Amazon Marketplace and Third-Party Sellers: The Battle over Strict Product Liability

“Amazon is fully capable, in its sole discretion, of removing unsafe products from its website. Imposing strict liability upon Amazon would be an incentive to do so.”

I. INTRODUCTION

Strict product liability is the legal theory that holds distributors, manufacturers, or sellers liable for any injury to a customer resulting from a defective product, regardless of whether the consumer is at fault. Since its inception in 1944, state legislatures across the United States have overwhelmingly adopted this tort. Following the rapid growth of e-commerce throughout the last decade, product liability now applies to more than just brick-and-mortar retailers.


4. See Press Release, U.S. Census Bureau News, Quarterly Retail E-Commerce Sales: 2nd Quarter 2020 (Aug. 18, 2020), https://www2.census.gov/retail/releases/historical/ecomm/20q2.pdf [https://perma.cc/Y89A-TQG2] (showing e-commerce growth over time); Ecommerce Product Liability 101: Protecting Yourself & Your Business, PIXEL UNION (Sept. 23, 2016), https://www.pixelunion.net/blog/ecommerce-product-liability-101-protecting-yourself/ [https://perma.cc/U7ZV-AGR]F] (describing product liability tips for e-commerce) [hereinafter Ecommerce Product Liability 101]. Recommendations for internet vendors include providing detailed descriptions of each product and including a terms and conditions page, so consumers understand how product liability is handled. See Ecommerce Product Liability 101, supra. It is important to note that a clause placing limitations on liability does not mean that the e-commerce company will be completely absolved from liability if a consumer is injured by a defective product because the clause may not always be enforceable. See id.
Online businesses face a variety of product liability issues because consumers are able to purchase items with the click of a button. Additionally, allowing internet retail companies to avoid strict product liability for products sold by third-party sellers poses a unique risk to e-commerce consumers. As the largest online retailer in the United States, Amazon is no stranger to these issues.

Over the past twenty years, Amazon has grown to dominate e-commerce in the United States. Many consumers, however, may not be aware of the difference between Amazon Retail and Amazon Marketplace. Amazon Marketplace is Amazon’s platform that allows third parties to sell their goods to consumers without selling the brand to Amazon. With sales of $175 billion in 2018, Amazon Marketplace makes up about two-thirds of Amazon’s total profit and is considered the largest online retailer in the country. EBay trails in second place.

See Ecommerce Product Liability 101, supra note 4 (detailing potential liability risk for online retailers).

One of the greatest differences between traditional brick-and-mortar retail and online shopping is “the degree to which customers can inspect and interact with products.” See id. Online shoppers cannot physically handle the product and, consequently, they rely on the retailer to provide information they could otherwise gather on their own. See id.

See Bullard, supra note 3, at 183-84 (stating e-commerce poses challenge for strict product liability tort).


See Emily Dayton, Amazon Statistics You Should Know: Opportunities to Make the Most of America’s Top Online Marketplace, BIGCOMMERCE BLOG, https://www.bigcommerce.com/blog/amazon-statistics/#10-fascinating-amazon-statistics-sellers-need-to-know-in-2019 [https://perma.cc/N2A4-YCBY] (demonstrating Amazon’s dominance in e-commerce). More than 197 million people visit Amazon.com each month, and Amazon sells over twelve million products in a variety of different categories, including computers, apparel, and food and beverages. Id.; see Loeb, supra note 7 (describing Amazon’s various products across industries). An Amazon Prime membership allows customers who pay a yearly fee to have access to free, two-day shipping on Prime products. See Dayton, supra (listing Amazon Prime membership benefits). Ninety-five million people in the United States had Amazon Prime memberships by the end of 2018, demonstrating a commitment to shopping on the Amazon platform. See id. Each year, Amazon Prime members spend an average of $1,400 on Amazon. Id.

See Juozas Kaziukënës, Amazon Marketplace Is the Largest Online Retailer, MARKETPLACE PULSE (Dec. 3, 2018), https://www.marketplacepulse.com/articles/amazon-marketplace-is-the-largest-online-retailer [https://perma.cc/5XXK-5TPJ] (discussing Amazon Marketplace’s third-party model). Unlike other marketplaces, Amazon does not openly advertise Amazon Marketplace, its third-party platform retailer. Compare id. (noting Amazon does not ordinarily allude to separate Amazon Marketplace), with infra note 50 (describing presentation of eBay to consumers). Amazon Marketplace is coherent with the Amazon platform, and it is often difficult for consumers to tell whether an item is being sold by a third-party retailer or by Amazon itself. See Kaziukënës, supra. Because of this, “sales volume goes through [the Amazon Marketplace] almost invisibly” as shoppers do not notice the difference between a transaction with a third party and Amazon itself. Id.

See id. (explaining Amazon Marketplace and comparing it to competitors); see also Bullard, supra note 3, at 193 (describing distribution process for third-party products). Amazon has such a large variety of products on its website by allowing third-party vendors to access its customer base. See Bullard, supra note 3, at 193. Amazon lets third parties choose between three fulfillment methods, each of which designate different responsibilities to Amazon and the third party in fulfilling consumers’ purchase orders. See id.; see also infra note 41 and accompanying text (explaining each fulfillment method along with advantages and disadvantages).

See Kaziukënës, supra note 9 (outlining size of Amazon Marketplace in numbers); see also Lina M. Khan, The Separation of Platforms and Commerce, 119 COLUM. L. REV. 973, 985-86 (2019) (stating Amazon
behind Amazon Marketplace for third-party platforms and is five times smaller in sales.\textsuperscript{12} Consumers and other retailers often overlook Amazon’s domination of third-party sales, as they are not always aware of the difference between Amazon Marketplace and Amazon Retail.\textsuperscript{13}

Amazon recently faced a plethora of lawsuits regarding Amazon Marketplace and strict product liability.\textsuperscript{14} When consumers buy a product from a third party on Amazon Marketplace and are subsequently harmed, they may file a strict product liability suit against Amazon.\textsuperscript{15} In these cases, Amazon has argued that it is not the technical “seller” of products on Amazon Marketplace for strict liability purposes and instead asked customers to seek recourse from the third party.\textsuperscript{16} Contacting third-party sellers has been difficult in situations where the injured consumer cannot locate the third-party seller or the seller no longer exists.\textsuperscript{17} Several circuit courts recently decided this liability issue, resulting in conflicting decisions regarding whether courts should consider Amazon to be the “seller” of third-party products.\textsuperscript{18}

captures “52.4% of all U.S. online retail spending”). In addition, 54% of all internet product searches begin on Amazon’s platform. Khan, supra, at 986.

\textsuperscript{12} See Kaziukėnas, supra note 9 (comparing eBay to Amazon Marketplace). Amazon’s revenue and control of the market share in comparison to eBay demonstrates the extent of Amazon’s e-commerce superiority. See id.

\textsuperscript{13} See id. (indicating Amazon Marketplace not common knowledge); see also Khan, supra note 11, at 988 (observing Amazon’s exploitation of Amazon Marketplace operator and merchant positions simultaneously). Because Amazon itself acts as a merchant of its own Amazon-brand goods, those products have two prominent advantages over products sold on Amazon Marketplace. See Khan, supra note 11, at 988. First, Amazon strategically implements policies that benefit its own products by giving Amazon “greater control over brands and pricing.” See id. Second, Amazon deliberately favors itself over other retail competitors on Amazon Marketplace by using an algorithm that recommends Amazon’s own products first. See id. Because about 82% of Amazon sales are made on the top listing for a product, Amazon effectively places its own products in a more favorable position. See id.

