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NAVIGATING [THE] AMAZON: LIABILITY OF E-COMMERCE COMPANIES FOR DEFECTIVE PRODUCTS SOLD THROUGH THEIR INTERNET WEBSITES

*Kenneth A. Jacobsen*¹

INTRODUCTION

Like many others, the COVID-19 pandemic dramatically changed my shopping practices. I had never shopped on Amazon or, indeed, any other e-commerce platform. That changed literally overnight. Not only did I purchase pots and pans for my home-cooked meals, but I also ordered groceries through Amazon, delivered right to my doorstep. While the reopening of restaurants will enable me to enjoy the culinary skills of experienced cooks once again and spare me from eating my own cooking, my other consumer shopping practices have likely changed forever.

And I am not alone. Prior to the pandemic, 16% of all sales of goods in the United States occurred through online platforms.² Amazon is by far the largest player in the online consumer marketplace.³

1. Practice Professor of Law, Temple University Beasley School of Law. I would like to thank the substantial contributions of Temple Law students Timothy S. Spangler III and Andrew Marth to the research and substantive content for this article.

2. *Quarterly ECommerce Retail Sales*, U.S. CENSUS BUREAU (May 18, 2021, 10:00 AM), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

3. Stephanie Chevalier, *Projected Retail E-commerce GMV Share of Amazon in the United States from 2016 to 2021*, STATISTA (Dec. 1, 2020), <https://www.statista.com/statistics/788109/amazon-retail-market-share-usa>. Market share is somewhat difficult to precisely determine because several of these companies have other sources of revenue which are not reported separately. But sources estimate Amazon holds between 39.8% and 47% of the U.S. e-commerce market. See Ethan McAfree, *3 Reasons Why Amazon Will Likely Continue To Gain E-Commerce Market Share*, FORBES (Mar. 31, 2021, 7:20 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/03/31/3-reasons-why-amazon-will-likely-continue-to-gain-e-commerce-market-share/?sh=4da05bd83ab8>. These same sources estimate that Walmart and eBay occupy 5.3% and 4.7%, respectively, of the market. Andrew Lipsman, *Top 10 US Ecommerce Companies 2020*, EMARKETER (Mar. 10, 2020), <https://www.emarketer.com/content/top-10-us-ecommerce-companies-2020>. Although Google Alphabet considers itself to be Amazon's main e-commerce competitor, there are few reliable estimates of its internet sales market share. Michael Waters, *Google's Marketplace is Free for Sellers. The Results so far are Mixed*, MODERNRETAIL (Jan. 29, 2021), <https://www.modernretail.co/platforms/googles-marketplace-is-free-for-sellers-they-still-arent-joining>. Google marketplace has slightly less than 8,000 sellers on its platform as opposed to Walmart's 70,000 and Amazon's more than 2 million sellers. *Id.*

The company's 2020 e-commerce sales were approximately \$310 billion.⁴ Google was a distant second with an estimated \$182 billion in internet sales in 2020.⁵ Walmart's total revenue in 2020 was \$523 billion,⁶ of which an estimated \$46 billion came from internet sales.⁷ eBay trailed with \$38 billion in e-commerce transactions.⁸

It is undeniable that the pandemic has had a dramatic influence on these numbers. For example, Amazon's total revenue grew 37.62% in 2020.⁹ In comparison to the 20.45% increase in revenue from 2018 to 2019, Amazon grew 84.08% more in 2020 than it did in 2019.¹⁰ Additionally, its profit increased 220% from the first quarter of 2020 to the first quarter of 2021.¹¹

But what exactly is the role of these e-commerce companies when it comes to injuries to consumers caused by defective products sold through their websites? Are they merely online intermediaries—global “matchmakers” if you will—through which sellers and buyers of goods conduct transactions? Or are they “sellers” of those goods, which expose them to liability under state strict liability laws when something goes awry? This characterization has significant practical consequences to consumers injured by a defective product, since the actual manufacturer and distributor of that product often is a foreign entity beyond the jurisdiction of state and federal courts in the United States.¹² If the e-commerce company through which the consumer purchased the defective product cannot be held liable for the consumer's injuries, then she may have no remedy at all.

4. *Top 10 US Retail Ecommerce Sales, by Company, 2020*, EMARKETER (Sept. 2020), <https://www.emarketer.com/chart/242546/top-10-us-retail-ecommerce-sales-by-company-2020-billions>.

5. *Alphabet, Inc. Income Statement*, WALL ST. J., <https://www.wsj.com/market-data/quotes/GOOGL/financials/annual/income-statement> (last visited June 2, 2021).

6. *Walmart, Inc. Income Statement*, WALL ST. J., <https://www.wsj.com/market-data/quotes/WMT/financials/annual/income-statement> (last visited June 2, 2021).

7. *Top 10 US Retail Ecommerce Sales, by Company*, *supra* note 4.

8. *Id.*

9. *Amazon.com, Inc. Income Statement*, WALL ST. J., <https://www.wsj.com/market-data/quotes/AMZN/financials/annual/income-statement> (last visited June 4, 2021).

10. *Id.*

11. Karen Weise, *Amazon's Profit Soars 220 Percent as Pandemic Drives Shopping Online*, N.Y. TIMES (Apr. 29, 2021), <https://www.nytimes.com/2021/04/29/technology/amazons-profits-triple.html>.

12. *See, e.g., Oberdorf v. Amazon.com, Inc.*, 936 F.3d 182 (3d Cir.) (mem.), *vacating* 930 F.3d 136 (3d Cir. 2019) (dealing with an inaccessible Chinese person or entity).

I. STATE STRICT LIABILITY LAWS

All states have some type of strict liability law, either statutory or under their common law.¹³ Although wide variations exist, many of these laws are modeled after the original Section 402A of the Restatement (Second) of Torts:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.¹⁴

Although Section 402A was originally intended to apply to products with latent manufacturing defects, it was extended to both sellers of products with design defects and to sellers who failed to warn consumers of unreasonably dangerous conditions in the use of their products.¹⁵ Sellers could be held strictly liable if their products were sold in a “defective condition unreasonably dangerous to the user.”¹⁶

A fundamental question for strict liability under state laws, then, is who is a “seller”? As noted above, this question has significant practical consequences when the manufacturer and distributor of a defec-

13. See, e.g., TENN. CODE ANN. § 29-28-101 (West 2021) (statutory products strict liability law); *Webb v. Zern*, 220 A.2d 853, 854 (Pa. 1966) (holding 402A applied to all Pennsylvania strict products liability claims).

14. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

15. See 63A AM. JUR. 2D *Products Liability* § 876 (2021).

16. *Id.* “There are three types of defective conditions which may give rise to strict liability: manufacturing defect, design defect, and failure to warn defect.” *French v. Commw. Assocs., Inc.*, 980 A.2d 623, 632 (Pa. 2009) (citing *Phillips v. A-Best Products, Co.*, 131 655 A.2d 1167, 1170 (Pa. 1995)). With the adoption of strict liability in my home state of Pennsylvania, “anyone injured by the defective product may sue, and anyone in the distributive chain may be sued.” *Goodman v. PPG Indus., Inc.*, 849 A.2d 1239, 1245 (Pa. Super. Ct. 2004), *aff’d*, 885 A.2d 982 (Pa. 2005). As a result, “manufacturers and sellers are . . . guarantors of the basic safety of products placed into the stream of commerce.” *Id.* “All those engaged in the business of supplying products for use or consumption by the public are subject to strict liability for injuries caused by a defective condition unreasonably dangerous to the user or consumer.” *Walasavage v. Marinelli*, 483 A.2d 509, 513 (Pa. Super. Ct. 1984) (citing *Francioni v. Gibsonia Truck Corp.*, 372 A.2d 736, 739 (Pa. 1977)). But despite this seemingly broad scope of liability articulated in these Pennsylvania appellate cases, their applicability to internet transactions remains unclear. See discussion *infra* Section IV.

tive product is insolvent, defunct, or beyond the jurisdiction of the state or federal court in which a consumer was injured.

