysis).

[165] W. Kip Viscusi, *Does Product Liability Make Us Safer?*, 35 REG., Spring 2012, at 24, 26–27 (showing that safety has increased significantly in automobile manufacture since the ruling in *MacPherson*, but insurance costs remain relatively high). *But see* Polinsky & Shavell, *supra* note 164. It is true that there are myriad other variables that could affect increased safety in automobiles, such as technological advances, government regulation, and increased consumer pressure to produce safer vehicles. Nevertheless, products liability provides at least symbolic, if not economic, incentive to increase product safety.

products liability's efficacy as a deterrent force, the incentivization of a safer consumer marketplace is nonetheless one of the most important justifications given in support of the regime as well as the justification most closely aligned with the overarching deterrent goal of tort law generally.[166]

To that end, Amazon is possibly better situated to efficiently incentivize a safer internet marketplace than any other entity in the modern e-commerce ecosystem. Amazon has already shown promise in this area with its "ASBSA," or "Amazon Services Business Solutions Agreement."[167] The ASBSA currently provides an encouraging framework for ensuring that third-party vendors can be held accountable to Amazon's shoppers. For instance, it already requires that third party vendors indemnify Amazon in the event of a suit resulting from one of the third-party vendors' products.[168] It also requires third-party vendors to promise Amazon that they are a duly and legally organized business and that all information regarding the seller is true and accurate.[169] Unfortunately, the reality is that the ASBSA exists primarily to serve Amazon's interest in shielding itself from as much liability stemming from its third-party vendors as possible.[170] Not only that, but the ASBSA is only roughly enforced to ensure that third-party vendors are legally reachable by Amazon and its customers.[171]

Going forward, consumers would benefit along with Amazon if it commits to effectively strengthening and enforcing its ASBSA terms to ensure the reachability of its third-party vendors. Additionally, Amazon possesses a great deal of leverage with which it could exert more pressure on its third-party vendors to verify the quality and legitimacy of the products they sell on Amazon. With

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[166] *See generally* Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181 (2011); Jennifer H. Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093, 1093 (1993) (stating that a "central goal [of tort law] is to reduce accident costs by deterring the creation of risks").

[167] *Amazon Services Business Solutions Agreement*, AMAZON, https://amzn.to/2FKJRcB (last visited Apr. 2, 2019).

[168] *Id.* at ¶ 6.

[169] *Id.* at ¶ 5.

[170] *Id.* at ¶¶ 5–8.

[171] *See* discussion *infra* Part V.D.1.

any luck, Amazon's influence would significantly hinder the sale of dangerous counterfeit products such as the one that burned down the Foxes' home.[172] Instead of placing profit above safety concerns, Amazon should increase its oversight authority to ensure that third-party vendors comply with the ASBSA and any additional measures necessary to ensure that they are held accountable in case of a defective product.

B. *Profit and Benefit: Social Responsibility*

Justice Traynor emphasized the social importance of placing losses from defective products with the parties responsible for placing those products on the market.[173] With the notable exception of *Oberdorf*, Amazon played an intimate role in the overall distribution of the defective FBA products in Part III.[174] The Restatement extends strict liability for defective products to all "nonmanufacturing sellers or distributors" of those products.[175] The Restatement specifically exempts "product distribution facilitators"—those who "indirectly [facilitate] the commercial distribution of products"—from strict liability.[176] It cites advertising firms, financing companies, auctioneers, and sales representatives as examples of the type of "[indirect] distribution facilitators" that are exempt from strict liability.[177] However, Amazon is clearly distinguishable from the type of entity that the Restatement exempts as "[indirect] distribution facilitators," and holding Amazon strictly

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[172] Counterfeit products are a relatively common—and dangerous—occurrence on Amazon. *See, e.g.*, Complaint for Damages and Equitable Relief, at 3–4, Apple, Inc., v. Mobile Star, LLC, 3:16–CV–06001 (N.D. Cal. Oct. 17, 2016), 2016 WL 6110683 (alleging Mobile Star supplied counterfeit Apple products for sale on Amazon) ("Consumers, relying on Amazon.com's reputation, have no reason to suspect the . . . products they purchased from Amazon.com are anything but genuine.").

[173] Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) ("[If defective products enter 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] *See supra* notes 49–75 and accompanying text.

[175] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB., *supra* note 1, at cmt. e.

[176] *Id.* § 20 cmt g.