\textsuperscript{14} See, e.g., Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 137 (4th Cir. 2019) (summarizing issue in case against Amazon for defective product sale); Fox v. Amazon.com, Inc., 930 F.3d 415, 418 (6th Cir. 2019) (stating complaint against Amazon for defective product sale); see also Kate Cox, Court Rules Amazon Can Be Held Responsible for Defective Third-Party Goods, ARSTECHNICA (July 8, 2019, 2:55 PM), https://arstechnica.com/tech-policy/2019/07/amazon-on-the-hook-for-third-party-goods-that-cause-injury-federal-court-says/ [https://perma.cc/HN3K-9ZZH] (explaining Amazon’s recent lawsuits regarding marketplace liability). Amazon argued that consumers can trace each third-party product sold on Amazon Marketplace back to the product’s specific vendor and that Amazon is not the true “seller” of Amazon Marketplace products. See Erie Ins. Co., 925 F.3d at 137, 142. The Third Circuit, however, stated that Amazon enables third parties to “conceal themselves from the customer” by only allowing communication between customers and the third parties to occur through the Amazon platform. See Oberdorf v. Amazon.com Inc., 930 F.3d 136, 145 (3d Cir. 2019), vacated and reh’g granted by 936 F.3d 182 (3d Cir. 2019).

\textsuperscript{15} See Cox, supra note 14 (describing product liability suits against Amazon).

\textsuperscript{16} See Erie Ins. Co., 925 F.3d at 137 (explaining Amazon motion for summary judgment because not technical seller); Cox, supra note 14 (stating Amazon’s argument against liability for third-party products).

\textsuperscript{17} See Cox, supra note 14 (noting challenges of third-party purchases).

\textsuperscript{18} See, e.g., Oberdorf, 930 F.3d at 153 (holding Amazon technical seller under strict liability theory); Milo & Gabby LLC v. Amazon.com, Inc., 693 F. App’x 879, 885-86 (Fed. Cir. 2017) (determining Amazon not seller under ordinary meaning of term); see also Cox, supra note 14 (outlining recent court decisions regarding Amazon liability).
This Note examines the risks and potential ramifications of not holding Amazon liable for defects in third-party products sold through Amazon Marketplace. Section II.A discusses the history and evolution of consumer protection jurisprudence in the United States. Section II.B provides an overview of the recent decisions regarding Amazon Marketplace liability, specifically Oberdorf v. Amazon.com Inc., and the precedent these decisions set. Section II.C evaluates other online marketplaces and compares their product liability exposure to Amazon’s. Section II.D assesses Amazon’s defense, the Communications Decency Act (CDA), and in particular, section 230 (CDA 230) and its application to third-party products. Part IV argues that Amazon should be considered the “seller” of third-party products on Amazon Marketplace to protect consumers and incentivize safe practices.

II. HISTORY

A. Consumer Protection: Strict Liability

1. Evolution of Strict Product Liability in the United States

Strict product liability in the United States began to develop in the early 1900s. Before this theory existed, courts required direct privity between consumers and the manufacturer to recover for any injury caused by a defective product. As the United States industrialized and the production of goods evolved, so did tort law surrounding new products for sale, and courts became increasingly concerned about public safety. In 1944, Justice Roger Traynor established the concept of strict liability in his concurring opinion to a California 19. See Cox, supra note 14 (indicating lack of recourse for Amazon Marketplace consumers).

20. See infra Section II.A (articulating consumer protection legal history); see also Ballard, supra note 3, at 186-87 (providing background regarding consumer protection).

21. See infra Section II.B (offering recent cases involving Amazon Marketplace); see also Oberdorf v. Amazon.com Inc., 930 F.3d 136, 153 (3d Cir. 2019), vacated and reh’g granted by 936 F.3d 182 (3d Cir. 2019). The court held that Amazon was the “seller” of products in its third-party Amazon Marketplace under Pennsylvania tort law for strict product liability purposes. See Oberdorf, 930 F.3d at 153.

22. See infra Section II.C (highlighting other online marketplaces’ liability exposure); see also David Berke, Article, Products Liability in the Sharing Economy, 33 YALE J. ON REGUL. 603, 622-23 (2016) (discussing products liability and eBay).


24. See infra Part IV (opining Amazon liable third-party “seller”); see also Cox, supra note 14 (discussing results of recent decisions regarding Amazon strict product liability).

25. See Ballard, supra note 3, at 185-86 (describing development of strict product liability).

26. See id. at 184 (introducing history of products liability law); see also MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916) (creating customer recourse against manufacturer). The court in MacPherson effectively removed the privity requirement and allowed injured consumers to seek recourse against manufacturers. See MacPherson, 111 N.E. at 1053.

27. See Francis J. O’Brien, The History of Products Liability, 62 TUL. L. REV. 313, 318 (1988) (stressing increase in importance of public safety to courts during relevant time period); see also Ballard, supra note 3, at 185 (noting exceptions to privity rule after innovative industries developed).
Supreme Court case. Justice Traynor continued to advocate for strict product liability in later cases, grounding his conclusions in public policy, social responsibility, and safety concerns for consumers.\textsuperscript{29} Greenman v. Yuba Power Products, Inc.\textsuperscript{30} was another formative case for the strict product liability doctrine, as the Supreme Court of California adopted Justice Traynor’s theory of strict product liability and held the manufacturer strictly liable.\textsuperscript{31} The Restatement (Second) of Torts (Restatement) closely tracks Justice Traynor’s strict liability concept in its own strict product liability doctrine, which exposes any party in the chain of production to potential liability.\textsuperscript{32}

2. Adoption of Strict Product Liability

According to the Restatement, those involved in selling or distributing products are subject to liability for any harm caused to the consumer.\textsuperscript{33} While there is no federal statute for strict product liability, every state has adopted some version of product-seller negligence laws for conduct occurring in the distribution
chain.\textsuperscript{34} Although many states have embraced some version of the Restatement, its release did not come without criticism.\textsuperscript{35} Opposing scholars have argued that strict liability “place[s] burdensome costs on manufacturers, prevent[s] vital research and development; it deter[s] businesses from marketing worthwhile products; and courts should defer to the legislature and regulatory agencies instead.”\textsuperscript{36} Nevertheless, most states across the country have adopted the doctrine.\textsuperscript{37} Consequently, any party selling goods to consumers in a state that has adopted the Restatement view is subject to potential liability for any injury to the consumer resulting from defective goods.\textsuperscript{38}

\textbf{B. Amazon as a Seller: The Legal Landscape}

Since its founding in the mid-1990s, Amazon has grown to dominate the online retail market and has capitalized on the increasing popularity of online shopping.\textsuperscript{39} Amazon Marketplace—the focus of the recent debate regarding strict product liability and e-commerce—allows third parties to sell products by choosing between three different methods of product fulfillment: Fulfillment by Amazon (FBA), Fulfillment by Merchant (FBM), and Seller Fulfilled Prime (SFP).\textsuperscript{40} Each of these methods outline varying degrees of responsibility between Amazon and the third-party seller.\textsuperscript{41} Consistent throughout all methods,

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\item \textsuperscript{35} See DuGan, supra note 31, at 202-03, 205 (noting criticism of Restatement’s adoption of strict liability).
\item \textsuperscript{36} Id. at 206 (describing negative response to Restatement’s strict product liability doctrine).
\item \textsuperscript{39} See Bullard, supra note 3, at 182 (describing Amazon’s dominance of internet commerce); Khan, supra note 11, at 987 (indicating Amazon Marketplace revenue exceeds overall online sales); Shehan, supra note 38, at 1216 (noting Amazon rising retail giant).
\item \textsuperscript{40} See John E. Lincoln, Fulfillment by Amazon vs. Fulfillment by Merchant vs. Seller-Fulfilled Prime (The Ultimate Guide), IGNITE VISIBILITY BLOG (July 25, 2017), https://ignitevisibility.com/fulfillment-amazon-vs-fulfillment-merchant-vs-seller-fulfilled-prime-ultimate-guide/ [https://perma.cc/A4PZ-KKTP] (introducing each fulfillment method). Amazon also requires that all third-party vendors sign a “Services Business Solutions Agreement” (BSA). See Shehan, supra note 38, at 1218-19 (explaining BSA agreement for Amazon’s third-party vendors). Among other requirements, the BSA asks third parties “to indemnify Amazon for any claims, losses, or damages arising from or related to the sale of third-party products.” Id. at 1218.
\item \textsuperscript{41} See Oberdorf v. Amazon.com Inc., 930 F.3d 136, 141 (3d Cir. 2019) (outlining Amazon’s duties in third-party relationship), vacated and reh’g granted by 936 F.3d 182 (3d Cir. 2019); see also Lincoln, supra note
\end{itemize}
however, is that Amazon exercises control over product pricing, collection of payment, and communications with customers.\textsuperscript{42} Recently, several circuit courts decided cases involving Amazon Marketplace products and strict product liability with varying results.\textsuperscript{43} In each of these cases, a consumer purchased a product from Amazon Marketplace and faced significant injury due to a defect in the product.\textsuperscript{44} While both the Fourth and Sixth Circuits, as well as the Federal Circuit, found in favor of Amazon and held that the company was not strictly liable for the injuries, the Seventh Circuit, in a case heard in circuit court, found in favor of Amazon and held that the company was not strictly liable for the injuries.