II. LIMITS ON PERSONAL JURISDICTION OVER FOREIGN ENTITIES

As the Supreme Court (Court) observed in its recent pronouncement on personal jurisdiction, a state court's power to exercise jurisdiction over an out-of-state or foreign company is limited by the Due Process Clause of the U.S. Constitution.¹⁷ The Court's "canonical decision" in *International Shoe Co. v. Washington* that we all studied in law school is as applicable today as when it was decided seventy-six years ago.¹⁸ In a nutshell, according to the decision, jurisdiction depends on the nature and extent of the "contacts" that a defendant has with the state.¹⁹ That analysis has led the Court to recognize "two kinds of personal jurisdiction: general jurisdiction (sometimes called all-purpose) and specific (sometimes called case-specific) jurisdiction."²⁰ As the Court explained, general jurisdiction extends to "any and all claims' brought against a defendant [and] [t]hose claims need not be related to the foreign [s]tate or the defendant's activity there"; but general jurisdiction comes with a "correlative limit" in that it exists only where the company is incorporated or has its principal place of business.²¹

Specific jurisdiction, by contrast, "is different: [i]t covers defendants less intimately connected with a [s]tate, but only as to a narrow class of claims."²² The Court explained this limitation as follows:

The contacts needed for this type of jurisdiction often go by the name "purposeful availment." The defendant, we have said, must take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.' The contacts must be the defendant's own choice and not 'random, isolated, or fortuitous' Yet even then—because the defendant is not 'at home'—the forum State may exercise jurisdiction only in certain cases. The plaintiff's claims, we have often stated, 'must arise out of or relate to the defendant's contacts with the forum.'²³

17. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021).

18. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

19. *Id.*

20. *Ford Motor Co.*, 141 S. Ct. at 1024 (citing *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 919 (2011)).

21. *Id.* The Court observed that "in an exceptional case," a corporate defendant may be "at home" elsewhere and subject to general jurisdiction in that other state. *Id.* Those situations are rare. *Id.*

22. *Id.*

23. *Id.* at 1024–25 (citations omitted).

Merely reciting these principles of general and specific jurisdiction underscores the seemingly insurmountable challenges faced by consumers injured by products manufactured abroad. General jurisdiction will never exist, and specific jurisdiction will rarely, if ever, exist over those foreign entities.²⁴ This leaves only the e-commerce company as a potential defendant if an injured consumer is to receive any remedy at all.

III. ARE E-COMMERCE COMPANIES “SELLERS” UNDER STATE STRICT LIABILITY LAWS?

Products sold by or through Amazon fall into four basic categories: (1) items that are manufactured, shipped, and sold by Amazon; (2) items that are shipped and sold by Amazon but manufactured by others; (3) items that are shipped by Amazon but sold by third-party vendors; and (4) items that are listed on Amazon’s website but sold and shipped directly by third-party vendors.²⁵ These distinctions are noted on Amazon’s own website.²⁶

When a consumer searches Amazon for a “dog leash,” for example, thousands of products are displayed for the consumer to browse:

24. See generally Kenneth A. Jacobsen et al., *Leveling the Playing Field—U.S. Court Jurisdiction over Disputes Between American Professional Athletes and Foreign Sports Teams*, 27 JEFFREY S. MOORAD SPORTS L.J. 181 (2020). Of note, the Supreme Court in *Ford Motor Company* did not address the challenging “doctrinal questions” that arise for personal jurisdiction in “internet transactions.” *Ford Motor Co.*, 141 S. Ct. at 1028 n.4.

25. See Dog Leash Search Results, AMAZON, <https://www.amazon.com> (search “dog leash” in the main search bar) (last visited July 8, 2021).

26. See *id.*

amazon Hello Select your address All dog leash

1-48 of over 2,000 results for "dog leash" Sort by: Featured

Eligible for Free Shipping
 Free Shipping by Amazon
 All customers get FREE Shipping on orders over \$25 shipped by Amazon

Delivery Day
 Get it by Tomorrow

Department
 Dog Leashes
 Standard Dog Leashes
 Dog Retractable Leashes
 Dog Double Leashes
 Dog Training & Behavior Aids
 Dog Training Leashes
 Cat Collars, Harnesses & Leashes
 Cat Leashes
 See All 22 Departments

Avg. Customer Review
 ★★★★★ & Up
 ★★★★★ & Up
 ★★★★★ & Up
 ★★★★★ & Up

Brand
 BAAPET
 TUG
 MayPaw
 PetSafe
 ladoogo
 FunTags
 iYoShop
 See more

Price
 Under \$25
 \$25 to \$50

Vexong™
 Devoted to bringing good pet products!
 Vexong Pet Products
 Shop the Vexong Store on Amazon >

Vexong Dog Leash Dual Hooks 4 to 8 FT Length Adj...
 ★★★★★ 8
 ✓prime

Vexong Dog Leash Dual Hooks 4 to 8 FT Length Adj...
 ★★★★★ 8
 ✓prime

Amazon's Choice

Petmegoo 5ft 1/2in Strong Blue Dog Leash for Medium Dogs & Large Dogs - Highly Reflective Puppy Leash with...
 ★★★★★ ~ 542
 \$9⁹⁹
 ✓prime Get it as soon as Fri, May 7
 FREE Shipping on orders over \$25 shipped by Amazon

ladoogo 2 Pack 5 FT Heavy Duty Dog Leash with Comfortable Padded Handle Reflective Dog leashes for...
 ★★★★★ ~ 15,578
 \$14⁹⁹
 ✓prime Get it as soon as Fri, May 7
 FREE Shipping on orders over \$25 shipped by Amazon

iYoShop 6 FT Strong Dog Leash with Comfortable Padded Handle and Highly Reflective Threads Dog...
 ★★★★★ ~ 10,876
 \$12⁸⁹ (\$12.89/Count) \$16⁹⁹
 ✓prime Get it as soon as Fri, May 7
 FREE Shipping on orders over \$25 shipped by Amazon

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Many of these products are shipped and sold by Amazon:

Ships from Amazon.com
Sold by Amazon.com₂₈

Other products are shipped by Amazon, but sold by a different company:

Ships from Amazon
Sold by JJTR INC₂₉

27. *Id.*

28. AMAZON, https://www.amazon.com/AmazonBasics-Tie-Out-Cable-Dogs-90lbs/dp/B06ZXX5MM4/ref=sr_1_5?dchild=1&keywords=amazonbasics+dog+leash&qid=1620139185&sr=8-5 (last visited July 8, 2021).

29. AMAZON, https://www.amazon.com/Petmegoo-Strong-Leash-Medium-Large/dp/B08LD2Y4KB/ref=sr_1_1_sspa?dchild=1&keywords=dog+leash&qid=1620138862&sr=8-1 (last visited July 8, 2021).

The final set of products are shipped and sold by a third-party vendor:

Ships from **TheCustomSite, LLC**
Sold by **TheCustomSite, LLC**³⁰

Amazon's arrangement with its third-party vendors is governed by its comprehensive "Amazon Services Business Solutions Agreement."³¹ According to the agreement, if a vendor subscribes to Amazon's "fulfillment" services, the vendor ships its products to an Amazon warehouse for storage and, once an order is received online for a product, Amazon will "retrieve the product from inventory, box it, and ship it to the purchaser."³²

Products manufactured, sold, and shipped by Amazon give rise to personal jurisdiction for strict liability claims under virtually any state's law, including my home state of Pennsylvania, for example.³³ Further, products sold and shipped by Amazon but manufactured by others may also give rise to personal jurisdiction.³⁴ The remaining two categories (items that are shipped by Amazon but sold by third-party vendors, and items that are listed on Amazon's website but are sold and shipped directly by third-party vendors) are less clear, and any consideration of whether strict liability laws will apply is a largely fact-driven exercise.

Confronted by a lack of established precedent, there are occasions when federal appellate courts will request that state appellate courts decide the question of who qualifies as a "seller" under that state's

30. AMAZON, https://www.amazon.com/Buckle-Down-Maryland-Flags-Leash/dp/B06XNNW48F/ref=sr_1_1?dchild=1&keywords=dog+leash&m=A1TE1CD9RKMYR4&qid=1625796382&refinements=p_6%3AA1TE1CD9RKMYR4&rnid=2661622011&s=pets-supplies&sr=1-1 (last visited July 8, 2021).

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

32. *Id.* This service allows for non-Amazon owned products to be eligible for Amazon Prime shipping services.

33. *See Burch v. Sears, Roebuck and Co.*, 467 A.2d 615, 618 (Pa. Super. Ct. 1983) (holding Sears could be strictly liable for defective lawn mower sold under its brand name); *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 532, 534 (Pa. Super. Ct. 2009) (holding Ford could be strictly liable for unreasonably dangerous design of 1996 Ford F-150). Products manufactured and sold by Amazon are placed into the stream of commerce by Amazon, and Amazon is clearly a "seller" of those products under Pennsylvania's strict liability laws.