[177] *Id.* § 20 reporters' n. g.

liable more closely aligns with prior case law holding similar nonmanufacturing retailers and distributors strictly liable.[178]

Before 1998, when the products liability Restatement was last revised, Amazon had been a public company for less than a year and sold only books.[179] Its Amazon Prime service wasn't launched until 2005, and its FBA service wasn't launched until 2006.[180] Amazon, even today, defies traditional notions of what a "distributor" might look like.[181] However, Amazon plays an integral role in placing potentially dangerous products into consumers' hands, which is a principal justification for imposing strict liability.[182] The California Court of Appeals in *Kasel v. Remington Arms Co.*[183] explained this

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[178] *See generally* Dunham v. Vaughan & Bushnell Mfg. Co., 247 N.E.2d 401, 408 (Ill. 1969) (holding a wholesaler liable for a defective hammer even though the hammer merely passed unopened through the wholesaler's warehouse); *see also* Canifax v. Hercules Powder Co., 46 Cal. Rptr. 552 (Ct. App. 1965) (holding a wholesaler powder company strictly liable even though it never had possession of the product and merely placed an order with the manufacturer, who shipped the defective product directly to the customer); Little v. Maxim, Inc., 310 F. Supp. 875, 877 (N.D. Ill. 1970) (holding a distributor strictly liable even though it had the defective product shipped directly to its customer and took no part in its installation); Kirby v. Rouselle Corp., 108 Misc. 2d 291, 293 (N.Y. Sup. Ct. 1981) (holding that a distributor is strictly liable even though it never inspects, controls, installs, or services the defective product).

[179] BRAD STONE, THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON (Little Brown & Co., 2013) (noting that Amazon's IPO was a "moderate success").

[180] *See id.*; Press Release, Amazon.com, Inc., Amazon Launches New Services to Help Small and Medium-Sized Businesses Enhance Their Customer Offerings by Accessing Amazon's Order Fulfillment, Customer Service, and Website Functionality (Sept. 19, 2006) (https://press.aboutamazon.com/news-releases/news-release-details/amazon-launches-new-services-help-small-and-medium-sized).

[181] *See supra* notes 130–46 and accompanying text.

[182] *See, e.g.*, Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 900 (Cal. 1963) (noting that liability attaches when a defective product is "placed on the market"); *see also* Frank J. Cavico, Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 NOVA L. REV. 213, 221 (1987) ("Thus, although 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.").

[183] 101 Cal. Rptr. 314 (Cal. Ct. App. 1972).

imposition by stating that "[i]t is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise which created consumer demand for and reliance upon the product which calls for imposition of strict liability."[184] The "personal profit or other benefit" discussed in *Kasel* is clear and straightforward when Amazon's role in the distribution of defective products is examined.

Amazon undoubtedly benefited economically and reputationally from its role in placing defective products into the stream of commerce, especially when those products were distributed through the FBA service.[185] It collects fees from third-party vendors to pay for warehousing and order fulfillment.[186] It benefits from increased site traffic by having a wide-variety of products for sale on its site.[187] It also obtains marketing benefits from the ability to extensively brand merchandise it delivers with its own packaging and tape—benefits that a newspaper would never enjoy from its classified ads section.[188] In addition to the physical marketing, Amazon also benefits by digitally marketing itself through its open branding on the product page and forthright acknowledgment of its role in distributing the product.[189] The "Prime" designation on products

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[184] *Id.* at 323.

[185] *See* discussion *supra* Part III.A.1.

[186] *See id.*

[187] *See id.*

[188] *See id.*

[189] *See, e.g.*, *XPRIT Hoverboard w/Bluetooth Speaker (Black)*, AMAZON, https://amzn.to/2IK1DRX (last visited Mar. 1, 2019). Any Amazon product page for a FBA product will similarly show Amazon's logo in the top left corner, as well as a statement under the buy-box that says "Sold by [Seller] and Fulfilled by Amazon." Amazon specifically acknowledges part of its role in distribution by explaining that "Fulfillment by Amazon (FBA) is a service we offer sellers that lets them store their products in Amazon's fulfillment centers, and we directly pack, ship, and provide customer service for these products. Something we hope you'll especially enjoy: *FBA items qualify for FREE Shipping and Amazon Prime*" (emphasis in original) (explanation available when the "Fulfilled by Amazon" link is clicked). *Id.* This particular hoverboard also has an "Amazon's choice" label, which designates that a product is "highly rated, well-priced [and] available to ship immediately" (explanation available when the "Amazon's Choice" label is clicked). *Id.* In the middle of the product page under the "Product details" heading there is a sentence directing potential purchasers to a link for

using the FBA service could also be seen as an implicit endorsement of the quality of the items being sold, and reliance on Amazon's reputation is not unreasonable; in fact, Amazon is one of America's most trusted and beloved companies.[190] Amazon further benefits from the Prime designation economically by collecting fees from Prime members, and its positive reputation grows from fulfilling customer orders in a timely fashion.[191]