40 (describing Amazon’s different fulfillment methods). “Amazon retains the right in its sole discretion to determine the content, appearance, design, functionality, and all other aspects of the Services, including by redesigning, modifying, removing, or restricting access to any of them.” Oberdorf, 930 F.3d at 141. FBA is the most hands-on method of fulfillment, as Amazon picks, packages, and ships the third party’s product. See Oberdorf, 930 F.3d at 141 (describing hands-on nature of FBA); Shehan, supra note 38, at 1219–20 (highlighting Amazon’s FBA program); Lincoln, supra note 40 (comparing Amazon’s fulfillment methods). Businesses that use FBA are able to advertise their products to Amazon Prime customers, providing them with the benefit of free two-day shipping. See Lincoln, supra note 40. In contrast, FBM holds the third-party business responsible for shipping and handling the product, as well as customer service. See id. Businesses who use FBM do not have access to the two-day Prime shipping included with Amazon Prime memberships, meaning Amazon Prime members may be less inclined to purchase these items. See Bullard, supra note 3, at 195–96. The last fulfillment method is SFP, which is a combination of the two previous fulfillment methods. See Lincoln, supra note 40. Under SFP, the third-party business has access to Amazon Prime shipping, but must handle the shipping, handling, and customer service itself. See id. To ensure that Amazon upholds its promise of two-day shipping to Prime customers, businesses that use SFP must ensure that their products arrive on time at least 99% of the time. See id. (listing strict requirements for SFP vendors).

42. See Oberdorf, 930 F.3d at 149 (stipulating Amazon’s role with third-party products); see also Bullard, supra note 3, at 193-96 (detailing Amazon’s three different fulfillment methods). The different fulfillment methods determine how a third party’s product will reach the customer. See Bullard, supra note 3, at 193. The FBA method is attractive to third parties because Amazon handles the packaging, shipping, and customer service responsibilities, among other logistical tasks; this method, however, is costlier due to Amazon’s substantial fulfillment fees. See id. at 193-94. A third party may select the FBM method instead, which is less costly but more work for the vendor because it must store and package the inventory and handle shipping and customer service inquiries. See id. at 195. Lastly, the SFP method appeals to vendors who want to control shipping and processing the product while still having access to Amazon Prime’s customer base. See id. at 196. As previously mentioned, this method has a stricter qualification process whereby sellers must demonstrate timely shipping capabilities. See id. In many of the recent cases involving Amazon and its product liability, third-party vendors used the FBA method. See Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17–2738 (LHG), 2018 U.S. Dist. LEXIS 123081, at *8 (D.N.J. July 24, 2018) (noting seller used FBA method); Fox v. Amazon.com, Inc., 930 F.3d 415, 419 (6th Cir. 2019) (describing shipment method seller used); see also Bullard, supra note 3, at 196 (introducing cases). While Amazon allows third parties to determine the list price of their product, Amazon mandates that vendors do not charge more on Amazon’s platform than they do on any other channel. See Oberdorf, 930 F.3d at 141.

43. See, e.g., Oberdorf, 930 F.3d at 153 (holding Amazon seller under strict liability theory); Milo & Gabby LLC v. Amazon.com, Inc., 693 F. App’x 879, 885-86 (Fed. Cir. 2017) (determining Amazon not seller under ordinary meaning of term); see also Cox, supra note 14 (outlining recent court decisions regarding Amazon liability).

44. See, e.g., Oberdorf, 930 F.3d at 140 (describing permanent injury plaintiff incurred using product); Fox v. Amazon.com, Inc., 930 F.3d 415, 421 (6th Cir. 2019) (providing example of strict liability case heard in circuit court); see also Cox, supra note 14 (highlighting permanent damage malfunctioning product caused). In Fox, the plaintiff’s family home was destroyed after a hoverboard he purchased on Amazon Marketplace caught fire due to a defect. See Fox, 926 F.3d at 421 (describing fire caused by Amazon hoverboard and damage to plaintiff); see also Bullard, supra note 3, at 203-04 (explaining facts and implications of Fox case). Another example of a consumer injured by an Amazon Marketplace product occurred in Oberdorf, where the plaintiff was struck in the eye by a retractable dog leash and experienced irreversible damage to her eyesight. See Oberdorf, 930 F.3d at 140 (describing permanent blindness to plaintiff resulting from Amazon Marketplace dog leash).
as a seller of third-party products, the Third Circuit took a different perspective in *Oberdorf* and held that Amazon should face liability for a defective third-party product. 

Nevertheless, a majority of the active judges on the Third Circuit later voted to rehear the case en banc. These recent cases represent the uncertainty surrounding Amazon Marketplace’s product liability and whether it is subject to strict product liability, as well as how variations in state product liability laws can affect a consumer’s legal recourse in these transactions.

C. Other Third-Party Online Retailers and Product Liability Exposure

The essential question in product liability suits involving Amazon and third-party sellers is whether Amazon is “merely an online marketplace,” playing a role akin to that of an auctioneer by simply facilitating a transaction between buyer and seller, or whether Amazon’s involvement in the selling process rises to the level of a “seller,” subjecting the company to liability. To answer this question, it is helpful to compare Amazon’s model to other third-party online retailers. EBay, for instance, is an online retailer with a focus on consumer-to-consumer sales and online auctions. EBay differs from the Amazon Marketplace platform in that it asks customers to place bids on items to purchase them, similar to an auctioneer. EBay ranks second out of the largest online

45. See *Oberdorf*, 930 F.3d at 153 (deciding against Amazon and in favor of plaintiff); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 144 (4th Cir. 2019) (holding Amazon not strictly liable); *Fox*, 930 F.3d at 429 (upholding dismissal of plaintiff’s claim against Amazon); *Milo & Gabby LLC*, 693 F. App’x at 885 (concluding Amazon not seller of third-party products); see also *Cox*, supra note 14 (explaining current legal landscape for Amazon). Most of these cases involved the FBA method of product distribution, with the exception of *Oberdorf*, which used the FBM method. See *Bullard*, supra note 3, at 196-97 (citing *Oberdorf* exception by using FBM method).

46. See *Oberdorf* v. *Amazon.com Inc.*, 936 F.3d at 182, 182-83 (3d Cir. 2019) (mem.) (granting petition for rehearing en banc).

47. See *Bullard*, supra note 3, at 206 (elucidating absence of case law on Amazon’s liability for defective products); *Cox*, supra note 14 (recognizing differences in state law create variations in recent Amazon circuit court cases).

48. See *Oberdorf* v. *Amazon.com Inc.*, 930 F.3d 136, 143 (3d Cir. 2019) (presenting issue of whether Amazon seller, *vacated and reh’g granted* by 936 F.3d 182 (3d Cir. 2019); *Bullard*, supra note 3, at 207 (explaining Amazon’s potential liability and comparing to auctioneer).