34. *See Barton v. Lowe's Home Centers, Inc.*, 124 A.3d 349, 353–54 (Pa. Super. Ct. 2015) (holding plaintiff sufficiently pled a strict product liability action against retailer and manufacturer of allegedly defective product). Pennsylvania appellate courts have routinely held "all suppliers of a defective product in the chain of distribution, whether retailers, parts makers, assemblers, owners, sellers, lessors, or any other relevant category, are potentially liable to the ultimate user injured by the defect." *Burch*, 467 A.2d at 621.

strict liability laws.³⁵ Alternately, other federal courts and lower state courts will predict how the appellate courts will decide.³⁶

In the recent case of *Oberdorf v. Amazon.com, Inc.*,³⁷ the Third Circuit Court of Appeals followed the first path by requesting that the state appellate court determine who qualifies as a “seller.” In *Oberdorf*, the plaintiff bought a dog collar on Amazon in 2014 from a third-party vendor named “The Furry Gang.”³⁸ Amazon never had the product in its possession. Amazon offers advertising and shipping services for third-party vendors,³⁹ but the core service that Amazon provides is the right to be listed on Amazon’s public website.⁴⁰ The Furry Gang did not opt into Amazon’s shipping service, so The Furry

35. When confronted with a novel issue of state law, a federal court can certify the question for decision by the highest appellate court in the state. *See, e.g.,* *McMillan v. Amazon.com, Inc.*, 983 F.3d 194 (5th Cir. 2020) (certifying the issue of whether an e-commerce marketplace such as Amazon.com be considered a “seller” under Texas strict liability law).

The federal circuit court is authorized to certify a question to the state appellate court by either a state statute or a rule of appellate procedure. *See, e.g.,* TEX. R. APP. P. 58.1 (“The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it.”). *See also* UNIFORM. CERTIFICATION OF QUESTIONS OF LAW ACT § 2 (1995). The federal circuit court then applies that legal determination to the facts of the case before it.

Certification of a question is rare and is reserved for exceptional cases. *See, e.g.,* *McMillan*, 983 F.3d at 202 (“We have articulated three factors to consider in deciding whether to certify a question: (1) the closeness of the question and the existence of sufficient sources of state law; (2) the degree to which considerations of comity are relevant in light of the particular issue and case to be decided; and (3) practical limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court.” (citing *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 332 (5th Cir. 2018), *certifying question to* 579 S.W.3d 53 (Tex. 2019)). *See also* *Fedziuk v. Comm’r of Pub. Safety*, 696 N.W.2d 340, 344 (Minn. 2005) (“A question is increasingly important if: (1) it will have statewide impact, (2) it is likely to be reversed, (3) it will terminate lengthy proceedings, and (4) the harm inflicted on the parties by a wrong ruling by the district court is substantial.”).

When the state appellate court receives the certified question, it may either accept the certification and answer the question or deny the certification and decline to answer the question posed by the federal circuit court. *See* *Hislop v. Dep’t of Soc. Welfare*, 388 A.2d 428 (Vt. 1978); TEX. R. APP. P. 58.1. In states that have adopted the Uniform Certification of Questions of Law Act, the state appellate court may decide *all* open issues undecided by the certifying court. *See* *Collins v. Tabet*, 806 P.2d 40, 53 (N.M. 1991) (emphasis added). In most cases, however, the state appellate court will simply answer the certified question of law and send the case back to the certifying federal circuit court to decide the case in accordance with the state court’s answer. *See* *Bd. of Educ. of Fairfield v. Dep’t of Educ. of Conn.*, 503 A.2d 1147, 1151 (Conn. 1986).

36. *See* *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App’x 213, 216 (9th Cir. 2020).

37. *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 144–49 (3d Cir.), *vacated*, 936 F.3d 182 (3d Cir. 2019).

38. *Id.* at 136.

39. *Id.* at 141. Amazon’s shipping service, known as “Fulfillment by Amazon,” takes physical possession of the goods before a sale so Amazon’s infrastructure can ship the goods directly to the consumer after a sale. *Id.*

40. *Id.* at 141–42 (describing Amazon’s main conditions for its vendors).

Gang shipped the dog collar directly to the plaintiff from Nevada.⁴¹ In 2015, a ring on the dog collar broke while the plaintiff was walking her dog, causing the retractable leash to recoil and strike the plaintiff in her left eye; this caused permanent blindness.⁴² Neither Amazon nor the plaintiff's attorneys were able to contact The Furry Gang, and its Amazon account went inactive in 2016.⁴³

The plaintiff filed suit against Amazon in federal court in the Middle District of Pennsylvania asserting claims for strict liability, negligence, breach of warranty, misrepresentation, and loss of consortium.⁴⁴ Amazon moved for summary judgment on the grounds that it was not a “seller” of the dog leash under Pennsylvania strict liability law because it neither owned⁴⁵ nor took physical possession of the allegedly defective leash.⁴⁶ In past decisions, without clear guidance from the Pennsylvania Supreme Court on internet transactions, federal district courts have analyzed similar motions using prior Pennsylvania Supreme Court cases⁴⁷ that list four policy factors, known as the *Musser* factors, to determine whether an entity could be classified as a “seller” under Section 402A: (1) [t]he defendant may be the only member of the marketing chain available to the injured plaintiff for redress; (2) imposition of strict liability upon the defendant will serve the same incentive for safety as that imposed on the actual seller; (3) the defendant is in a better position than the consumer to prevent the distribution of defective products; and (4) the defendant can distribute the cost of compensating for injuries resulting from defects by spreading those costs among its business expenses.⁴⁸ Applying these factors, the district court concluded that Amazon was not a “seller” of the dog collar and granted its motion for summary judgment.⁴⁹

On appeal, a divided panel of the Third Circuit (Panel) reversed.⁵⁰ The majority applied the same four *Musser* factors as the district court

41. *Id.* at 142.

42. *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 142 (3d Cir.), *vacated*, 936 F.3d 182 (3d Cir. 2019).

43. *Id.*

44. *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 498–99 (M.D. Pa. 2017), *rev'd*, 930 F.3d 136 (3d Cir. 2019), *vacated*, 936 F.3d 182 (3d Cir. 2019).

45. Here and for the purposes of the rest of this Article, to own means to have title.

46. *Oberdorf*, 295 F. Supp. 3d at 499–500.

47. *Id.* at 500–501. *See generally* RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965) (explaining the Restatement's (Second) approach to products liability).

48. These factors are the *Musser* factors. *Musser v. Vilsmeier Auction Co.*, 562 A.2d 279, 282 (Pa. 1989); *Francioni v. Gibsonia Truck Corp.*, 372 A.2d 736, 739 (Pa. 1977).

49. *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 499–501 (M.D. Pa. 2017).

50. *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 153 (3d Cir. 2019) (reversing on the “seller” status of Amazon), *vacated*, 936 F.3d 182 (2019).

but reached a different conclusion, largely because of its assessment of the extensive interconnection between Amazon and its third-party vendors.⁵¹ The following issues were of particular importance to the Panel:

- Although the third-party vendors make decisions about what products to sell, shipping costs, and pricing, Amazon lists the products on its website, collects order information, and processes payments for the transactions.
- Amazon creates the product listing on its website using information and photographs provided by that third-party.
- Amazon offers vendors additional advertising on its website and, notably, the opportunity to have Amazon ship their products.
- If Amazon fulfills shipping, then it takes physical possession of the product and ships the product directly to the consumer.⁵²

The Panel found that all four *Musser* factors supported imposing strict liability on Amazon, concluding:

Amazon's role extends beyond that of the *Hoffman* sales agent, who in exchange for a commission merely accepted orders and arranged for product shipments. Amazon not only accepts orders and arranges for product shipments, but it also exerts substantial market control over product sales by restricting product pricing, customer service, and communications with customers. Amazon's involvement, in other words, resembles but also exceeds that of the sales agent labeled a 'seller' in *Hoffman*.⁵³

Amazon sought en banc review of the Panel's ruling, which was granted.⁵⁴ Noting that e-commerce transactions "present a novel situation" that raise "several unresolved questions" under Pennsylvania law, the en banc court first questioned whether "Pennsylvania's test for applying Section 402A involves one or two steps, and "second, if there are two steps, what constitutes each step?"⁵⁵ Seeking guidance from the Pennsylvania Supreme Court on these unresolved issues, the

51. *Id.* at 144–47; *see also id.* at 140–42. The dissent disagreed with the majority's adoption and application of the four-factor *Musser* analysis. *Id.* at 154 (Scirica, J., dissenting). According to the dissent, the proper analysis under Pennsylvania's strict liability law was a two-step process. *Id.* at 156. As a threshold matter, the defendant must be engaged in the business of selling the product at issue, which requires either a transfer of ownership or possession of the goods. *Id.* at 156–57. Only then should the court apply the four-factor test to determine whether strict liability should apply. *Id.* at 156. Since Amazon never owned or possessed the dog collar, the predicate step was not met. *Id.* at 158. The dissent, alternatively, concluded the four factors weighed against applying strict liability. *Id.* at 164.

