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Amazon's Invincibility: The Effect of Defective Third-Party Vendors' Products on Amazon

Amy E. Shehan
University of Georgia School of Law

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AMAZON’S INVINCIBILITY: THE EFFECT OF DEFECTIVE THIRD-PARTY VENDORS’ PRODUCTS ON AMAZON

*Amy Elizabeth Shehan**

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* J.D. Candidate, 2020, University of Georgia School of Law; B.A, 2017, University of North Carolina at Chapel Hill.

I. INTRODUCTION

Online shopping is the fastest growing use of the Internet.¹ Amazon, a veritable retail giant, has played a substantial role in the rise of ecommerce.² As a pioneer in online shopping, Amazon has evolved from selling only books³ to selling everything imaginable: diapers, sushi pillow cushions, batteries, wigs for dogs, and the list goes on.⁴ As consumers increasingly purchase products with the click of a button from the comfort of their own home, brick-and-mortar stores struggle to compete with giant ecommerce companies like Amazon.⁵

As Amazon's role in the retail landscape continues to evolve and expand, it faces greater legal exposure. In recent years, Amazon has faced product liability challenges. Product liability law governs the "legal liability of manufacturers or sellers of goods to compensate buyers, users, and even bystanders for damages or injuries suffered because of defects in goods purchased."⁶

Product liability law poses a challenge for Amazon because Amazon operates an online marketplace. While Amazon sells some of its own products on its marketplace, "a significant portion of the products" are sold by third-party vendors.⁷ Recently, several courts have considered whether Amazon should be held liable for defective

¹ See Sandra M. Forsythe & Bo Shi, *Consumer Patronage and Risk Perceptions in Internet Shopping*, 56 J. BUS. RES. 867, 867 (2003) (noting that "53% of Internet users report[] shopping as a primary use of the Web").

² See Kate Taylor, *One Statistic Shows How Much Amazon Could Dominate the Future of Retail*, BUSINESS INSIDER (Nov. 1, 2017, 4:20 PM), <https://www.businessinsider.com/retail-apocalypse-amazon-accounts-for-half-of-all-retail-growth-2017-11> (noting that "Amazon accounts for about 31% of all [U.S.] ecommerce purchases").

³ See Makeda Easter & Paresh Dave, *Remember When Amazon Only Sold Books?*, L.A. TIMES (June 18, 2017, 12:40 PM), <http://www.latimes.com/business/la-fi-amazon-history-20170618-htmlstory.html> (detailing the history of Amazon and its origins as an online bookselling site).

⁴ See Erik Sherman, *20 Years of Amazon's Expansive Evolution*, CBS NEWS: MONEYWATCH (July 15, 2015, 5:15 AM), <https://www.cbsnews.com/news/20-years-of-amazons-expansive-evolution/> (explaining the expansion of Amazon's products and noting that "Amazon has now become a titan of retail that has branched out into many other areas").

⁵ See Taylor, *supra* note 2 (explaining that "[t]he so-called 'Amazon effect' is threatening brick-and-mortar retailers like Macy's, Sears, and JCPenney" and noting that brick-and-mortar sales grew 1.4% while online sales grew 10.1% in 2016).

⁶ *Introduction to Product Liability Law*, HANOVER RISK SOLS., <https://www.hanover.com/linec/docs/171-1748.pdf> (last visited Sept. 30, 2018).

⁷ *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 396 (S.D.N.Y. 2018).

products sold by third-party vendors on Amazon's online marketplace. Since there is no uniform federal scheme that addresses product liability,⁸ jurisdictions faced with this issue have approached it differently. Some states have their own product liability statutes, while other states have adopted the *Restatement*, either in whole or in part.⁹

Plaintiffs seeking to hold Amazon liable for third-party vendors' defective products primarily argue that Amazon is a "seller" within the meaning of a state's product liability statute or the *Restatement*.¹⁰ If courts agree that Amazon is a seller, then Amazon can be held liable for defective products sold by third-party vendors on its marketplace. However, if Amazon is not a seller, then, under current product liability law, Amazon cannot be held liable for defective products sold by third-party vendors on its marketplace. Plaintiffs also advance a variety of creative arguments ranging from bailment theories¹¹ to arguments based on the Uniform Commercial Code.¹² Similarly, Amazon has creatively claimed immunity from liability as an online service provider under the Communications Decency Act.¹³ This Note will examine these arguments in depth.