50. See *What Is eBay?*, EBay, https://www.ebay.com.sg/pages/help/account/questions/about-ebay.html [https://perma.cc/5LDH-QK2Z] (explaining online auction process). EBay advertises itself as an online marketplace and “a place for buyers and sellers to come together,” transparently indicating that eBay is not the seller of the products; rather, the users of eBay’s website are selling the products themselves. See id.

marketplaces by sales, although it trails significantly behind Amazon. While eBay and Amazon both list third-party seller information on a product’s webpage, the typeface is significantly smaller on Amazon’s platform and “buried in an information-dense area of the user-interface.” Because of its auctioneer model, eBay customers are inevitably aware that they are bidding on an item sold by a third party, while Amazon customers may not notice the small print that indicates the product comes from another company because the webpage and listing looks almost identical to when Amazon itself sells a product.

Amazon Marketplace is also distinguishable from Craigslist—an online service that allows consumers to post classified ads in a manner similar to a newspaper. While Craigslist simply seeks to connect the seller and buyer on a neutral platform, Amazon’s interests in its consumer transactions run much deeper. These interests include Amazon Marketplace’s different fulfillment methods and the company’s varied involvement in the shipping and handling process for third-party sales.

Further, several cases exist in which neither Amazon nor the injured customer are able to locate the third-party vendor or manufacturer listed on Amazon Marketplace.

Purchasers of eBay items are typically aware that the product is coming from a third party due to eBay’s auctioneer-like model. See Bullard, supra note 3, at 208.

52. See Kaziukėnas, supra note 9 (demonstrating eBay sales trailing behind Amazon Marketplace and Amazon Retail). With 7.2% of the overall market share, eBay is the second largest online marketplace in the United States but is still five times smaller than Amazon Marketplace. Id.

53. See Bullard, supra note 3, at 208 (indicating Amazon conceals seller information); see also Kaziukėnas, supra note 9 (observing lack of public knowledge about Amazon Marketplace). Shoppers often do not notice when they are purchasing an Amazon item from Amazon Marketplace versus from Amazon Retail. See Kaziukėnas, supra note 9. Many brands will opt to place their product on Amazon Marketplace because it means they can have access to Amazon’s colossal consumer base without selling their entire brand to Amazon. See id.

54. See Bullard, supra note 3, at 208 (comparing eBay and Amazon third-party sales); Kaziukėnas, supra note 9 (calling Amazon Marketplace “most overlooked player” in U.S. commerce).

55. See Jonathan Strickland, How Craigslist Works, HOWSTUFFWORKS (Nov. 1, 2007), https://money.howstuffworks.com/craigslist.htm [https://perma.cc/3XZH-PWKS] (detailing Craigslist operating system and uses for consumers). Craigslist is an online forum which hosts classified ads and “provide[s] users with a helpful, noncommercial way to connect with other people in their communities.” Id. It is free to post and respond to most ads. See id. All Craigslist transactions are directly between the person who posted the ad and anyone who responds to it; Craigslist does not get involved in transactions unless a consumer reports a problem. See id.

56. See id. (stating Craigslist’s purpose); Lina M. Khan, Note, Amazon’s Antitrust Paradox, 126 YALE L.J. 710, 713, 777 (2017) (illustrating Amazon’s various other activities beyond online retail). Amazon is not only an online marketplace, but also “a major book publisher, a producer of television and films, a fashion designer, a hardware manufacturer, and a leading host of cloud server space,” among other things. Khan, supra, at 713. Amazon is also a payment service and a delivery and logistics network, as evidenced by the company’s wide array of economic interests and complex business strategy. See id. The internet giant is known for its forceful business tactics in acquiring products to sell and has made itself an unavoidable piece of the internet economy. See id. at 779.

57. Compare Khan, supra note 56, at 713, 774 (noting Amazon’s delivery and logistics network), and supra note 41 and accompanying text (explaining Amazon’s different fulfillment methods for Amazon Marketplace shipping and processing), with Strickland, supra note 55 (explaining Craigslist consumer-driven model).
Marketplace. Often, the vendor does not have adequate identifying information on Amazon Marketplace or has been inactive for years and cannot be tracked down, leaving the consumer with no recourse. For example, in *Erie Insurance Co. v. Amazon.com, Inc.*, the plaintiff argued that Amazon should be considered akin to a brick-and-mortar store such as Home Depot. The plaintiff went on to state that while it acknowledges that the product was technically sold by a third party, Amazon had significant control over the transaction. The plaintiff described how they ordered the product on Amazon’s website, paid money directly to Amazon, and then Amazon packaged and delivered the product to the purchaser, without any interaction with the third-party vendor. This process differs significantly from Craigslist’s model, where buyers and third-party sellers communicate directly with one another and often meet in person to deliver the purchased goods.

Comparing Amazon’s practices to the business model used by Etsy, another online marketplace, is helpful to understanding the appropriate treatment of online, third-party sellers in product liability claims. Etsy is an e-commerce

58. See Oberdorf v. Amazon.com Inc., 930 F.3d 136, 145 (3d Cir. 2019) (stating cases exist where no recourse available for consumer against unknown third party), vacated and reh’g granted by 936 F.3d 182 (3d Cir. 2019). Amazon argued that every item on its website can be traced to a particular vendor but did not acknowledge the fact that the consumer is only able to communicate with the third-party vendor through the Amazon Marketplace platform. See id. This allows third-party vendors to “conceal themselves from the customer,” leaving injured customers with no direct recourse. See id.; see also Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738 (LHG), 2018 U.S. Dist. LEXIS 123081, at *5 (D.N.J. July 24, 2018) (recognizing neither Amazon nor plaintiff can identify third-party manufacturer); Fox v. Amazon.com, Inc., 930 F.3d 415, 419 (6th Cir 2019) (indicating defective hoverboard manufacturer’s identity remains unknown).

59. See Oberdorf, 930 F.3d at 145 (explaining lack of precautions by Amazon for third parties). Amazon admitted that it has “no vetting process in place to ensure, for example, that third-party vendors were amenable to legal process.” Id. In these cases, and when a suit against Amazon itself fails, injured consumers have no remedy. See id. Moreover, Amazon encourages third-party sellers to select informal and “friendly names,” such as “W-Deals” and “DEALz-,” to use in Amazon Marketplace. See Fox, 930 F.3d at 428. Critics and plaintiffs have argued that this encouragement only leads to confusion over who consumers are purchasing from and the ability for sellers to disguise themselves. See id. Research also shows that thousands of sellers’ accounts are opened on Amazon every day, which suggests that some accounts may be fraudulent or purposely recreated to maintain anonymity. See Wade Shepard, Amazon Scams on the Rise as Fraudulent Sellers Run Amok and Profit Big, FORBES (Jan. 2, 2017, 12:19 PM), https://www.forbes.com/sites/wadeshepard/2017/01/02/amazon-scams-on-the-rise-in-2017-as-fraudulent-sellers-run-amok-and-profit-big/#4c5043232ea6 [https://perma.cc/5RXT-3LNX]. Further, the process for creating a third-party seller profile is not monitored by Amazon, making it easy for third parties to sell to and collect money from Amazon customers for products that do not actually exist. See id. Amazon has stated that it is a user-regulated platform and will act on fraudulent sellers only after customers complain. See id.


61. See id. (describing Amazon Marketplace’s control over products).

62. See id. (explaining significant purchaser interaction with Amazon and lacking third-party seller).


site that specializes in selling handmade, custom, and vintage items. The online retailer is made up of independent sellers, each of whom has his or her own page with products for sale. A self-proclaimed “online marketplace,” Etsy is similar to the Amazon Marketplace model in that both models allow third parties to post and sell products directly to consumers. Etsy provides eligible sellers with a “Seller Protection Policy” to protect them from potential issues with product sales and appears to make sellers aware of their exposure to liability. Recently, Etsy faced a lawsuit in California Superior Court for the wrongful death of a customer’s eighteen-month-old son after he was strangled to death by a teething necklace purchased on Etsy and given to the child’s mother as a gift. In its defense, Etsy stated that it “did not make or directly sell” the item at issue and that “any legal claim relating to an item [purchased on Etsy] must be brought directly against the sellers of the item.” Amazon’s defense in these cases parallels Etsy’s, arguing that it is not liable for third-party Amazon Marketplace goods and any potential injuries that may result from using those products. Like eBay and Craigslist, however, Etsy makes its identity as an online marketplace apparent to both buyers and sellers. With no clear separation between Amazon Marketplace and products sold directly by Amazon on its website, the buyer’s ability to identify the liable seller becomes increasingly foggy.