warranty information. *Id.* When that link is followed, a message from Amazon is displayed that says, "Please contact the seller directly for warranty information for this product. You may also be able to find warranty information on the manufacturer's website." *See Amazon.com message*, AMAZON, https://amzn.to/1Pp0RGE (last visited Mar. 1, 2019). However, Amazon offers no information regarding how to contact the seller or manufacturer. *See id.* In order to contact the seller, XPRITINC, the purchaser must click the XPRIT name in the "Sold by XPRIT, Fulfilled by Amazon" link. *See id.* Next, the purchaser must navigate the XPRITINC storefront. *See Amazon.com Seller Profile: XPRITINC*, AMAZON, https://amzn.to/2C1ufjZ (last visited Mar. 1, 2019). From there, the purchaser must click the "Ask a Question" button in the top right of the webpage. *See id.* The communication is then handled through Amazon ("IMPORTANT NOTICE: When you submit this form, Amazon will replace your email address with one provided by Amazon in order to protect your identity, and forward the message on your behalf. Amazon will retain copies of all e-mails sent and received using this service, including the message you submit below, and may review these messages as necessary to resolve disputes. By using this service, you consent to this action. Amazon uses filtering technology to protect buyers and sellers and to identify possible fraud. Messages that fail this filtering—even if they are not fraudulent—will not be transmitted. This form is for use by Amazon customers to ask product-related questions of sellers on our third-party platforms (Amazon Marketplace and Merchants). The use of this form to send unrelated messages to sellers is strictly prohibited."). *Id.*

[190] *See* Aaron Task, *Americans Don't Just Shop on Amazon, They Also Admire and Trust It Too*, FORTUNE (June 7, 2016), http://fortune.com/2016/06/07/fortune-500-amazon-survey-monkey-poll/; Karsten Strauss, *America's Most Reputable Companies, 2016: Amazon Tops the List*, FORBES (Mar. 29, 2016), https://www.forbes.com/sites/karstenstrauss/2016/03/29/americas-most-reputable-companies-2016-amazon-tops-the-list/#5e54ea83712f.

[191] *See supra* notes 57–58 and accompanying text.

C. *Equitably Spreading Losses*

Courts have often held that it is not the obligation of the retailer to ensure that their products will not cause harm.[192] A principal justification for the imposition of strict products liability onto retailers, however, is that retailers are often in control of the price of a product, and therefore in a position well-suited to adjust prices in order to compensate for potential liability.[193] The courts in *Allstate*, *Fox*, and *Eberhart* repeatedly pointed out that Amazon is not in control of the price of products sold by third-party vendors.[194] Although it is technically true that Amazon does not directly set the price of these products, it exerts significant influence over prices by collecting subscription fees, selling fees, per-item fees, and referral fees, which are often computed as a percentage of the total purchase price of a product, from its third-party vendors.[195] Though a traditional retailer might directly set the price of a product after figuring his own markup, Amazon indirectly sets the price of third-party products by charging predictable fees that allow the third-party vendors to set the overall product price after taking into account Amazon's share and the third-party's desired markup.[196] Therefore, Amazon is as well-situated as a traditional retailer to adjust the prices of its fees in order to compensate for potential liability. As a result, the concerns expressed by the courts in *Allstate*, *Fox*, and

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[192] *See, e.g.*, Syrie v. Knoll Int'l, 748 F.2d 304 (5th Cir. 1984); Collins v. Caldor of Kingston, Inc., 73 A.D.2d 708 (N.Y. App. Div. 1979).

[193] Vandermark v. Ford Motor Co., 391 P.2d 168, 171–72 (Cal. 1964).

[194] Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 396 (S.D.N.Y. 2018); Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17–2738, 2018 WL 3546197, at *8 (D.N.J. July 24, 2018); Fox v. Amazon.com, Inc., 3:16–CV–03013, 2018 WL 2431628, at *2, *8 (M.D. Tenn. May 30, 2018).

[195] *See Selling on Amazon Fee Schedule*, AMAZON, https://amzn.to/2UmlYBq (last visited Apr. 2, 2019) (illustrating that these fees are in addition to the fees incurred through FBA).

[196] *See id.* Selling fees take into account certain shipping and packaging costs. *Id.* Individual third-party vendors might pay a 99¢ per-item fee for each item sold. *Id.* Professional sellers might pay a monthly subscription fee of $39.99. *Id.* Referral fees are calculated as a percentage of the total purchase price of a product, depending on the specific category a product falls into. *Id.* Most categories impose a 15% referral fee, but the percentage can be as high as 45%. *See id.* Amazon collects these fees from the purchase price paid by the consumer, and then remits the excess to the third-party vendors. *See id.*

Eberhart are misguided with respect to Amazon's perceived lack of control over product prices—if anything, Amazon exerts considerable influence over product prices through its predictable and consistent fee structures.