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

53. *Id.* at 149 (citing *Hoffman v. Loos & Dilworth, Inc.*, 307 Pa. Super. 131, 452 A.2d 1349 (1982)).

54. *Oberdorf v. Amazon.com, Inc.*, 936 F.3d 182, 182–83 (3d Cir.) (mem.), *vacating* 930 F.3d 136 (3d Cir. 2019).

55. *Oberdorf v. Amazon.com, Inc.*, 818 F. App'x 138, 141 (3d Cir.), *certifying question to* 237 A.3d 394 (Pa. 2020) (table decision).

Third Circuit vacated the decision of the district court and certified the following question to the Pennsylvania Supreme Court: “[u]nder Pennsylvania law, is an e-commerce business, like Amazon, strictly liable for a defective product that was purchased on its platform from a third-party vendor, which product was neither possessed nor owned by the e-commerce business?”⁵⁶ The Pennsylvania Supreme Court accepted the certification from the Third Circuit.⁵⁷ The Third Circuit’s question, however, remains unanswered. On September 23, 2020, the parties agreed to a joint dismissal of the case, indicating a settlement.⁵⁸ Thus, the certification to the Pennsylvania Supreme Court was rendered moot.⁵⁹

A similar procedural approach was taken by the Fifth Circuit in *McMillan v. Amazon.com, Inc.*⁶⁰ In *McMillan*, the plaintiff purchased a remote control on Amazon from the third-party vendor “USA Shopping 7693.”⁶¹ Amazon shipped the remote control directly to the plaintiff from its warehouse facility through its “Fulfillment by Amazon” program.⁶² A year later, the plaintiff’s toddler swallowed the remote control’s battery.⁶³ The battery was removed surgically, but the plaintiff alleged that the battery caused serious and permanent damage to the child’s throat.⁶⁴ The plaintiff notified Amazon of the incident, and Amazon identified Hu Xi Jie⁶⁵ as the owner of the “USA Shopping 7693” account.⁶⁶ When Amazon was unable to contact Hu Xi Jie, it suspended the “USA Shopping 7693” account and removed the remote control from its website.⁶⁷

The plaintiff sued Amazon and Hu Xi Jie in Texas federal court for five causes of action, including strict products liability.⁶⁸ All attempts to serve Hu Xi Jie failed, and Hu Xi Jie never made an appearance in the case.⁶⁹ After discovery, Amazon moved for summary judgment,

56. *Id.* at 143.

57. *Oberdorf v. Amazon.com, Inc.*, 237 A.3d 394 (Pa. 2020) (table decision).

58. *Oberdorf v. Amazon.com, Inc.*, No. 16 EAP 2020 (Pa. Sept. 25, 2020) (renumbered from No. 41 EM 2020).

59. *See id.*

60. *McMillan v. Amazon.com, Inc.*, 983 F.3d 194 (5th Cir. 2020).

61. *Id.* at 197.

62. *Id.* at 200.

63. *Id.* at 197.

64. *Id.*

65. It is unknown whether Hu Xi Jie is a Chinese individual or entity. *Id.*

66. *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 197 (5th Cir. 2020).

67. *Id.*

68. *Id.* (listing the five claims: (i) strict products liability design defect; (ii) strict products liability marketing defect; (iii) breach of implied warranty; (iv) negligence; and (v) gross negligence).

69. *Id.*

arguing that it was not a “seller” under Texas law and could not be held strictly liable for any injuries caused by the remote control or its battery.⁷⁰ The district court denied Amazon’s motion, holding that Amazon qualified as a “seller” under Texas’s strict liability statute because Amazon “was an integral component in the chain of distribution” and was “in the business of placing the product in the stream of commerce.”⁷¹

Both parties moved to certify an immediate appeal of the district court’s holding on the “seller” classification.⁷² The district court certified for interlocutory appeal, and the Fifth Circuit granted the requisite permission.⁷³ The Fifth Circuit laid out the general principles that the Supreme Court of Texas had historically used to determine “seller” status under its strict liability laws.⁷⁴ The Fifth Circuit, however, found that those older cases were inapplicable to internet transactions and rejected Amazon’s contention that it was analogous to an auctioneer or a delivery service as in those prior decisions.⁷⁵ The Fifth Circuit also refused to decide the “seller” issue based on decisions of other circuits “given the difference in state laws and facts.”⁷⁶ Instead, like the Third Circuit in *Oberdorf*, the Fifth Circuit certified the question to the Supreme Court of Texas: “[u]nder Texas products-liability law, is Amazon a ‘seller’ of third-party products sold on Amazon’s website when Amazon does not hold title to the product but controls the process of the transaction and delivery through Amazon’s Fulfillment by Amazon program?”⁷⁷ The Supreme Court of Texas accepted the certification from the Fifth Circuit and answered the question in the negative.⁷⁸

70. The “seller” issue was important because, although non-manufacturing sellers are expressly exempt from liability under the Texas Products Liability Act, an exception applies when the manufacturer is beyond the jurisdiction of the Texas courts—as Hu Xi Jie was. *Id.* at 198.

71. *Id.* (quoting *McMillan v. Amazon.com, Inc.*, 433 F. Supp. 3d 1034, 1043 (S.D. Tex. 2020), *rev’d*, 983 F.3d 194 (5th Cir. 2020)).

72. *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 197 (5th Cir. 2020).

73. *Id.*

74. *Id.* at 199 (explaining the two main principles used in determining “seller” status are: (i) whether the alleged seller places the product in the stream of commerce or only “facilitate[s] the stream”; and (ii) allowing service providers to be considered sellers only if they are “engaged in the business of selling” a product and providing that product is not incidental to selling the service) (citing *New Tex. Auto Auction Servs., L.P. v. Gomez De Hernandez*, 249 S.W.3d 400, 403 (Tex. 2008)).

75. *Id.* at 200–01 (finding Amazon is not like an auctioneer because they do more than make occasional sales and Amazon’s use of UPS indicates they are not a delivery service like UPS).

76. *Id.* at 201.

77. *Id.* at 203.

78. *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 112 (Tex. 2021).

The Supreme Court of Texas began its analysis by noting the fundamental change in consumer practices over the decades since strict liability was adopted in Texas as part of its common law, now codified in the Texas Products Liability Act:

In the first few decades after we recognized common-law strict products liability, the people and entities held liable were typically part of a conventional distribution chain: upstream manufacturers, mid-stream distributors, and downstream retailers. Today, third-party e-commerce platforms—such as Amazon, eBay, Etsy and Alibaba—provide many of the services traditionally performed by distributors and retailers, enabling merchants from all over the world to reach consumers directly.⁷⁹

The court then turned to the definition of “seller” contained in the statute.⁸⁰ Under that statutory definition, a seller is “a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.”⁸¹ So, in determining whether Amazon was a “seller” under the statute, the court had to answer “whether Amazon’s role in the distribution chain amounts to ‘distributing or otherwise placing’ a product in the stream of commerce.”⁸²

In answering this question, the court examined its prior decisions analyzing Section 402A before the enactment of the Texas statute, noting that strict liability had been extended only in limited circumstances to non-manufacturing distributors of defective products as well as to some bailors and lessors.⁸³ But the court made clear that it “[has] refused to extend liability to all persons and entities involved in the distribution chain,” and entities that “provide both goods and services are not sellers if the provision of products is incidental to the provision of services.”⁸⁴ Similarly, businesses “that merely assist in or facilitate sales—such as auctioneers, advertising agencies, newspapers, internet providers, and shipment companies—are not sellers.”⁸⁵

Noting that the adoption of the Texas Products Liability Act did not alter the common law or expand liability to those who were not subject to liability before its enactment, the court identified the two dis-

79. *Id.* at 103–04 (footnote omitted).

80. *Id.* at 106.

81. *Id.* (quoting TEX. CIV. PRAC. & REM. CODE § 82.001(3)).