67. See Keep Commerce Human, supra note 65; see also Kaziukėnas, supra note 9 (comparing Etsy to Amazon in online retailing). Etsy has a gross merchandise volume of approximately $2 billion, a small number when compared to Amazon Marketplace’s $175 billion. See Kaziukėnas, supra note 9.
70. Id. Etsy stated that users release the company from any claims involving an item that is purchased through its terms of agreement, which all users must click and agree to in order to complete a purchase. See id. The plaintiff argued that because the product was given to her as a gift, she never consented to Etsy’s terms of agreement. See id.
71. See infra Section II.D (explaining Amazon’s defense regarding Amazon Marketplace product liability).
72. See Keep Commerce Human, supra note 65 (showing Etsy self-proclaimed online third-party marketplace); Bullard, supra note 3, at 208-09 (demonstrating eBay and Craigslist make online marketplace model clear).
73. See Kaziukėnas, supra note 9 (observing Amazon does not clearly identify Amazon Marketplace purchases to consumer).
these reasons, several courts have distinguished Amazon Marketplace from other types of retailers. 74

D. Amazon’s Defense

In recent cases, Amazon has persuaded some courts that it should not be held liable for consumer injuries resulting from its third-party Amazon Marketplace products. 75 In its defense, Amazon has maintained that it should not be considered the “seller” of these products because it does not hold title to them. 76 For example, Amazon argued in Fox that, under the applicable Tennessee Products Liability Act of 1978 (TPLA), a “seller” should be construed as “any individual or entity regularly engaged in transferring title to a product for an agreed upon price, for livelihood or gain.” 77 Applying this definition to its business model, Amazon opined that because it never held title to the third-party product at issue, it should not face liability. 78 In contrast, Fox, the plaintiff, contended that the TPLA definition also includes one who exercises “sufficient control” over a product and that the Amazon FBA fulfillment method used for this product grants Amazon a sufficient level of control. 79 The court ultimately adopted Fox’s broader definition in this case but was not convinced that Amazon exercised the control over the product necessary to be considered a “seller.” 80 Similarly, in Erie Insurance Co., Amazon argued that it did not hold title to the customer’s defective headlamp purchased from Amazon Marketplace. 81 The court agreed

75. See Fox v. Amazon.com, Inc, 930 F.3d 415, 428 (6th Cir. 2019) (affirming judgment in favor of Amazon); McDonald v. LG Elecs. USA, Inc., 219 F. Supp. 3d 533, 536 (D. Md. 2016) (recognizing plaintiff’s failure to state valid claim against Amazon). The United States District Court for the District of Maryland in McDonald found that the plaintiff’s claim that Amazon failed to warn the consumer of the dangers of a third-party product fell under CDA 230 and subsequently dismissed the claim, granting Amazon immunity. See 219 F. Supp. 3d at 540.
76. See Fox, 930 F.3d at 422 (arguing Amazon not seller because company “never had title” of product).
77. See id. (explaining possible construction of TPLA “seller” definition); see also TENN. CODE ANN., § 29-28-102(7) (2019) (defining “seller”). The TPLA defines “seller” as “any individual or entity engaged in the business of selling a product, whether such sale is for resale, or for use or consumption.” § 29-28-102(7).
78. See Fox, 930 F.3d at 422 (stating Amazon’s argument for adoption of narrower “seller” definition).
79. See id. at 423, 425 (presenting sufficient control argument). The court ultimately decided that Amazon’s actions did not reach the level of control necessary to be considered a seller under the TPLA “seller” definition because Amazon “did not choose to offer the hoverboard for sale, did not set the price of the hoverboard, and did not make any representations about the safety or specifications of the hoverboard on its marketplace.” See id. at 425.
80. See id. at 425 (concluding Amazon did not exercise sufficient control under “seller” definition).
with Amazon and stated that, “[a]lthough Amazon’s services were extensive in facilitating the sale,” they did not reach the level of a “seller.”

Amazon has also employed CDA 230 in its defense. Congress first introduced the CDA in 1995 as an attempt to regulate indecency on the then-emerging internet. Out of concern for the future of free speech on the internet, what would become section 230 was subsequently added by amendment. Often called the “safe harbor provision,” the purpose of CDA 230 is to protect online platforms from liability for user-generated content. Today, it is crucially important to internet speech.

In Oberdorf, Amazon argued that CDA 230 barred the plaintiff’s claims because they sought to hold Amazon liable “as the online publisher of a third party’s content.” Using CDA 230, Amazon essentially asserted that it should not be required to police third-party postings on Amazon Marketplace or add warnings to Amazon Marketplace product postings about a potential danger to consumers. Although a majority of active judges on the Court of Appeals for the Third Circuit elected to vacate the Oberdorf decision, the Third Circuit originally held that CDA 230 did not bar the plaintiff’s claims, except those that

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82. See id. (comparing Amazon’s role in transaction to UPS Ground services). The court held that Amazon’s significant involvement in facilitating the third-party sale made it no more of a “seller” than UPS Ground, who also facilitated the sale by delivering the product to the customer. See id.
86. See 47 U.S.C. § 230(c) (setting forth safe harbor provision); CDA 230: Legislative History, supra note 84 (explaining online platforms not publishers, unlike newspapers); Cox, supra note 14 (explaining purpose behind “safe harbor” provision of CDA 230). One example that illuminates the purpose behind the CDA is if a Twitter user attempted to sue Twitter over another user’s Tweets. See Cox, supra note 14 (citing to discussion of congressman’s problematic lawsuit against Twitter). This is a difficult issue because if Twitter was liable for all user content, it would face the overwhelming responsibility to highly regulate all Tweets. See Jeff Hermes, Section 230 as Gatekeeper: When Is an Intermediary Liability Case Against a Digital Platform Ripe for Early Dismissal?, 43 LITIG., Spring 2017, at 34, 40. CDA 230 provides online platforms with widespread immunity from the content their users produce to avoid this outcome. See id.
87. See CDA 230: Legislative History, supra note 84 (noting value Congress placed on CDA); Hermes, supra note 86, at 34 (presenting importance of CDA 230 to online platforms).
88. See Oberdorf, 930 F.3d at 140, 151 (presenting district court holdings and addressing whether CDA applies); see also Cox, supra note 14 (explaining Oberdorf decision and other recent product liability cases against Amazon).
89. See Oberdorf v. Amazon.com Inc., 930 F.3d 130, 151-52 (3d Cir. 2019) (asserting Amazon’s CDA defense argument), vacated and reh’g granted by 936 F.3d 182 (3d Cir. 2019).
related to a “failure to warn” theory of liability. While Amazon’s defense has persuaded some circuit courts that it should not be held liable for products purchased on Amazon Marketplace, it appears that lawsuits stemming from injuries caused by these products will likely continue, as will the confusion surrounding Amazon’s potential liability exposure in Amazon Marketplace.

III. ANALYSIS

A. Necessary Liability for Amazon and Lack of Protection Under CDA 230

1. Discrepancies Between Amazon and Its Competitors

Amazon and Amazon Marketplace have undoubtedly transformed the way that consumers shop, and are the first place many consumers go to make a purchase. Nevertheless, with such a large consumer base comes great responsibility. Although Amazon has repeatedly argued that Amazon Marketplace should not be considered the “seller,” implicitly aligning itself with platforms like eBay and Etsy to avoid being considered the “seller” under strict product liability theory, Amazon’s involvement extends beyond its competitors’ “auctioneer” style of sale. Amazon is more involved with the distribution of third-party products than its competitors, making Amazon more akin to a true seller than simply a

90. See id. at 153 (holding Oberdorf’s claims not barred by CDA besides “failure to warn”); Oberdorf v. Amazon.com Inc., 936 F.3d 182, 182-83 (3d Cir. 2019) (mem.) (vacating decision and granting petition for rehearing en banc).