In any case, the imposition of the strict liability regime upon retailers has given rise to products liability insurance for retailers, which helps advance the policy goal of loss-spreading.[197] It is undoubtedly true that the procurement of general liability insurance (which usually includes products liability insurance) greatly increases the likelihood that a plaintiff will recover, especially against a small business who may not have substantial assets.[198] On the other hand, one of the most salient arguments against this suggestion that insurance is perhaps the most appropriate method to allocate loss is that, especially for smaller businesses, products liability insurance is hardly an option "for the product seller who, not because of unacceptable business conduct, cannot procure insurance or procure it at a cost which can be passed on to product buyers in a way that will keep the cost of the product competitive."[199]

These arguments are not persuasive when applied to Amazon.[200] Amazon already charges Prime customers approximately $120 per

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[197] *See Vandermark*, 391 P.2d at 171–72 (Cal. 1964) ("[T]he 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*." (emphasis added)); *see also* Cavico, Jr., *supra* note 182, at 230.

[198] *See generally* Steven Shavell, *On Liability and Insurance*, 13 BELL J. OF ECON. 120 (1982) (discussing the advantages and disadvantages of the two major types of products liability insurance with respect to negligence-based products liability as well as strict products liability).

[199] *See* Cavico, Jr., *supra* note 182, at 231.

[200] *Contra* Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *12 (D.N.J. July 24, 2018) ("I find that stretching the case law to capture Amazon's activities in this case would conflict with the spirit of the law. As the Supreme Court of New Jersey has explained, courts should be cautious in expanding the law when doing so 'would impose a substantial economic burden on these businesses and individuals, without necessarily achieving the goal of enhanced product safety.'"); *but see infra* notes 201–03 and accompanying text.

year for the service, and one of the main benefits of Prime membership is faster access to products fulfilled through the FBA or SFP services.[201] Simply increasing the cost of Prime membership by a nominal amount could cover some defective products liability costs Amazon might incur through its roles in directly facilitating the distribution of products into the stream of commerce.[202] Additionally, part of the cost of insuring against products liability could be borne (and is, perhaps, more appropriately borne) by the third-party vendors themselves. In other words, Amazon could increase its referral fees to pay for part of the increased costs of liability insurance. This would also guarantee some degree of indemnification, however indirect, from third-party vendors that are unable or unavailable to be held accountable for injuries resulting from defective products they sold through Amazon's site.[203]

D. *Revisiting Objections: Isn't Negligence Enough?*

Those who would oppose the imposition of strict products liability to an entity with Amazon's overall role in the marketing of products might object on the grounds that gross negligence is a fair standard by which to judge Amazon's liability. After all, Amazon is not clearly a distributor or retailer in all cases, and Amazon likely did not cause the products in Part III to be defective. In Congressional testimony, one witness stated:

> [Strict products liability] has produced a . . . system which is badly out of balance, and utterly lacking in equity and common sense. It no longer fairly adjudicates claims based on responsibility. Rather it has become a convenient mechanism to pay damages whenever someone is injured. Unfortunately, the uncertainty created by this revolutionary change in the law has produced a virtual "lottery" for businesses which sell products.[204]

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[201] *See supra* notes 57–58 and accompanying text.

[202] For a discussion about the pricing of general business liability insurance with respect to forecasting claim costs, see Scott E. Harrington & Patricia M. Danzon, *Price Cutting in Liability Insurance Markets*, 67 J. BUS. 511 (1994).

[203] *See infra* Part V.D.1 for a brief discussion of the lack of accountability on the part of third-party vendors and manufacturers in these products liability cases involving Amazon.

[204] *Problems Associated with Product Liability: Hearing Before the Subcomm. on Consumer Prot. & Fin. of the Comm. on Interstate & Foreign Commerce*, 96th

However, the extension of strict liability to Amazon is necessary because negligence has proven to be an inadequate standard by which to promote the policy goals of products liability in general.

1. *The "Unreachable" Problem*

Without reachability, there is no way to hold the true seller or manufacturer of a defective product liable for the injuries it might cause.[205] Especially with regards to products manufactured in China, it can be particularly difficult for injured parties to seek recourse under American law.[206] It is fundamental to the promotion of products liability's policy objectives that an entity in the distribution chain of a product be held accountable to injured plaintiffs.[207] Amazon remains unwilling to require enough of its third-party vendors to ensure that they are reachable if a product proves dangerous.