82. *Id.*

83. *Amazon.com v. McMillan*, 625 S.W.3d 101, 106 (Tex. 2021). The court referred to bailors and lessors that may qualify as sellers as “non-sale commercial transactions.” *Id.*

84. *Id.* (citations omitted).

85. *Id.*

tinct categories of transactions: sales and non-sales transactions.⁸⁶ In an ordinary sales transaction, a “seller” cannot be “anyone other than the person or entity who relinquishes title.”⁸⁷ Even in a non-sales commercial transaction, such as a bailment or lease, there has always been a transfer of title somewhere in the distribution chain and the bailor or lessor held title.⁸⁸

Applying these legal principles to the case before it, the Texas Supreme Court held that Amazon was not a “seller” under Texas’s strict liability statute.⁸⁹ Amazon never held or transferred title to the allegedly defective remote control, which was a necessary predicate for seller liability in a sales transaction.⁹⁰ Nor did Amazon’s possession of the remote control “followed by a transfer of title” between the plaintiff and Hu Xi Jie “constitute a sale.”⁹¹ Exceptional cases allowing liability in non-sales commercial transactions, such as a bailment or lease, were inapplicable in a case involving an actual sales transaction.⁹²

Strict liability against Amazon was also the subject of a recent decision by the Ninth Circuit Court of Appeals which applied Arizona’s products liability law.⁹³ In *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*,⁹⁴ a consumer bought two hoverboards on Amazon from the third-party vendor “Super Engine.”⁹⁵ Since Super Engine participated in Amazon’s “Fulfillment by Amazon” program, Amazon sent the hoverboards directly to the consumer from its warehouse.⁹⁶ The consumer sold the hoverboards to another individual, Zeitonus.⁹⁷ While Zeitonus was charging the batteries of the hoverboards, they burst into flames, causing severe damage to his house.⁹⁸ State Farm,

86. *Id.* at 106, 109 (“Given that Chapter 82 is more restrictive than the common law, we see no indication that the Legislature intended for ‘distributing or otherwise placing’ to include commercial behavior beyond ordinary sales and previously qualifying non-sale commercial transactions.”).

87. *Id.* at 109.

88. *See id.* at 110.

89. *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 112 (Tex. 2021).

90. *Id.* at 111–12.

91. *Id.* at 112.

92. *Id.*

93. *See State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 407 F. Supp. 3d 848 (D. Ariz. 2019), *aff’d* 835 F. App’x 213 (9th Cir. 2020).

94. *Id.*

95. *Id.* at 849.

96. *Id.*

97. *Id.*

98. *State Farm Fire & Cas. Co. v. Amazon.com, Inc.* 407 F. Supp. 3d 848, 849 (D. Ariz. 2019).

Zeitonus's insurance carrier, paid for an investigation of the incident and for the damages to his property.⁹⁹

State Farm, as subrogee, sued Amazon for strict products liability and negligence in the District of Arizona.¹⁰⁰ The parties filed cross-motions for summary judgment, of which Amazon's was granted.¹⁰¹ The district court analyzed the case under seven factors identified by the Arizona courts for determining an entity's "seller" status under Section 402A.¹⁰² According to the district court, to fit within Arizona's definition of a "seller" subject to strict liability under Arizona law, the entity must be an integral part of an enterprise that resulted in the defective product being placed in the stream of commerce.¹⁰³ State Farm appealed the decision of the district court to the Ninth Circuit, which affirmed the district court's application of the seven-factor test and its conclusion that Amazon was not a "seller" of the hoverboards under Arizona law.¹⁰⁴

A similar result, in a case also involving igniting hoverboards, was reached in *Fox v. Amazon.com, Inc.*, but the Sixth Circuit employed a different analysis.¹⁰⁵ The plaintiff purchased a hoverboard on Amazon from the third-party vendor "W2M Trading Corp" (W2M).¹⁰⁶ Neither W2M nor Amazon manufactured the hoverboard.¹⁰⁷ The manufacturer is unknown.¹⁰⁸ It is unclear what entity shipped the hoverboard to the plaintiff or whether W2M participated in the "Fulfillment by Amazon" program with this particular product.¹⁰⁹ W2M had previously used the "Fulfillment by Amazon" program for other products.¹¹⁰

The plaintiff's son briefly used the hoverboard and then left it on the first floor of the plaintiff's two-story house, where it caused a fire

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 850–54 (listing the seven factors as whether the entity: "(1) provide[s] a warranty for the product's quality; (2) [is] responsible for the product during transit; (3) exercise[s] enough control over the product to inspect or examine it; (4) take[s] title or ownership over the product; (5) derive[s] an economic benefit from the transaction; (6) ha[s] the capacity to influence a product's design and manufacture; or (7) foster[s] consumer reliance through their involvement."). This approach is the distribution chain approach.

103. *Id.* at 854.

104. *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213 (9th Cir. 2020).

105. *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 425 (6th Cir. 2019).

106. *Id.* at 418.

107. *Id.* at 419.

108. *Id.*

109. *Id.*

110. *Id.*

that burned down the home.¹¹¹ Two of the plaintiff's children were in the house when the fire started.¹¹² The children survived but were injured escaping the fire.¹¹³ Both parties agreed that the cause of the fire was the lithium-ion battery in the hoverboard.¹¹⁴

The plaintiff sued Amazon and W2M in the Middle District of Tennessee for violations of the Tennessee Products Liability Act of 1978, a violation of the Tennessee Consumer Protection Act of 1977 (Act), and negligence.¹¹⁵ Amazon moved for summary judgment on all claims, and the motion was granted by the district court.¹¹⁶ With particular reference to the plaintiff's claim under the Tennessee Products Liability Act, the district court found that Amazon was not a "seller."¹¹⁷ Examining the dictionary definition of a "seller," the district court held that a defendant must have held title to the allegedly defective product, which, here, Amazon never did.¹¹⁸ The plaintiff then appealed the district court's decision.¹¹⁹

The Sixth Circuit affirmed the district court's holding but rejected its analysis on ownership and title.¹²⁰ The Sixth Circuit noted that the language of the Act was more expansive than dictionary definitions of the term "seller," and by including "lessor" and "bailor" in the definition of a "seller," the Tennessee Legislature rejected any limitation based on ownership of or title to the allegedly defective product.¹²¹ The Sixth Circuit instead adopted a "control" approach to strict liability under the Act, defining a "seller" under Tennessee law to include

111. *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 421 (6th Cir. 2019).

112. *Id.*

113. *Id.*

114. *Id.* There were news reports of hoverboards catching fire or exploding during this period. Several of these involved hoverboards purchased through Amazon.com. *Id.* Complaints about these fires led Amazon to conduct an internal investigation in November 2015, which identified seventeen instances of hoverboard fires. *Id.* at 419–20. After the internal investigation, Amazon's Product Safety Manager removed his hoverboard from his own home and Amazon ceased all hoverboard sales worldwide in early December. *Id.* at 420. Amazon also sent an email to purchasers informing them of issues with the lithium-ion batteries but not the details of the reports or the findings of its internal investigation. *Id.* Fox claimed he never received this email. *Id.*

115. *Id.* at 421.

116. *Id.*

117. *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 425. See TENN. CODE ANN. § 29-28-102(7) (West 2021) ("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. 'Seller' also includes a lessor or bailor engaged in the business of leasing or bailment of a product.").

118. *Fox v. Amazon.com, Inc.*, No. 3:16-CV003013, 2018 WL 2431628 at *7 (M.D. Tenn. May 30, 2018).

119. *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 421 (6th Cir. 2019).

120. *Id.* at 422–23.

121. *Id.* at 424–25.