91. See, e.g., Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 144 (4th Cir. 2019) (holding Amazon not liable seller); Fox v. Amazon.com, Inc., 930 F.3d 415, 425 (6th Cir. 2019) (declining to hold Amazon liable seller); see also Cox, supra note 14 (explaining outcome of Amazon’s recent lawsuits regarding Amazon Marketplace liability). The Fourth Circuit held that Amazon is not the technical “seller” of Amazon Marketplace products. See Erie Ins. Co., 925 F.3d at 142. The Third Circuit, however, stated that Amazon enables third parties to “conceal themselves from the customer” by only allowing communication between customers and the third parties to occur through the Amazon platform, a factor which weighed in favor of imposing liability. See Oberdorf, 930 F.3d at 145.

92. See Khan, supra note 11, at 986 (acknowledging majority of internet product searches begin on Amazon). Furthermore, “merchants who list products on other sites . . . rely upon Amazon for up to 90% of their sales.” Id.; see supra note 8 and accompanying text (observing customers’ commitment to Amazon through Prime membership); see also Kaziukėnas, supra note 9 (discussing Amazon’s growth and leadership in industry).

93. See Khan, supra note 11, at 1081 (recognizing responsibility of dominant platforms); Bullard, supra note 3, at 209-10 (describing Amazon’s extensive reach); Dayton, supra note 8 (characterizing Amazon e-commerce giant).

94. See supra notes 53-54 and accompanying text (contrasting Amazon Marketplace and eBay auctioneer model). All Amazon Marketplace “customer service requests and inquiries” are hosted through Amazon, and there is no way for a customer to contact a third-party seller directly. See Bullard, supra note 3, at 209 (distinguishing Amazon customer service from other online retailers). This is more restrictive than traditional auctioneer websites that “merely facilitate contact between buyer and seller” by allowing the consumer to have direct contact with the seller. Id. eBay’s platform asks consumers to place bids on items for sale, indicating that the sale is an auction-style transaction, and places the seller information in large noticeable type. See id. at 208.
platform facilitating the sale of third-party goods.\textsuperscript{95} Additionally, the Amazon web interface does not clearly indicate when consumers are shopping on Amazon Marketplace as compared to when they are purchasing a product from Amazon directly, so consumers may assume their purchase is backed by Amazon itself.\textsuperscript{96} Amazon is dissimilar from eBay, where sellers’ names are clearly displayed, users make bids on items, and it is clear eBay does not have responsibility for the products.\textsuperscript{97} With essentially no vetting process for third-party Amazon Marketplace sellers, Amazon does not ensure that third-party vendors are responsive to legal process.\textsuperscript{98} Amazon Marketplace’s current business model is therefore dangerous to the unknowing consumer.\textsuperscript{99} As a result, courts should treat Amazon Marketplace differently than its “auctioneer” competitors and hold Amazon liable for all third-party Amazon Marketplace products that cause injuries to customers.\textsuperscript{100}

2. Flawed Reasoning Under CDA 230

In its defense, Amazon argues that CDA 230 bars any claims against Amazon for its third-party Amazon Marketplace products.\textsuperscript{101} While Amazon maintains that it is not a seller of Amazon Marketplace products under strict product liability theory, the company also states that Amazon Marketplace product claims are barred because Amazon is not the publisher of third-party offers, as defined by CDA 230.\textsuperscript{102} By maintaining that CDA 230 bars all negligence and strict liability claims in relation to Amazon Marketplace items, Amazon argued that the plaintiffs in these cases wrongfully attempted to treat Amazon as the publisher of all third-party Amazon Marketplace product offers and information.\textsuperscript{103} CDA 230 does not fully protect Amazon, however, because the provision is focused on content posted by a website’s users, not necessarily the products behind the

\textsuperscript{95} See Bullard, supra note 3, at 210 (pointing to Amazon’s significant involvement in delivery of third-party products). Under a strict product liability analysis, it is clear that Amazon had a hand in placing defective products on the market. See id. at 231-32 (observing Allstate and Fox cases demonstrate Amazon’s entity role).

\textsuperscript{96} See Kaziukénas, supra note 9 (finding sales pass through Amazon Marketplace “almost invisibly”). Transactions in Amazon Marketplace look akin to those on Amazon’s normal retail site, resulting in many consumers purchasing third-party products unknowingly. See id.

\textsuperscript{97} See Bullard, supra note 3, at 208 (comparing eBay and Amazon third-party sales). Compare Berke, supra note 22, at 622-24 (commenting on eBay product liability), and What Is eBay?, supra note 50 (explaining eBay’s online auction process), with Kaziukénas, supra note 9 (describing how products on Amazon Marketplace look like Amazon’s own products).

\textsuperscript{98} Oberdorf v. Amazon.com Inc., 930 F.3d 136, 145 (3d Cir. 2019) (concluding Amazon does not screen third-party vendors), vacated and reh’g granted by 936 F.3d 182 (3d Cir. 2019). Oberdorf describes how easy it is for third parties to conceal themselves from customers, leaving no recourse for defective products. See id. (cautioning danger in Amazon third-party labeling process).

\textsuperscript{99} See id. (stressing danger of consumers left without recourse when third party unavailable).

\textsuperscript{100} See id. (explaining Amazon’s position in marketing chain favors imposition of strict liability).

\textsuperscript{101} See id. at 151-52 (articulating Amazon’s defense under CDA 230).

\textsuperscript{102} See Oberdorf, 930 F.3d at 143, 151-52 (denying applicability of CDA 230 and explaining how CDA 230 bars strict product liability).

\textsuperscript{103} See id. at 151-52 (acknowledging Amazon’s argument regarding plaintiff’s claims).
content—i.e., simply because Amazon does not publish the third-party listing associated with the product does not mean that it can escape liability if the underlying product is defective. The Oberdorf court was correct in deciding that CDA 230 does not bar all strict product liability claims against Amazon simply because they stem from third-party Amazon Marketplace postings. “Amazon’s involvement in transactions extends beyond a mere editorial function; it plays a large role in the actual sales process.” For this reason, only claims specific to Amazon’s failure to warn about the potential dangers of third-party products should be barred by CDA 230 because they directly relate to Amazon’s editorial function.

3. Differentiating Between Distribution Methods

While Amazon plays a role in all Amazon Marketplace transactions, courts must consider Amazon’s different levels of involvement within the methods of product fulfillment when determining whether Amazon is liable under strict product liability. When third parties use the FBA fulfillment method, Amazon is heavily involved with warehousing, shipping, and payment processing, among other activities. Under this method, it is Amazon’s job to collect money directly from buyers, handle customer service inquiries for the vendor’s products, and package and ship the product to the customer. Third parties that use FBA may also market products on Amazon Prime, giving them access to a dedicated consumer base and free two-day shipping. Amazon should be held liable

104. See Oberdorf v. Amazon.com Inc., 930 F.3d 136, 151 (3d Cir. 2019) (citing reasoning behind CDA 230, vacated and reh’g granted by 936 F.3d 182 (3d Cir. 2019). The courts have broadly interpreted CDA 230 in cases where the plaintiff attempts to hold an online service liable for defamatory content posted by a third party. See id. at 152 (discussing cases that precluded recovery in these circumstances). Nevertheless, CDA 230 should not completely immunize a company simply because a third party published information about a product online. See id. at 152-53 (explaining lack of total protection for Amazon under CDA 230); see also supra notes 84-87 and accompanying text (reviewing history of CDA and CDA 230).

105. See Oberdorf, 930 F.3d at 153 (opining plaintiff’s claims do not all seek Amazon’s liability under publisher theory).

106. Id. Because Amazon is very involved in the Amazon Marketplace sales process, any of the plaintiff’s claims concerning Amazon’s role in this context should not be barred by CDA 230. See id. (asserting claims do not all seek to make Amazon publisher of third-party content). Amazon’s involvement includes “receiving customer shipping information, processing customer payments, relaying funds and information to third-party vendors, and collecting the fees it charges for providing these services.” Id.