For instance, in *Allstate*, the third-party vendor of the defective laptop battery, Lenoge Technology HK Ltd. (known as "E-Life" on its Amazon seller account), is not subject to process in the United States.[208] Therefore, Ms. Wilmot was unable to sue Lenoge to recover for the damage caused by its laptop battery, necessitating a

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Cong. 353–54 (1979) (statement of William C. McCamant, Vice Chairman of the Board, Nat'l Ass'n of Wholesaler-Distributors).

[205] *See* Julia A. Phillips, *Does "Made in China" Translate to "Watch Out" For Consumers? The U.S. Congressional Response to Consumer Product Safety Concerns*, 27 PENN. ST. INT'L L. REV. 217, 235 (2008).

[206] *See* Meghan Josephine Carmody, *The Price of Cheap Goods: International Trade with China and the Need for Stringent Enforcement of Manufacturing Regulations*, 34 N.C. J. INT'L. L. 655, 660–86 (2009); *see also* Joel Slawotsky, *Liability for Defective Chinese Products Under the Alien Tort Claims Act*, 7 WASH. U. GLOBAL STUD. L. REV. 519, 541 nn.8, 18 (2008).

[207] *See, e.g.*, Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring).

[208] Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *4 (D.N.J. July 24, 2018) (noting that, though Lenoge is not subject to process in the United States, Lenoge did agree to indemnify Amazon for any damages resulting from the sale of its products in the "Amazon Services Business Solutions Agreement" it signed); *cf.* Cavico, Jr., *supra* note 182, 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.").

suit against Amazon in order to recover.[209] Similarly, in *Fox*, the third-party vendor of the offending hoverboard, called "–DEALS–" on its Amazon seller account (W2M Trading Corporation, in reality) was unable to be contacted in the aftermath of the hoverboard explosion.[210] Amazon also does not allow contact between third-party sellers and buyers using FBA; communication regarding customer support or other inquiries must be handled through Amazon.[211] Although the plaintiffs obtained default judgment against W2M Trading Corporation for its failure to appear, W2M itself was unlikely to pay for the plaintiffs' injuries, which necessitated the plaintiffs' action to recover through Amazon because the plaintiffs have been unable to contact W2M at all.[212] Additionally, the plaintiffs in *Oberdorf* were "unable to identify or locate a place of operations, contact information, or any agents" for the third-party vendor from whom they purchased a defective dog leash.[213]

In *Vandermark*, Justice Traynor expounded on the idea that retailers should be held liable for injuries caused by defective products they sell to their customers.[214] "In some cases," he wrote, "the retailer may be the only member of [the overall producing and marketing] enterprise reasonably available to the injured plaintiff."[215] In FBA transactions where the third-party vendor is so far removed from the consumer as to be unreachable, strict liability should attach to Amazon as the member of the overall producing

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[209] For a fascinating discussion about Chinese manufacturers' danger to the public policy goals of the American strict products liability regime, see Stephen Ray Strobel, *Made Safely in the USA: Rethinking U.S. Strict Product Liability Laws to Counter China*, 39 W. ST. U. L. REV. 155 (2012).

[210] First Amended Complaint & Demand for Jury Trial at 10–11, Fox v. Amazon.com, Inc., No. 3:16–CV–03013 (M.D. Tenn. Jan. 3, 2017), 2017 WL 728025.

[211] *See id.*

[212] Fox v. Amazon.com, Inc., No. 3:16–CV–03013, 2018 WL 2431628, at *1 (M.D. Tenn. May 30, 2018); *see also* First Amended Complaint, *supra* note 210, at 10–11.

[213] Complaint at 3–4, Oberdorf v. Amazon.com, Inc., No. 4:16-CV-01127 (M.D. Pa. June 13, 2016), 2016 WL 3267591.

[214] *See* Vandermark v. Ford Motor Co., 391 P.2d 168, 171–72 (Cal. 1964).

[215] *Id.*

and marketing enterprise most reasonably available to the consumer.[216] In fact, the plaintiffs in *Fox* and *Allstate* assert that they reasonably believed that they were purchasing the defective products from Amazon itself.[217] However inaccurate, this belief is reasonable in light of Amazon's inextricable role in distributing the products.[218]

If Amazon wants the third-party vendors to be held responsible for their defective products, it should require more of the third-party vendors it allows to sell products using its FBA service.[219] At a minimum, Amazon should require them to provide information that would allow them to be reached in the event a defective product causes harm. Otherwise, according to Justice Traynor's arguments in *Vandermark*, Amazon should bear the cost of enabling its third-party vendors to remain unaccountable for injuries caused by their defective products.[220]

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[216] *See, e.g.*, Cavico, Jr., *supra* note 182, at 246 (discussing the potential liability of resellers) ("A 'passive' reseller, acting as a mere conduit, should not be strictly liable as a general rule. However, if 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. This two-pronged principle of re-seller liability evidences an awareness of traditional, utilitarian, and pragmatic tort goals and does not offend one's sense of fairness and justice.").