But first, Part II of this Note provides background information on Amazon, including the Amazon Services Business Solutions Agreement, Amazon's "A-to-z Guarantee," and the Fulfillment by Amazon program. Part III of this Note examines the two approaches to product liability law: the *Restatement* approach and state product

⁸ See HANOVER RISK SOLS., *supra* note 6 ("Currently, there is no uniform federal products liability law.").

⁹ See *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738 (FLW) (LHG), 2018 WL 3546197, at *1 (D.N.J. July 24, 2018) (applying New Jersey's Products Liability Act); *Fox v. Amazon.com, Inc.*, No. 3:16-cv-03013, 2018 WL 2431628, at *6 (M.D. Tenn. May 30, 2018) (applying Tennessee's Products Liability Act of 1978). *But see Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 499 (M.D. Pa. 2017) (applying § 402A of the *Restatement (Second) of Torts*).

¹⁰ See, e.g., *Fox*, 2018 WL 2431628, at *6 ("Plaintiffs seek judgment as a matter of law that Amazon is a 'seller' under the [Tennessee Products Liability] Act.")

¹¹ See *id.* at *8 (describing the plaintiffs' alternative argument that Amazon satisfies the definition of a seller under the Tennessee Products Liability Act because Amazon is a bailor of the product in question).

¹² See *McDonald v. LG Elecs., USA, Inc.*, 219 F. Supp. 3d 533, 542 (D. Md. 2016) (explaining that the plaintiff's breach of implied warranty claim against Amazon must fail because "Amazon's role as the 'platform' for the third-party sales does not qualify it as a merchant or a seller under Maryland's UCC").

¹³ See *id.* at 537 (explaining Amazon's argument that dismissal is mandated under § 230 of the Communications Decency Act).

liability statutes' approach. Part IV of this Note explains why Amazon does not fall within the definition of a seller, bailor, or merchant for purposes of liability. Lastly, Part V of this Note examines the Communications Decency Act and explains why Amazon should receive immunity from liability regarding defective products sold by third-party vendors on the Amazon Marketplace.

II. BACKGROUND ON AMAZON

The volume of sellers on Amazon's marketplace has grown steadily over the years.¹⁴ Currently, more than one million third-party vendors use Amazon's marketplace to sell products,¹⁵ accounting for approximately "40 percent of Amazon's gross revenue."¹⁶ To promote sales by third-party vendors, Amazon has a "merchant integration team" whose role is "to help new sellers learn how to list products, how to describe their products on Amazon's website, and how to handle order fulfillment."¹⁷ Amazon has also streamlined the third-party vendor listing process: To create a listing on the marketplace, a third-party vendor simply provides a description of the product to Amazon.¹⁸

To avoid liability, Amazon requires all third-party vendors to agree to the Amazon Services Business Solutions Agreement (BSA).¹⁹ The terms of the BSA range from enrollment to tax matters to password security.²⁰ For example, section 6 of the BSA requires third-party vendors to indemnify Amazon for any claims, losses, or

¹⁴ See *Fox*, 2018 WL 2431628, at *3 (observing this growth).

¹⁵ *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 498 (M.D. Pa. 2017).

¹⁶ *Fox*, 2018 WL 2431628, at *3.

¹⁷ See *id.* (detailing the role and technique of the merchant integration team).

¹⁸ See *Oberdorf*, 295 F. Supp. 3d at 498 (noting the simple listing process).

¹⁹ See *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 396 (S.D.N.Y. 2018) (explaining that "Amazon offers 'a suite of optional services for sellers'" in the BSA).

²⁰ See *Amazon Services Business Solutions Agreement*, AMAZON SELLER CENTRAL, <https://sellercentral.amazon.com/gp/help/1791> (last visited Feb. 25, 2019) (covering enrollment, service fee payments, receipt of sales proceeds, term and termination, license, representations, indemnification, disclaimer and general release, limitation of liability, insurance, tax matters, confidentiality, force majeure, relationship of the parties, use of Amazon transaction information, suggestions and other information, modification, password security, export, and miscellaneous topics).

damages arising from or related to the sale of third-party products.²¹ Section 9 of the BSA requires third-party vendors to maintain liability insurance naming Amazon as an insured upon reaching an insurance threshold.²² Under the BSA, third-party vendors have exclusive authority to determine the products they wish to sell and the price of their products.²³