107. See id. (stating CDA 230 only bars claims regarding editorial function).

108. See Bullard, supra note 3, at 229-30 (asserting impracticality of holding Amazon liable under all distribution methods); see also supra note 41 and accompanying text (comparing Amazon’s fulfillment methods).

109. See Bullard, supra note 3, at 193-94 (listing Amazon’s various responsibilities under FBA method); Lincoln, supra note 40 (describing FBA method pros and cons). Most recent circuit court cases pertaining to Amazon and third-party liability involved the FBA method. See Fox v. Amazon.com, Inc., 930 F.3d 415, 419 (6th Cir. 2019) (indicating dispute over whether third party used FBA method); Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738 (LHG), 2018 U.S. Dist. LEXIS 123081, at *8 (D.N.J. July 24, 2018) (articulating FBA service third party used).

110. See Bullard, supra note 3, at 193-94 (stating what FBA method entails).

111. See id. at 194 (noting FBA gives access to Prime members).
under strict product liability as the seller of FBA third-party products because of the company’s thorough involvement in the processing of these items. Amazon is involved in nearly every aspect of product processing under the FBA method—including picking, packaging, and shipping the product—making it the exact party that strict product liability theory seeks to hold liable.

In contrast to the FBA method, the FBM method of fulfillment places many of the processing responsibilities in the hands of the third party. Amazon is only in charge of the product’s payment processing, while the third party must handle packaging and shipping to the consumer. Although the third party is more involved in the product packaging and shipping process when using the FBM method as opposed to the FBA method, most Amazon consumers likely cannot tell the difference between an FBA product, FBM product, and Amazon’s own products when shopping on the website. Further, Amazon has full control over the sales process of any third-party products that are posted under the BSA, which all third-party vendors must agree to irrespective of fulfillment method.

112. See id. at 230 (advocating for Amazon strict product liability under FBA method).
113. See Restatement (Second) of Torts § 402A cmt. f (Am. L. Inst. 1965) (seeking to hold every party in chain of product distribution strictly liable); see also Bullard, supra note 3, at 193-94 (describing FBA method of fulfillment); Shehan, supra note 38, at 1219-20 (characterizing FBA fulfillment method and uses); LaMance, supra note 2 (defining strict product liability). Strict product liability theory intends to protect consumers by holding any party involved with the production or manufacturing of a product potentially liable. See Restatement (Second) of Torts § 402A cmt. f (stating strict product liability doctrine); see also Wertheimer, supra note 33, at 1184-85 (explaining strict product liability theory and goals). Under strict product liability theory, it is clear that Amazon’s involvement in third-party products through the FBA method of processing reaches the level of participation that the Restatement intended. See Restatement (Second) of Torts § 402A cmt. f (Am. L. Inst. 1965) (describing parties subject to liability); Bullard, supra note 3, at 230-31 (characterizing Amazon’s position in distribution chain). “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.” Bullard, supra note 3, at 231 (arguing in favor of holding Amazon liable under strict product liability).
114. See Bullard, supra note 3, at 195 (commenting on FBM method and comparing to FBA method). While the SFP fulfillment method is not discussed directly in this section, this method falls between the FBA and FBM methods in terms of Amazon’s responsibilities. See id. at 196 (asserting that SFP method incorporates FBA Prime member access with FBM shipping costs).
115. See id. at 195 (demonstrating Amazon’s lesser involvement during FBM process). It is important to note that the third party in Oberdorf used the FBM method of fulfillment. See Oberdorf v. Amazon.com Inc., 930 F.3d 136, 141 (3d Cir. 2019) (summarizing Amazon and third party’s roles in FBM method of fulfillment), vacated and reh’g granted by 936 F.3d 182 (3d Cir. 2019); Bullard, supra note 3, at 196-97 (stating third-party seller used FBM method in Oberdorf).
116. See supra note 9 and accompanying text (describing how sales pass through Amazon Marketplace seamlessly).
117. See Shehan, supra note 38, at 1218 (explaining BSA agreement for Amazon’s third-party vendors); Oberdorf, 930 F.3d at 141 (noting Amazon’s control over third-party products under BSA). Under the BSA, Amazon retains the right in its sole discretion to determine the content, appearance, design, functionality, and all other aspects of the Services, including by redesigning, modifying, removing, or restricting access to any of them. In fact, the Agreement grants Amazon a royalty-free, non-exclusive, worldwide, perpetual, irrevocable right and license to commercially or non-commercially exploit in any manner, the information provided by third-party vendors.
Amazon even has the ability to cease a third party’s fulfillment services at any time and can mandate that a vendor halt all orders of a product if it so desires. Amazon’s dominance over Amazon Marketplace third-party sellers, regardless of whether they are using the FBA method or FBM method, is explicitly shown in the strict terms of the BSA. Amazon’s control under all fulfillment methods is enough to hold the internet giant responsible as a seller under strict liability because Amazon has the full capacity to control Amazon Marketplace products to ensure they are not placing consumers in harm’s way.

B. Policy Considerations: Holding Amazon Accountable

1. A Safer Amazon Marketplace

Amazon is in a better position to protect consumers from defective third-party products than its third-party vendors. Third-party vendors are forced to communicate with customers through Amazon’s channels, making it extremely difficult for customers to reach them, particularly if the third-party vendor is no longer active on Amazon. Additionally, Amazon receives complaints and product ratings from customers directly, further supporting the notion that Amazon is in the best position to filter out defective products.

In terms of public policy, imposing the title of “seller” on Amazon for all third-party Amazon Marketplace items, including those used under the FBM method of fulfillment, and holding Amazon strictly liable will lead to a safer marketplace.

Oberdorf, 930 F.3d at 141.

118. See Oberdorf, 930 F.3d at 142 (noting under BSA Amazon can require third party to halt or cancel sales); see also Shehan, supra note 38, at 1218-19 (articulating purpose and terms of BSA for Amazon third parties).

119. See Oberdorf, 930 F.3d at 146 (demonstrating Amazon’s capability to regulate safety of products on Amazon Marketplace). The BSA gives Amazon the potential to exert significant power over regulation of third-party products. See id. (describing Amazon’s ability to remove third-party listings, suspend services, withhold payments, and more).

120. See id. (explaining Amazon’s “substantial control over third-party vendors”).

121. See Oberdorf v. Amazon.com Inc., 930 F.3d 136, 146-47 (3d Cir. 2019) (concluding Amazon in best position to receive reports of defective products), vacated and reh’g granted by 936 F.3d 182 (3d Cir. 2019). Amazon’s website “serves as the public-facing forum for products listed by third-party vendors.” Id.

122. See id. at 147 (critiquing Amazon model channeling all third-party communications through Amazon platform); Cox, supra note 14 (illustrating difficulty consumers face when they cannot track down third-party vendor).

123. See Oberdorf, 930 F.3d at 146-47 (examining how Amazon receives ratings and customer feedback). Because all communication is streamlined through Amazon’s platform, Amazon is in the best position to receive reports regarding product safety and ratings about potential issues with Amazon Marketplace products. See id.; see also Bullard, supra note 3, at 216 (justifying Amazon in best position to create safer Amazon Marketplace). Amazon has substantial power under the BSA, yet the agreement is largely self-serving and crafted to shield Amazon from as much liability as possible. See Bullard, supra note 3, at 216. The BSA is also “only roughly enforced to ensure that third-party vendors are legally reachable by Amazon and its customers.” Id. Because the BSA is centered on Amazon’s profit goals, customers face greater risk when purchasing products from Amazon Marketplace. See id. (demonstrating self-serving nature of Amazon BSA for third parties).
internet for consumers overall. Holding Amazon strictly liable for third-party products will also incentivize Amazon to create a more consumer-focused BSA and ensure all third-party products are vetted for safety before entering Amazon Marketplace. For example, when customers purchase an Amazon Marketplace product, the product has not been vetted by Amazon, though in the eyes of the innocent consumer, third-party products often appear to be backed by and sold from Amazon itself. Labeling Amazon as the seller and holding it strictly liable will change this misconception, while also allowing the injured plaintiff to seek recourse against Amazon as a seller. Amazon can also easily absorb the cost of compensating customers who are injured by third-party products: One uncomplicated solution is to integrate the cost into the fees charged to third-party vendors. A retailer as large and powerful as Amazon must take responsibility and strive for better practices.