[217] Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *1 (D.N.J. July 24, 2018) ("Ms. Wilmot . . . was under the impression that Amazon was the battery seller."); *Fox*, 2018 WL 2431628, at *2 ("Both Mr. and Mrs. Fox believed the hoverboard was purchased directly from Amazon.").

[218] *See supra* notes 87–88 and accompanying text. Such a belief is reasonable because of the combination of (1) aggressive Amazon branding around the product pages and on the shipping materials, (2) Amazon's handling of the financial transaction, and (3) Amazon's handling of customer service (because the traditional first point of contact for customers experiencing defective products is to reach out to the brick-and-mortar retailer they purchased the product from). *See id.*

[219] *See supra* notes 197–203 and accompanying text for an alternative method by which Amazon could guarantee some degree of indemnification from third-party vendors that are unreachable by injured plaintiffs.

[220] *See* Vandermark v. Ford Motor Co., 391 P.2d 168, 171–72 (Cal. 1964).

2. *Negligent Misrepresentation*

A sub-issue that has repeatedly been raised, especially in *Oberdorf*, and to a lesser extent in *Allstate* and *Eberhart*, is that Amazon should be held liable under a negligence theory for the advertisements or product descriptions written by third-party vendors and published on Amazon's website.[221] All three courts found that Amazon could not be held liable for written content published by third-party vendors, even if it was misleading or incorrect, because it was immunized by the Communications Decency Act.[222] The text of the statute suggests this is the correct result.[223] However, the legislative history is less clear that the actual policy intent behind the Act was to protect online retailers or resellers from negligent content posted by third-parties that might cause physical harm.[224] Legislative action would likely be needed in order to either once again restrict the scope of the Act to its original intent, or to ameliorate the negative consequences of blanket immunization in negligent misrepresentation products liability cases by enacting a notice-and-takedown procedure similar to the one in

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[221] Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393 (S.D.N.Y. 2018); *Allstate* 2018 WL 3546197, at *12 n.9; Oberdorf v. Amazon.com, Inc., 295 F. Supp.3d 496, 502–03 (M.D. Pa. 2017).

[222] *Eberhart*, 325 F. Supp. 3d at 400 n.5; *Allstate*, 2018 WL 3546197, at *12 n.9; *Oberdorf*, 295 F. Supp. 3d at 502–03; *see also* 47 U.S.C. § 230(c)(1) (2017) ("No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

[223] *Eberhart*, 325 F. Supp. 3d at 400 n.5; *see also* Amazon.com, Inc.'s Reply to Plaintiff's Response to Amazon's Motion for Summary Judgment at 4–5, Fox v. Amazon.com, Inc., No. 3:16-CV-03013 2018 WL 2431628 (M.D. Tenn. Mar. 14, 2018), 2018 WL 3409587 (arguing Amazon should be immunized against defective third-party vendors' products) The court did not rule on that specific defense, presumably because section 230 acts only to immunize against liability resulting from written content, not liability resulting from defective products themselves. *See* Fox v. Amazon.com, Inc., No. 3:16–CV–03013, 2018 WL 2431628, at *14 n.5 (M.D. Tenn. May 30, 2018).

[224] *See, e.g.*, Patricia Spiccia, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369, 386 (2013) (" . . . the legislative history and text of section 230 suggests that the statute's scope is narrow—applying only to defamation claims and good faith efforts to self-regulate . . . .").

the Digital Millennium Copyright Act.[225] The notice-and-takedown procedure in a products liability context would require entities like Amazon to issue a recall warning for potentially defective products already sold and to remove third-party written content pertaining to a particular product on their site upon notice that a particular product is defective.[226] As current law stands, negligent misrepresentation is insufficient to protect consumers against potentially harmful third-party products sold on Amazon.

3. *Negligent Failure to Warn*

Injured plaintiffs might also pursue a negligent failure to warn claim against Amazon for defective products purchased on its website.[227] In *Fox*, for instance, Amazon had ample notice of a pattern of defective hoverboards sold on its site between the date that Fox purchased the defective hoverboard on November 3, 2015, the date that the hoverboard began to be used by the Foxes on December 25, 2015, and the date of the catastrophic fire caused by the hoverboard in question on January 9, 2016.[228] Yet, despite knowing that approximately 250,000 hoverboards were sold on Amazon through December 10, 2015, and despite acknowledging the possibility of additional potentially dangerous hoverboard malfunctions after they were opened on December 25, 2015, Amazon declined to recall the hoverboards.[229] Instead, it merely sent a "non-alarmist" email that failed to mention the specific safety

[225] The notice-and-takedown procedure in a products liability context would require entities like Amazon to remove products it knows to be harmful. *See* 17 U.S.C. § 512 (2017).