“any individual regularly engaged in exercising sufficient control over a product in connection with its sale, lease, or bailment, for livelihood or gain.”¹²² Applying this standard, the Sixth Circuit found that Amazon did not exercise sufficient control over the hoverboard to be considered a “seller” under the Tennessee Products Liability Act.¹²³

In yet another recent federal court of appeals decision, Amazon avoided liability in the Fourth Circuit in *Erie Ins. Co. v. Amazon.com, Inc.*¹²⁴ In *Erie*, a customer purchased a headlamp on Amazon used for recreational purposes such as cycling, camping, and hiking from the third-party seller “Dream Light.”¹²⁵ Dream Light participated in the “Fulfillment by Amazon” program, so Amazon shipped the package from its warehouse using the third-party shipper, UPS.¹²⁶ As part of its fulfillment services, Amazon collected payment for the headlamp from the purchaser and, after withdrawing its service fee, remitted the remainder to Dream Light.¹²⁷

The purchaser gave the headlamp to his friend as a gift.¹²⁸ The headlamp malfunctioned, allegedly from a defective battery, and ignited his friend’s house, causing damages exceeding \$300,000.¹²⁹ The friend’s insurance company, Erie Insurance, paid for the damages.¹³⁰

Erie Insurance, as subrogee, sued Amazon for strict products liability, negligence, and breach of warranty under Maryland law in the District of Maryland.¹³¹ Amazon’s motion for summary judgment was granted by the district court on the ground that Amazon was not a “seller” of the headlamp under Maryland’s strict liability law due to the nature of the “Fulfillment by Amazon” program, where Amazon was merely a bailor and not the owner of the headlamp.¹³² As the district court explained:

The question is whether the circumstances of this case in which Amazon ‘fulfilled’ the order converts Amazon into the status of the seller. . . .The fulfillment role as far as Amazon is concerned is that it stored the product at the expense and risk of Dream Light. That it allowed the merchandise to be advertised on Amazon’s webpage. That if a purchase was made, Amazon would take the product from

122. *Id.* at 425. This approach is the control-based approach.

123. *Id.*

124. *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 144 (4th Cir. 2019).

125. *Id.* at 138.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

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

131. *Id.* at 137.

132. *Id.* at 138.

its fulfillment center, put it in a box and send it to the purchaser who made arrangements to buy the Dream Light.

...
I conclude that the case can be disposed of favorably to Amazon on summary judgment because it is not a seller.¹³³

Erie Insurance subsequently appealed to the Fourth Circuit.¹³⁴ The Fourth Circuit affirmed the district court's holding regarding Amazon's status as a "seller" under Maryland law.¹³⁵ Using the dictionary and Uniform Commercial Code definitions of "seller," the Fourth Circuit determined that a seller must hold title to the product for purposes of strict liability under Maryland law.¹³⁶ Thus, as a mere bailee, Amazon was not a "seller" of the headlamp.¹³⁷

Amazon is not the only company embroiled in litigation over its "seller" status under state strict liability laws. In *Inman v. Technicolor USA, Inc.*, the plaintiff asserted a products liability claim against the website eBay and several other defendants for distributing vacuum tubes that contained mercury.¹³⁸ eBay filed a motion to dismiss on the grounds that the plaintiff failed to state a claim for relief.¹³⁹

133. *Id.* (quoting *Erie Ins. Co. v. Amazon*, Civ No. 16-02679-RWT, 2018 WL 3046243 at *1 (D. Md., Jan. 22, 2018)).

134. *Id.* at 139.

135. *Id.* at 144.

136. *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 141 (4th Cir. 2019).

137. *Id.* at 143. Other recent Amazon "seller" cases include *Phila. Indem. Ins. Co. v. Amazon.com, Inc.*, 425 F. Supp. 3d 158, 163 (E.D.N.Y. 2019) (adopting the distribution chain approach; granting summary judgment in favor of Amazon); *Papataros v. Amazon.com, Inc.*, Civ. No. 17-9836, 2019 WL 4011502 (D.N.J., Aug. 26, 2019) (adopting the "control plus" policy approach; granting summary judgment in favor of Amazon); *Garber v. Amazon.com, Inc.*, 380 F. Supp. 3d 766 (N.D. Ill. 2019) (adopting the distribution chain approach; holding parties outside of distribution chain can be liable if they play an integral role in transaction; granting summary judgment for Amazon); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964 (W.D. Wis. 2019); (adopting the distribution chain approach; denying Amazon's motion for summary judgment because Amazon is a "seller"); *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738, 2018 WL 3546197 (D.N.J., July 24, 2018) (adopting the control approach; granting summary judgment in favor of Amazon); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393 (S.D.N.Y. 2018) (adopting the distribution chain approach; granting summary judgment in favor of Amazon); *Stiner v. Amazon.com, Inc.*, 164 N.E.3d 394 (Ohio 2020) (adopting the control approach to "supplier" under the Ohio Products Liability Act; affirming summary judgment in favor of Amazon); *Bolger v. Amazon.com, Inc.*, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020) (adopting a "vertical" distribution chain approach that promotes policies underlying strict products liability law; reversing and remanding summary judgment in favor of Amazon); *Loomis v. Amazon.com L.L.C.*, 277 Cal. Rptr. 3d 769 (Cal. Ct. App. 2021) (adopting a "vertical" distribution chain or stream of commerce approach where any party in the chain may be held liable if they directly benefited financially, were integral to the process, and exercised control over the distribution process; reversing and remanding summary judgment in favor of Amazon).

138. *Inman v. Technicolor USA, Inc.*, No. 11-666, 2011 WL 5829024, at *1 (W.D. Pa. Nov. 18, 2011).

139. *Id.* at *1.

The plaintiff purchased several vacuum tubes over a period of approximately eight years.¹⁴⁰ The plaintiff then learned he had acute mercury poisoning allegedly caused by the vacuum tubes he purchased through eBay.¹⁴¹ Notably, eBay's User Agreement states:

[W]e are not a traditional auctioneer. Instead our sites are venues to allow anyone to offer, sell and buy just about anything . . . in a variety of pricing formats and locations, such as stores, fixed price formats and auction-style formats. We are not involved in the actual transaction between buyers and sellers.¹⁴²

The court recognized that eBay “can only be held strictly liable for harm caused by a defective or unreasonably dangerous product if it was a ‘seller’ of the product under this section. Status as a seller depends on the relationship between the defendant, the defective product, and the overall chain of distribution.”¹⁴³ The plaintiff alleged that eBay was a seller under the four-factor *Musser* test used in Pennsylvania and discussed above.¹⁴⁴ The court held otherwise:

Liability as a ‘seller,’ as defined by Section 402A, must be supported by allegations of a relationship among eBay, the product, and [Plaintiff] sufficient to justify holding eBay liable for [Plaintiff's] injuries. eBay's arguments that it takes no part in any transaction on its website, and the User Agreement included on its website stating the same, illustrate the insufficiency of [Plaintiff's] bare allegation that he ‘purchased and/or obtained’ vacuum tubes from eBay. Plaintiff has not set forth any facts demonstrating that eBay acts as anything more than an online forum where sellers such as Tube Zone may peddle their wares to buyers such as [Plaintiff].

[Plaintiff] has not pled facts alleging that eBay is so connected to the overall chain of distribution as to suggest a relationship with the manufacturer or product ‘beyond their immediate sale’ (citation omitted). Specifically, he has not alleged that eBay, at any time, had anything more than a fleeting connection to the allegedly defective products. He has not alleged that eBay ever had physical possession of the products, that they were moved or stored in a facility owned by eBay, or any other facts to suggest that holding eBay responsible would incentivize safety, that eBay is the only member of the marketing chain available, or that eBay is in a better position than Inman to prevent the circulation of such defective vacuum tubes.¹⁴⁵

140. *Id.*

141. *Id.*

142. *Id.* at *2 (quoting Doc. No. 154 at 3, n. 3).

143. *Id.* at *5 (citing *Frey v. Harley Davidson Motor Co.*, 734 A.2d 1, 17 (Pa. Super. Ct. 1999)).

144. *Inman v. Technicolor USA, Inc.*, No. 11–666, 2011 WL 5829024 at *6 (W.D. Pa. Nov. 18, 2011). See *supra* notes 29–48 and accompanying text.

145. *Id.* at *6.

There was no appellate court decision in *Inman* because eBay was dismissed from the case, likely indicating a settlement was reached between the parties.¹⁴⁶

As evidenced by the foregoing discussion, federal and state courts reach different results on the “seller” status of e-commerce companies based on the statutory or common law incarnation of the applicable state’s strict liability law.¹⁴⁷ Some states, like Texas and Maryland, apply a title or ownership-based approach, where liability will be imposed only on companies that pass title to the purchaser.¹⁴⁸ Other states, like Pennsylvania, although that question remains unresolved, apply a policy-based approach that employs a four-factor analysis to determine who can best preserve safety, prevent the circulation of defective products, and absorb financial losses.¹⁴⁹ Still others, like Arizona, apply a distribution chain-based approach, which examines the e-commerce company’s involvement in placing the product in the stream of commerce.¹⁵⁰ And others, like Tennessee, apply a control-based approach, which scrutinizes the level of control that the e-commerce company exercises over its vendors and the products that they sell.¹⁵¹ Decisions from a sample of other state courts further reveal how these various approaches are applied.¹⁵²

A. *New Jersey*

New Jersey’s strict liability law is embodied in the New Jersey Products Liability Act,¹⁵³ which provides in pertinent part:

A manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it: a. deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner.¹⁵⁴

146. *Id.* at *8.