2. Making the Consumer Whole Again

Strict product liability seeks to make the plaintiff whole again by providing them with damages commensurate with the injury that they have faced. Many consumers have been permanently injured by defective Amazon Marketplace products with little possibility of recovery in damages. This all-too-common

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124. See Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (connecting strict product liability and public safety); see also Bullard, supra note 3, at 189 (stating strict liability incentivizes creation of safer products).

125. See Oberdorf, 930 F.3d at 146 (describing safety incentive provided by holding Amazon strictly liable).

126. See id. at 145 (stipulating Amazon does not have vetting process for Amazon Marketplace vendors); Kaziukénas, supra note 9 (highlighting difficulty of distinguishing between Amazon platforms). Third parties have almost complete discretion over the products they list on Amazon Marketplace. See Oberdorf, 930 F.3d at 141 (explaining lack of limitations on product postings). The only exceptions to third-party product listings are products that are “illegal, sexually explicit, defamatory, or obscene.” Id.

127. See Oberdorf v. Amazon.com Inc., 930 F.3d 136, 145 & n.20 (3d Cir. 2019) (recounting numerous cases where injured plaintiff could not locate third-party seller), vacated and reh’g granted by 936 F.3d 182 (3d Cir. 2019); Kaziukénas, supra note 9 (showing difficulty of ascertaining actual seller of Amazon products). In Oberdorf, for example, the third party “The Furry Gang” had not been active on the Amazon Marketplace for over three years and could not be located for recourse. See Oberdorf, 930 F.3d at 142 (highlighting seller not active since May 2016).

128. See Oberdorf, 930 F.3d at 147 (suggesting Amazon absorb product liability in third-party fees). “Amazon can adjust the commission-based fees that it charges to third-party vendors based on the risk that the third-party vendor presents.” Id. This would also motivate Amazon to better track Amazon Marketplace’s third-party vendors. See id.

129. See id. at 146 (explaining Amazon control over third-party vendors); Khan, supra note 11, at 1081 (presenting argument for dominant platform responsibility).


131. See Oberdorf, 930 F.3d at 145 & n.20 (noting numerous cases where third party not located for recourse); see also Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738 (LHG), 2018 U.S. Dist. LEXIS 123081, at *5 (D.N.J. July 24, 2018) (recognizing neither Amazon nor plaintiff can identify product manufacturer); Fox
result is unethical and should not be a recurring situation for customers who likely believed that Amazon would compensate them for any injuries sustained from products sold on its website. Holding Amazon strictly liable for third-party products would give injured consumers a chance for recourse against a party, Amazon, clearly involved in the product distribution. As the largest online retailer in the world, Amazon should be a company that consumers can trust. There should be no place for concealed or nonexistent third-party sellers in Amazon Marketplace, and the only way to bring about change is to hold Amazon strictly liable for these products in support of responsible consumerism.

3. Potential Opposition

Those who oppose holding Amazon liable under strict product liability may argue that it is unreasonable to expect Amazon to regulate the 500 million separate product listings on Amazon Marketplace. Nevertheless, if Amazon is unwilling to take on the responsibility that comes with strict product liability, the company should instead consider changing its Amazon Marketplace layout and overall function. To fall under the “auctioneer” style of sale, Amazon must more closely resemble its competitors and make clear to consumers that Amazon

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132. See Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 140 (4th Cir. 2019) (noting consumer only interacted with Amazon); Oberdorff, 930 F.3d at 145 (concluding no recourse available against third party for plaintiff); Allstate N.J. Ins. Co., 2018 U.S. Dist. LEXIS 123081, at *2 (stating plaintiff unable to seek damages against third-party manufacturer); see also Fox, 930 F.3d at 419 (determining no recourse for plaintiff without locating third party); Escola, 150 P.2d at 443 (Traynor, J., concurring) (describing new relationship between consumers and producers supports liability).

133. See Oberdorff v. Amazon.com Inc., 930 F.3d 136, 147 (3d Cir. 2019) (explaining Amazon’s capability to compensate plaintiffs), vacated and rehe’ ing granted by 936 F.3d 182 (3d Cir. 2019).

134. See Khan, supra note 11, at 1081 (highlighting argument for dominant platform responsibility); Dayton, supra note 8 (setting forth Amazon’s dominance); Kaziukėnas, supra note 9 (stating Amazon Marketplace largest online retailer in United States).

135. See Bullard, supra note 3, at 232 (concluding proper to hold Amazon liable because Amazon participates in chain of distribution).

136. See id. at 229 (positing impracticality of holding Amazon strictly liable for all Amazon Marketplace products). Even so, many who oppose holding Amazon strictly liable under all distribution methods still recognize that the courts’ current analysis, which looks to the product distribution chain, is outdated and “no longer makes sense in the modern economy.” See id. at 230 (providing details of current product liability evaluation).

137. See Kaziukėnas, supra note 9 (addressing difficulty of distinguishing Amazon website from Amazon Marketplace); see also Bullard, supra note 3, at 208 (demonstrating Amazon concealment of third-party information). Amazon also encourages its third parties to use “friendly” names for their seller accounts, such as “The Furry Gang” for the seller of a dog leash. See Bullard, supra note 3, at 231 (highlighting use of “friendly” vendor names); Oberdorff, 930 F.3d at 146 (providing example of third-party vendor name). These misleading seller names can contribute to customer’s confusion surrounding where the product is coming from. See Bullard, supra note 3, at 231 (contending Amazon easiest party to reach in third-party sales process). Furthermore, seemingly random third-party names on Amazon Marketplace enables third parties to hide behind an alias when strict product liability claims are brought against them. See id.
Marketplace products are not being sold directly by Amazon. Further, Amazon must highlight to Amazon Marketplace customers that it is truly not liable for any third-party products. Even still, Amazon may not be able to fully escape strict product liability for FBA products, due to its deep involvement in the processing and selling process.

IV. CONCLUSION

Large corporations owe a duty of care to their customers and must strive for social responsibility. Amazon Marketplace is no exception; rather, its power and control over online commerce only creates a greater need to protect its millions of consumers. The injuries resulting from third-party products will persist if steps are not taken to hold Amazon accountable. If Amazon wants to separate itself from the products sold through Amazon Marketplace, the company must change the way it lists third-party products on its website and reduce the number of responsibilities Amazon holds under vendor distribution methods. Making these changes to the website platform will certainly help the company’s case against being considered a “seller” for third parties who use the FBM method and will strengthen Amazon’s defense against the injured consumer.

While CDA 230 shields Amazon from certain claims, it does not protect the internet giant from being held strictly liable for Amazon Marketplace merchandise. Many courts have concluded to the contrary and found that Amazon is not liable for third-party products; however, doing so is only enabling the sale of goods that could potentially harm consumers and leave them with no direct legal recourse. Amazon is more than capable of taking responsibility for Amazon Marketplace and meets the criteria for a seller under strict product liability. Regardless of the legal outcome, Amazon should immediately make changes to its online platform by clearly distinguishing between Amazon Marketplace products and its own, which will better inform consumers of which entity is responsible for selling the product. Doing so is in the best interests of Amazon’s customers, vendors, and Amazon itself.

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139. See Shehan, supra note 38, at 1218-19 (explaining BSA agreement for Amazon’s third-party vendors).
140. See id., at 1219-20 (highlighting Amazon’s FBA program); RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (AM. L. INST. 1965) (describing parties Restatement seeks to hold strictly liable); see also Bullard, supra note 3, at 193 (detailing Amazon’s three different fulfillment methods).