[226] This would necessarily require Amazon to also suspend sales of the defective product until the third-party vendor updates its content to include sufficient warning.

[227] For a discussion of the existing approaches to a post-sale duty to warn, especially with respect to the doctrine's potential burdens on manufacturers and distributors, see generally Victor E. Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892 (1983).

[228] Fox v. Amazon.com, Inc., No. 3:16–CV–03013, 2018 WL 2431628, at *2–5 (M.D. Tenn. May 30, 2018); *see also supra* notes 115–19 and accompanying text.

[229] *Fox*, 2018 WL 2431628, at *4.

concerns that Amazon knew the hoverboards to have, such as their significant fire-risk or risk of explosion.[230]

The court in *Fox*, however, dismissed the failure to warn claim on the grounds that Tennessee courts do not recognize any post-sale duty to warn.[231] Even if Tennessee courts did recognize a post-sale duty to warn, the Restatement attaches this duty only to sellers and distributors.[232] Because the court in *Fox* declined to recognize Amazon as a seller or distributor under the Tennessee PLA, it seems unlikely that it would reverse course and find that Amazon had a duty to warn the Foxes about the potential dangers of the hoverboard they purchased from its site.[233] However, in jurisdictions where the post-sale duty to warn is acknowledged, Amazon might be found negligent if its substantial role in placing products onto the consumer market is recognized. Therefore, in limited circumstances, and if the appropriate factual conclusions regarding Amazon's distribution role are reached, this theory of negligence may be sufficient to protect consumers. Yet, the current inability of negligence theories to provide injured consumers with some degree of recompense highlights the urgency with which the current strict products liability regime must evolve.

E. *Recognizing the Need for Evolution in Strict Products Liability*

It is impractical to assert that Amazon should be held strictly liable for every potentially defective product sold on its site. The number of products listed on its United States marketplace alone is in excess of 500 million separate listings.[234] Of course, it is more

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[230] *See supra* notes 117–18 and accompanying text (noting Amazon was specifically aware of seventeen separate fire or explosion incidents involving the hoverboards in question).

[231] *Fox*, 2018 WL 2431628, at *9–10 (citing, *inter alia*, Irion v. Sun Lighting, Inc., No. M2002–00766–COAR3–CV, 2004 WL 746823, at *17 (Tenn. Ct. App. Apr. 7, 2004)).

[232] *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB., *supra* note 1, at § 10.

[233] See *supra* notes 159–60, 185–91 and accompanying text for an analysis of why Amazon should be considered a seller or distributor given its FBA service.

[234] *How Many Products Does Amazon Sell? – January 2018*, SCRAPEHERO (Jan. 11, 2018), https://www.scrapehero.com/many-products-amazon-sell-january-2018/. At the same time, this recent development is not suggesting that

clear that Amazon is already strictly liable for defective products sold under its own name, while it is not strictly liable for defective products distributed by the FBM method, because its contact with the product and overall responsibility for placing the product on the market are minimal.[235] Problematically though, Amazon is not currently strictly liable for products sold through its FBA service, and plaintiffs injured by these products have had little luck in holding a responsible party accountable.[236] The distribution chain analysis currently employed by courts to impose strict liability no longer makes sense in the modern economy, and tort law should evolve to match changed circumstances.[237]

The essential purpose of the distribution chain analysis is to hold strictly liable the entities that are most responsible for placing defective products into the hands of consumers.[238] It is apparent that

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the mere quantity of product listings an entity maintains is any basis on which to resist the due extension of strict liability. For instance, department stores and big-box stores also offer large quantities of products for which they would be held strictly liable for. The typical Walmart brick-and-mortar store, as an example, carries around 120,000 products, and Walmart's online store carries more than 35 million products. Matthew Boyle, *Wal-Mart to Discount One Million Online Items Picked Up in Stores*, BLOOMBERG (Apr. 12, 2017), https://www.bloomberg.com/news/articles/2017-04-12/wal-mart-to-discount-1-million-online-items-picked-up-in-stores (subscription required).

[235] *See* Oberdorf v. Amazon.com, Inc., 295 F. Supp. 3d 496, 501 (M.D. Pa. 2017) (explaining that, here, Amazon's minimal role in bringing the offending dog leash to market is more comparable to a newspaper classified ads section; therefore, it is not strictly liable for injuries caused by the dog leash).