Amazon also guarantees products purchased from third-party vendors on its marketplace through its "A-to-z Guarantee."²⁴ Specifically, "[t]he condition of the item . . . and its timely delivery are guaranteed under the Amazon A-to-z Guarantee."²⁵ However, the A-to-z Guarantee is not a warranty and provides that Amazon will issue a refund of the sale price only if one of three specified conditions are met.²⁶ Additionally, the A-to-z Guarantee carries several restrictions which further limit its scope.²⁷

Amazon also operates a program known as Fulfillment by Amazon (FBA) in which sellers provide their inventory to Amazon for storage in an Amazon fulfillment center until the products are purchased.²⁸ Once a product is purchased, Amazon places the

²¹ See *id.* (requiring that third-party vendors "agree to indemnify, defend, and hold harmless" Amazon and its affiliates, including "their respective officers, directors, employees, representatives, and agents").

²² See *id.* ("If the gross proceeds from [a third-party vendors'] [t]ransactions exceed the applicable [i]nsurance [t]hreshold during each month over any period of three (3) consecutive months, or otherwise if requested by [Amazon], then within thirty (30) days thereafter, [the third-party vendor] will maintain at [its own] expense . . . liability insurance.").

²³ See *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 498 (M.D. Pa. 2017) (explaining that third-party vendors select which products they want to sell, "obtain their stock from manufacturers or upstream distributors, and set their own sales price").

²⁴ See *About A-to-z Guarantee*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=201889410.a> (last visited Feb. 25, 2019) ("The Amazon A-to-z Guarantee protects you when you purchase items sold and fulfilled by a third-party seller.").

²⁵ See *Buyer Dispute Program*, AMAZON, <https://pay.amazon.com/us/help/201751580> (last visited Mar. 7, 2019).

²⁶ See *About A-to-z Guarantee*, *supra* note 24 ("You may be eligible to request a refund under the A-to-z Guarantee if any of the following apply: (1) You have not received your package and three days have passed since the maximum estimated delivery date or the tracking shows a delivery confirmation, whichever is sooner[;] (2) You received an order that is different than expected and have requested a return with the seller[;] (3) You returned your item with a trackable shipping method and the seller has not issued you a refund.").

²⁷ See *id.* (stating, for example, that the A-to-z Guarantee does not cover digital items).

²⁸ See *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 396 (S.D.N.Y. 2018) ("Amazon will store the seller's inventory.").

product in an Amazon-labeled box and delivers it to a shipper.²⁹ Third-party vendors who participate in the FBA program “retain title to their products and pay for storage space.”³⁰ If a third-party vendor declines to participate in the FBA program, Amazon has no control over or interaction with the third-party vendor’s product at any time throughout the course of the transaction.³¹

However, even in the absence of an FBA relationship, Amazon retains some control over the sales process. For example, Amazon retains the right to determine the appropriateness of the products sold on its marketplace³² and the right to edit the content of product listings.³³ Amazon also “collect[s] money from purchasers and direct[s] it to third-party vendors after deducting a fee.”³⁴ Customers do not pay third-party sellers directly,³⁵ and Amazon continuously reminds purchasers “that they are purchasing from an identified third party, and not from Amazon itself.”³⁶

III. TWO APPROACHES TO PRODUCT LIABILITY LAW

There is no uniform federal scheme of product liability.³⁷ As a result, states vary on their approach to product liability: some states have adopted the *Restatement* in its entirety, some have adopted the *Restatement* in part, and others have chosen to independently draft a state product liability statute.³⁸

²⁹ See *id.* (explaining that “upon receipt of an order, [Amazon] will place the product in a shipping container and deliver it to a shipper”).

³⁰ *Id.*

³¹ See *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 498 (M.D. Pa. 2017) (“Unless the third-party vendor participates in a special ‘Fulfillment by Amazon’ program[,] . . . Amazon has no interaction with the third-party vendor’s product at any time.”).

³² See *Offensive and Controversial Materials*, Amazon, <https://sellercentral.amazon.com/gp/help/external/200164670> (last visited Mar. 7, 2019) (“Amazon reserves the right to make judgments about whether or not content is appropriate.”).

³³ See *Oberdorf*, 295 F. Supp. 3d at 498 (explaining that Amazon reserves the right to “determine the appearance of product listings”).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See HANOVER RISK SOLS., *supra* note 6 (noting that “there is no uniform federal products liability law”).