147. *See supra* notes 29–130 and accompanying text.

148. *See Amazon.com, Inc. v. McMillan*, No. 20-0979, 2021 WL 2605885, 110–11 (Tex. June 25, 2021); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 141 (4th Cir. 2019).

149. *See Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 144–49 (3d Cir.), *vacated*, 936 F.3d 182 (3d Cir. 2019).

150. *See State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App’x 213, at 215–16 (9th Cir. 2020).

151. *See Fox v. Amazon.com, Inc.*, 930 F.3d 415, 422–25 (6th Cir. 2019).

152. *See discussion infra* Parts III.A, III.B.

153. N.J. STAT. ANN. § 2A:58C-1 (West 1987).

154. *Id.* § 2A:58C-2.

This Act defines a “product seller” as:

[A]ny person who, in the course of a business conducted for that purpose: sells; distributes; leases; installs; prepares or assembles a manufacturer’s product according to the manufacturer’s plan, intention, design, specifications or formulations; blends; packages; labels; markets; repairs; maintains or otherwise is involved in placing a product in the line of commerce.¹⁵⁵

In applying New Jersey’s strict product liability law to e-commerce companies such as Amazon, federal courts in that state have relied on the Panel’s decision in *Oberdorf*.¹⁵⁶ However, the relationship between the customer, Amazon, and the third-party vendor in *Papataros v. Amazon.com, Inc.* was significantly different than the situation presented in *Oberdorf*.

In *Papataros*, a customer purchased a scooter through Amazon from a company named “Coolreall.”¹⁵⁷ Amazon’s website specifically stated: “[s]old by Coolreall and Fulfilled by Amazon.”¹⁵⁸ Following her order, the customer received an email from Amazon thanking her for her purchase from “us.”¹⁵⁹

The relationship between Amazon and Coolreall was governed by Amazon’s standard form “Business Solutions Agreement.”¹⁶⁰ This agreement gave Amazon a “royalty-free, non-exclusive, worldwide, perpetual, irrevocable right and license to use, reproduce, perform, display, distribute, adapt, modify, re-format, create derivative works of, and otherwise commercially or non-commercially exploit any and all of the third-party seller’s materials.”¹⁶¹ Amazon requires that all vendors who sell more than \$10,000 of products on Amazon must have liability insurance naming Amazon as an insured.¹⁶² Amazon further requires customers to pay for purchases and to communicate with third-party vendors only through Amazon.¹⁶³

The customer in *Papataros* was injured using the scooter and sued Amazon in New Jersey state court under New Jersey’s strict products liability statute.¹⁶⁴ Amazon moved to dismiss the action on the

155. *Id.* § 2A:58C-8.

156. *See Papataros v. Amazon.com, Inc.*, 2019 WL 4011502, at *1 (D.N.J. Aug. 26, 2019).

157. *Id.* at *1–2.

158. *Id.* This indicates Coolreall participated in “Fulfillment by Amazon.”

159. *Id.* at *1.

160. *Id.* at *2.

161. *Id.* (internal quotations omitted).

162. *Papataros v. Amazon.com, Inc.*, 2019 WL 4011502, at *2 (D.N.J. Aug. 26, 2019).

163. *Id.*

164. *Id.* at *4. Then, this case was removed to federal court by Amazon. *Id.*

grounds that it was not a “seller” of the scooter under the statute’s language.¹⁶⁵

Analyzing Amazon’s status under the statute, the district court was influenced by two overarching considerations: control and public policy.¹⁶⁶ First, the court distinguished New Jersey and Pennsylvania law by observing that Pennsylvania folds the control aspect into its *Musser* test in determining whether an entity is a seller.¹⁶⁷ By contrast, New Jersey “will analyze control as a standalone factor.”¹⁶⁸ According to the court, it is necessary under New Jersey law that the party exercise control over the product, and “[t]he focus is on a party’s control of the product itself—that is, the ability to exercise dominance over, for example, the manner in which the product is sold.”¹⁶⁹ Further, the court stated “[i]ndicia of such control include the extent to which the defendant held title, took physical possession, or altered the product, and the extent to which it dictated the manner of sale.”¹⁷⁰

In applying this control requirement, the *Papataros* court observed that Amazon had physical possession of the scooter and shipped it to the customer in an Amazon box.¹⁷¹ Further, Amazon exerted control over the actual sale of the scooter as illustrated by its confirmation of the sale with a “thank you for shopping with us.”¹⁷²

In consideration of public policy, New Jersey applies the *Musser* factors, with particular importance given to “the party’s ability to distribute the cost of accidents through pricing, and . . . that party’s ability to influence the manufacturer to produce a safer product.”¹⁷³ As to the first of those two factors, the court observed that “Amazon collects a fee in connection with each product sold on the site and possesses considerable market clout. If Amazon wished to adjust its business model to spread costs of defective products among consumers, it could do so.”¹⁷⁴ The court made particular note of the fact that “Amazon stands between the consumer and a manufacturer/seller who may or may not be available to provide redress.”¹⁷⁵

165. *Id.* at *1.

166. *Id.* at *14.

167. *Id.*

168. *Papataros v. Amazon.com, Inc.*, 2019 WL 4011502, at *14 (D.N.J. Aug. 26, 2019).

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

170. *Id.*

171. *Id.* at *14–15.

172. *Id.* (emphasis added).

173. *Id.* at *15.

174. *Papataros v. Amazon.com, Inc.*, 2019 WL 4011502, at *16. (D.N.J. Aug. 26, 2019) (citation omitted).

175. *Id.*

Applying the second factor, the court held that Amazon is in the best position to influence the safety of these products because Amazon is the only party that can distribute costs up the marketing chain:

One such safety incentive is obviously monetary; a manufacturer liable to bear the costs of accidents will take precautions to avoid them, as noted under the first factor. But where, as here, the business model is set up to insulate the consumer from the ultimate manufacturer, Amazon is really the only party situated to distribute such costs up the marketing chain to those who should bear them. As noted in *Oberdorf*, Amazon restricts direct communication between customers and vendors, but it does collect feedback from customers, so it is in a position to receive reports of defective products. Moreover, through its relationships with its vendors, Amazon could, if it wished, more directly enforce safety standards and influence them to produce safer products.¹⁷⁶

The court held that Amazon is a seller under the New Jersey Product Liability Act because of its “control of the product, [its] relationship with third-party sellers, and the structure of the Amazon marketplace.”¹⁷⁷

B. California

In California:

[T]he concept of strict products liability was created and shaped judicially. In its evolution, the doctrinal encumbrances of contract and warranty, and the traditional elements of negligence, were stripped from the remedy, and a new tort emerged which extended liability for defective product design and manufacture beyond negligence but short of absolute liability.¹⁷⁸

The public policy underlying the rule “reflected judicial concern 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.’”¹⁷⁹

In *Bolger v. Amazon.com, Inc.*, the plaintiff purchased a laptop battery on Amazon.¹⁸⁰ The third-party vendor was a corporation named “E-life.”¹⁸¹ The battery was among the products fulfilled by Amazon, so Amazon had control over the battery and shipped it to the purchaser.¹⁸² The battery exploded several months after the plaintiff re-

176. *Id.* at *16–17.

177. *Id.* at *17.

178. *Bolger v. Amazon.com, Inc.*, 267 Cal. Rptr. 3d 601, 612 (Cal. Ct. App. 2020) (quoting *Daly v. Gen. Motors*, 575 P.2d 1162, 1166 (Cal. 1978)).

179. *Id.* (quoting *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963)).

180. *Id.* at 604.

181. *Id.*

182. *See id.*

ceived it, causing significant burns.¹⁸³ The California Appeals Court, in holding that Amazon may be liable under a strict product liability theory, recognized several policy considerations:

Amazon is a direct link in the chain of distribution, acting as a powerful intermediary between the third-party seller and the consumer. Amazon is the only member of the enterprise reasonably available to an injured consumer in some cases, it plays a substantial part in ensuring the products listed on its website are safe, it can and does exert pressure on upstream distributors . . . to enhance safety, and it has the ability to adjust the cost of liability between itself and its third-party sellers. Under established principles of strict liability, Amazon should be held liable if a product sold through its website turns out to be defective.¹⁸⁴

California would thus appear to apply a hybrid distribution-chain approach like Arizona and control-based approach like Tennessee.