[236] *See* Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738, 2018 WL 3546197, at *4 (D.N.J. July 24, 2018) ("[T]he record does not reflect that [the third-party vendor] was subject to process in [the United States].)"; *see also Fox*, 2018 WL2431628, at *1, *3 (noting the plaintiffs obtained default judgment against the third-party vendor for failure to appear, and finding that Amazon did not allow contact between the third-party vendor and the consumer before, during, or after the hoverboard purchase); *cf. Oberdorf*, 295 F. Supp. 3d at 498 (stating that although the third-party vendor did not utilize the FBA service, the plaintiff was still unable to make contact with it after the defective product caused her injury).

[237] For a related discussion of why antitrust law should also evolve to match the modern e-commerce economy dominated by Amazon, see generally Khan, *supra* note 139.

[238] Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 901 (Cal. 1963) ("The purpose of such liability is to insure that the costs of injuries resulting from

Amazon is more responsible for the overall marketing and distribution of a product than a mere auctioneer, advertising agency, or sales representative.[239] Arguably, Amazon is as equally responsible for the injection of the product into the stream of commerce as the third-party vendor that posted it for sale through Amazon and contracted with Amazon to fulfill it. Amazon is the final entity to provide an advertising platform, collect payment on, and handle a product before the carrier delivers it to the consumer in an FBA transaction. It is also potentially the only accurately named, reliably identifiable entity in the FBA sales process; third-party vendors are asked to use a "friendly" name as the display-name on their Amazon seller account, which can conceal the true identity of the seller.[240] Moreover, Amazon is the most easily reached entity in the process; for instance, in *Fox*, the third-party seller of the hoverboard was impossible for the Foxes to contact in the wake of their injuries, and the true manufacturer was impossible to ascertain.[241]

For these reasons, it may be more loyal to the policy motivations behind strict products liability to shift from a "distribution chain" analysis to an inquiry more focused on determining the degree to which any given entity is responsible for placing a defective product on the consumer market.[242] When this analysis is superimposed onto the facts of *Allstate*, *Fox*, and *Eberhart*, Amazon is clearly meant to

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defective products are borne by the [party] that put such products on the market rather than by the injured persons who are powerless to protect themselves.").

[239] *See supra* notes 134–38 and accompanying text.

[240] *See supra* notes 131–33 and accompanying text; *see also* Vandermark v. Ford Motor Co., 391 P.2d 168, 171 (Cal. 1964) (arguing that retailers should be strictly liable for defective products because the retailer may be the most "reasonably available" party in an enterprise). Here, where Amazon is often the only member of the enterprise that is reasonably identifiable by name and/ or location to the consumer, it follows that Amazon should be held strictly liable for defective products sold on its marketplace.

[241] *See supra* notes 109–22 and accompanying text.

[242] *See, e.g.*, Weber v. Johns-Manville Corp., 630 F. Supp. 285, 288 (D.N.J. 1986) (recognizing that courts should employ a "stream of commerce" analysis to determine whether strict products liability is appropriate, rather than any physical "touch" requirement).

be held strictly liable for the injuries caused by defective products it helped place on the market.

VI. CONCLUSION

The factual question that courts must grapple with is whether Amazon's Fulfillment by Amazon service is so inextricably tied in with the direct facilitation of potentially defective products that it should be held strictly liable for injuries resulting from them. To the extent that Amazon's role is comparable to the role of traditional brick-and-mortar retailers in supplying potentially defective products to the consumer market, Amazon should be held to a comparable legal standard of accountability when consumers are injured. However, Amazon continues to defy the traditional legal understanding of what type of entities constitute distributors and retailers. Nevertheless, the policy underpinnings of strict products liability are still applicable in evaluating Amazon's potential responsibility to the consumer market at large.

The emerging trend of not holding Amazon strictly liable for defective products sold on its website and fulfilled through its FBA service raises substantial questions with respect to the overarching policy goals of tort law, including deterrence, loss distribution, corrective justice, and social responsibility. From a policy perspective, the essential question is whether or not the current strict products liability regime satisfactorily accomplishes those goals. Courts reviewing these cases might consider refocusing their inquiry on the original objectives of the American strict products liability regime. In so doing, they would show a willingness to allow the common law to naturally evolve in tandem with the modern economy.[243]

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[243] *See* Roger J. Traynor, *The Supreme Court's Watch on the Law*, *in* 2 HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA 1900-1950, 207, 211 (J. Edward Johnson ed., 1966) ("There are always some who note with alarm any appellate opinion that goes beyond a mechanical canvass of more or less established precedents. They include the diehards, dead set against all but familiar routines. They include the slothful, who would rationalize their own inertia. They also include carpers hostile toward any enlightenment, who would knowingly impair judicial vigil by keeping the visibility low. Slyly they equate justice with the blindfold image without articulating the corollary that decision would then be

reduced to a blind toss of the coin. They do not state how problematic are the problems that reach the Supreme Court, and how great the need for judicial reasoning beyond formulas.").