³⁸ *Id.*

A. RESTATEMENT

In 1965, the American Law Institute (ALI) published the *Restatement (Second) of Torts*, which contained a single provision, § 402A, focused on products liability.³⁹ The text of § 402A reads:

(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.⁴⁰

Notably, this rule imposes strict liability—the seller is liable to the consumer even if the seller “has exercised all possible care in the preparation and sale of the product.”⁴¹ At the time the ALI published § 402A, product liability case law was not well-developed.⁴² As a result, the ALI sought to propose what the law should become, meaning that § 402A is not a true *restatement* of the law. Many states quickly adopted § 402A,⁴³ and today most

³⁹ See Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 713 (1970) (explaining the promulgation and acceptance of § 402A).

⁴⁰ RESTATEMENT (SECOND) OF TORTS: SPECIAL LIABILITY OF SELLER OF PRODUCT FOR PHYSICAL HARM TO USER OR CONSUMER § 402A (AM. LAW INST. 1965).

⁴¹ See *id.* at cmt. a (noting this rule is one of strict liability).

⁴² See J. Denny Shupe & Todd R. Steggerda, *Toward a More Uniform and Reasonable Approach to Products Liability Litigation: Current Trends in the Adoption of the Restatement (Third) and Its Potential Impact on Aviation Litigation*, 66 J. AIR L. & COMM. 129, 131 (2000) (emphasizing the “extensive lack of doctrinal coverage” in 1965).

⁴³ See Titus, *supra* note 39, at 714 (noting that “state courts in at least 15 jurisdictions” had adopted § 402A just five years after its promulgation).

states have adopted it in some form.⁴⁴ Due to the widespread use of this section, the ALI published the new *Restatement (Third) of Torts: Products Liability* in 1997.⁴⁵ However, some states, such as Pennsylvania, have explicitly declined to adopt the *Third Restatement*.⁴⁶

B. PRODUCT LIABILITY STATUTES

On the other hand, some states have declined to adopt any version of the *Restatement*, opting for a state-specific product liability statute instead.⁴⁷ These states have developed their own approach to product liability issues, which may or may not include ideas from the *Restatement*. For example, New Jersey enacted the New Jersey Products Liability Act in 1987 with the intention of limiting the liability of sellers and manufacturers by “balanc[ing] the interests of the public and the individual with a view towards economic reality.”⁴⁸ Courts have interpreted the Act as evincing a legislative intent to limit the expansion of product liability law.⁴⁹ Under this Act, New Jersey defines a “product seller” as:

any person who, in the course of a business conducted for that purpose: sells; distributes; leases; installs; prepares or assembles a manufacturer’s product

⁴⁴ See Shupe, *supra* note 42, at 131 (“Beginning in 1965, Section 402A of the *Restatement (Second) of Torts* . . . was adopted by most states as the conceptual foundation of their products liability law.”).

⁴⁵ See *id.* (explaining that the *Restatement (Third) of Torts: Products Liability* “was adopted by the diverse ALI membership without a dissenting vote at its annual meeting in May[] 1997”).

⁴⁶ See Neal Walters et al., *Pennsylvania Supreme Court Declines to Adopt Restatement (Third) of Torts*, BALLARD SPAHR (Nov. 21, 2014), <https://www.ballardspahr.com/alertspublications/legalalerts/2014-11-21-pennsylvania-supreme-court-declines-to-adopt-restatement-third-of-torts.aspx> (noting that the Pennsylvania Supreme Court ruled “that the strict liability regime of the Restatement (Second) will continue to govern”).

⁴⁷ See, e.g., *Fox v. Amazon.com, Inc.*, No. 3:16-cv-03013, 2018 WL 2431628, at *6 (M.D. Tenn. May 30, 2018) (discussing the Tennessee Products Liability Act of 1978).

⁴⁸ See *Sinclair v. Merck & Co.*, 948 A.2d 587, 593 (N.J. 2008) (quoting *Zaza v. Marquess & Nell, Inc.*, 675 A.2d 620, 627 (N.J. 1996)) (explaining the New Jersey legislature’s intention for enacting the Products Liability Act).