IV. AMAZON'S NEW POLICY TO COMPENSATE CONSUMERS

On August 9, 2021, Amazon announced a new policy under which it will compensate consumers for property damage and personal injuries caused by defective products sold on its website.¹⁸⁵ The new policy, which went into effect on September 1, 2021, applies both to products packaged and shipped by Amazon under its “Fulfilled by Amazon” program as well as to products shipped directly to purchasers by third-party vendors.¹⁸⁶ Amazon’s announcement came less than a month after the federal Consumer Product Safety Commission (CPSC) filed an administrative complaint against Amazon compelling the company to play a more active role in the recall of hundreds of thousands of defective products deemed by the CPSC to pose a serious risk of injury or death to consumers, and requiring Amazon to provide full refunds to its customers.¹⁸⁷

183. *Id.*

184. *Bolger v. Amazon.com, Inc.* 267 Cal. Rptr. 3d, 601, 605 (Cal. Ct. App. 2020).

185. *A-to-z Guarantee to Cover Property Damage and Personal Injury*, AMAZON (Aug. 9, 2021), <https://www.aboutamazon.com/news/how-amazon-works/new-a-to-z-guarantee-better-protects-amazon-customers-and-sellers>; *A-to-z Claims Process for Property Damage and Personal Injury*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GS3GYAU8JGDBGWH2> (last visited Aug. 29, 2021); see Jon Brodtkin, *Amazon's Plan to Avoid Lawsuits: Pay Customers \$1,000 When Products Injure People*, ARS TECHNICA (Aug. 10, 2021, 2:44 PM), <https://arstechnica.com/tech-policy/2021/08/amazons-plan-to-avoid-lawsuits-pay-customers-1000-when-products-injure-people/>.

186. *A-to-z Guarantee*, *supra* note 185.

187. *Id.*; *A-to-z Claims*, *supra* note 185; *CPSC Sues Amazon to Force Recall of Hazardous Products Sold on Amazon.com*, CISION (July 14, 2021, 5:38 PM), <https://www.prnewswire.com/news-releases/cpsc-sues-amazon-to-force-recall-of-hazardous-products-sold-on-amazoncom-301334206.html>; Compl., No. 21 (CPSC July 14, 2021), <https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/001-In-re-Amazon-com-Inc.pdf?TvlLxHy1UMfiz3BpfXaKjQy1ibQbYAiU>.

Under Amazon's new policy, it will pay "valid" claims for property damage and personal injury under \$1,000 directly to consumers regardless of who shipped the defective product.¹⁸⁸ Amazon reserves the right "to determine the amount, if any, to offer [a consumer] to resolve [their] claim" and may reject claims that Amazon deems "unsubstantiated" or "frivolous."¹⁸⁹ Amazon states that it also "may step in to pay claims for higher amounts if the seller is unresponsive or rejects a claim that we believe to be valid."¹⁹⁰ But as with claims for lesser damages, Amazon's policy is short on details, having first been announced in a blog post.¹⁹¹

Amazon also announced the creation of the "Amazon Insurance Accelerator" to give "qualifying sellers" the option to purchase product liability insurance through a network of insurance providers.¹⁹² According to an email sent to sellers, the new policy requires third-party sellers to obtain products liability insurance "once they hit \$10,000 in sales in a month."¹⁹³ Amazon previously required sellers to purchase such insurance only after three consecutive months of \$10,000 sales.¹⁹⁴

CONCLUSION

Amazon's commercial success is undeniable. So, too, is its success in largely warding off lawsuits by its customers who seek to hold it strictly liable for injuries that they sustained from allegedly defective products sold on its website. But at what cost to those injured consumers and society at large?

Some state courts' interpretations of their state's strict liability statutes seem to contort and outright defy the plain meaning of those laws to shield e-commerce companies from liability. Texas is one example.¹⁹⁵ Can it really be credibly said that Amazon plays no role in "dis-

Among the products are 24,000 faulty carbon monoxide detectors that fail to detect and sound an alarm for elevated levels of carbon monoxide, children's sleepwear made of material that violate flammable safety standards, and 400,000 hair dryers that lack safety devices to protect consumers from shock and electrocution. *CPSC Sues Amazon*, *supra* note 187.

188. *A-to-z Guarantee*, *supra* note 185. Amazon's announcement states that more than 80% of claims against Amazon and its third-party vendors are under \$1,000. *Id.*

189. *A-to-z Claims*, *supra* note 185.

190. *Id.*

191. *See id.*

192. *Id.*

193. Jay Greene, *Amazon Agrees to Pay Shoppers Up to \$1,000 for Defective Goods After Facing High-Profile Liability Cases*, WASH. POST (Aug. 10, 2021, 5:54 PM), <https://www.washingtonpost.com/technology/2021/08/10/amazon-defective-products-claims/>.

194. *Id.*

195. *See supra* notes 79–92 and accompanying text.

tributing or otherwise placing” a product sold on its website in the stream of commerce, as the Texas Supreme Court recently ruled in *McMillan*?¹⁹⁶ The Texas State Legislature, of course, is free to amend its statute to correct any perceived misreading of it or to more clearly expand the rights of consumers, but can there be any real hope of change in the polarized and politically charged environment in which we currently live?

So what recourse is available? Compelling third-party vendors to agree in their contracts with Amazon to submit to the jurisdiction of the U.S. courts would not be worth the paper on which that agreement is written. As in several of the cases cited above, the vendor simply disappears. There is no reason to believe that the vendors will honor any such contract term and show up to defend themselves in court.

Amazon’s new policy for compensating victims of property damage or personal injury is short on details and long on conditions. Amazon alone decides whether a claim is “valid,” while also emphasizing that its new policy goes “far beyond our legal obligations” and continues to deny *any* legal liability for damage caused by defective products sold through its website.¹⁹⁷ While customers retain the right to reject any settlement offer from Amazon and pursue their claims in court,¹⁹⁸ think of what negotiations would look like in a state which has adopted the “title” approach to strict products liability for e-commerce transactions. The consumer would have no leverage or bargaining power whatsoever.

Perhaps a more practical approach would be for Amazon to compel its vendors to purchase liability insurance that protects not only Amazon, as was the situation in *Papataros*, but also serves as a fund to compensate injured consumers. This approach seems to be the rationale behind Amazon’s newly created “Amazon Insurance Accelerator,” but this policy has too many loopholes and is too new to provide any assurance of protection. Even with its revised requirement that vendors obtain products liability insurance when they hit \$10,000 in monthly sales, too many Amazon sellers fall far below that threshold:

Seller competition on Amazon is fierce. Despite the large number of sellers on Amazon, a big portion of its total sales is generated by only a tiny fraction of its sellers. Fewer than one in ten active Ama-

196. See *supra* notes 60–92 and accompanying text.

197. *A-to-z Guarantee*, *supra* note 185.

198. *Id.*

zon sellers were able to generate over \$100,000 in annual sales, and just one percent of them hit the \$1 million sales mark.¹⁹⁹

Amazon could purchase the coverage itself and add the premium to the fees that it deducts from the sales transaction before remitting the balance to the vendor. But any such coverage would still require the consumer to prove all the elements of a substantive products liability claim. What would those court proceedings look like if the manufacturer and vendor are not present to participate? The insurer certainly has no incentive to defend the vendor and part with its money. Amazon, which has taken aggressive, and largely successful, steps to extract itself from similar lawsuits filed directly against it, likely would not want to become embroiled as a proxy in any lawsuit involving its vendor. Compulsory mediation or arbitration may be more efficient alternatives, but they still present the same troublesome issues of who, if anyone, will defend the claim?

Another alternative, but also not a practical one, would be for Amazon to require its vendors to deposit funds in a U.S. bank to cover claims for injuries caused by their products. But this raises the same questions as the insurance coverage scenario above: who defends those claims, and who decides the merits of those claims when the vendor refuses to participate? And would the manufacturer of an inexpensive dog leash really deposit millions of dollars in advance of doing business in the United States? These are all open questions.

What is not an open question is that consumers injured by an allegedly defective product have no recourse against Amazon or any other e-commerce company in Maryland, while consumers just across the border in Pennsylvania appear to have substantially broader rights. This contrast in approaches between two contiguous states demonstrates the need for uniformity in this area of law.

199. Maryam Moshin, *10 Amazon Statistics You Need to Know in 2021*, OBERLO (Mar. 9, 2021), <https://www.oberlo.com/blog/amazon-statistics>. Amazon has approximately 9.7 million registered vendors, only approximately 2 million of which are actively selling on its website. *Id.*