⁴⁹ See *Roberts v. Rich Foods, Inc.*, 654 A.2d 1365, 1369 (N.J. 1995) (“The Legislature limited the expansion of products-liability law by creating absolute defenses and rebuttable presumptions of nonliability.” (quoting *Shackil v. Lederle Labs.*, 561 A.2d 511, 527 (N.J. 1989))).

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.⁵⁰

The New Jersey Products Liability Act serves as just one example of a state's approach to product liability law. Other states, such as Tennessee, define a seller differently.⁵¹ Consequently, it is critical that plaintiffs and Amazon are aware of the exact language of a state's product liability law in order to tailor their arguments precisely to the language in the statute.

IV. COMMON ARGUMENTS FROM PLAINTIFFS AND WHY EACH OF THEM ULTIMATELY FAIL

Plaintiffs have advanced creative arguments in an attempt to hold Amazon liable for defective products sold by third-party vendors.⁵² These arguments label Amazon a seller under the *Restatement* or a state's product liability statute, a bailor under a state's product liability statute, or a merchant under the *Uniform Commercial Code*.⁵³ Because Amazon does not fit within these categorizations, it should not be held liable for defective products sold by third-party vendors through its marketplace.

A. AMAZON IS NOT A SELLER

Regardless of the product liability law that a particular state has adopted, plaintiffs primarily argue that Amazon falls within the definition of a seller and thus can be held liable for third-party vendors' defective products.⁵⁴ This argument fails for three reasons:

⁵⁰ N.J. STAT. ANN. § 2A:58C-8 (West 2018).

⁵¹ See TENN. CODE ANN. § 29-28-102(7) (West 2018) (explaining that a seller includes any "retailer, wholesaler, or distributor" and defining 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").

⁵² See *supra* notes 11–12 and accompanying text (noting bailor and UCC theories of seller liability).

⁵³ See *infra* Part IV.A–C.

⁵⁴ See, e.g., *Fox v. Amazon.com, Inc.*, No. 3:16-cv-03013, 2018 WL 2431628, at *6 (M.D. Tenn. May 30, 2018) (stating that the "[p]laintiffs seek judgment as a matter of law that Amazon is a 'seller'").

(1) Amazon is a facilitator of sales, not a seller; (2) Amazon does not exercise sufficient control over the third-party vendors' products to make it a seller; and (3) subjecting Amazon to strict liability for third-party vendors' defective products does not advance the policy underlying product liability laws.

1. Amazon is a Facilitator

In cases involving intermediaries in the distribution process, some courts examine whether the intermediary's role "was that of a facilitator rather than an 'active participant' in the transaction."⁵⁵ Amazon's role in the transactions between third-party vendors and customers is that of a facilitator.⁵⁶ Amazon simply provides a platform on which sellers can connect with potential customers in an efficient and organized manner.⁵⁷ Many other entities, such as auctioneers, malls, credit card companies, and flea market owners, provide services that facilitate sales. Amazon can be analogized to these entities.⁵⁸ The Amazon Marketplace, like an auction or flea market, is a "third-party vendor's 'means of marketing'" while the "fact of marketing [is] the act of the seller . . . cho[osing] the products and expos[ing] them for sale."⁵⁹ In other words, Amazon provides "a

⁵⁵ See *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738 (FLW) (LHG), 2018 WL 3546197, at *7 (D.N.J. July 24, 2018) (citations omitted) (discussing how the distinction between facilitators and active participants centers on whether the intermediary party ever "had physical control of the product [or] had merely arranged the sale"); *Oscar Mayer Corp. v. Mincing Trading Corp.*, 744 F. Supp. 79, 84 (D.N.J. 1990) (holding that the broker—an intermediary—could not be held strictly liable for defective peppercorns because the broker did not exercise any degree of control over the defective product). *But cf.* *Straley v. United States*, 887 F. Supp. 728, 744 (D.N.J. 1995) (holding that the intermediary party "transcended the role of a mere broker" by taking title to the defective product and thus exercising some degree of control over it).

⁵⁶ Anyone who purchases a product from a third-party vendor on the Amazon Marketplace "is engaging in a transaction with the seller that Amazon is merely facilitating." *Allstate*, 2018 WL 3546197, at *8.

⁵⁷ See *Fox*, 2018 WL 2431628, at *7 ("Amazon's role in the transaction was to provide a mechanism to facilitate the interchange between the entity seeking to sell the product and the individual who sought to buy it.").

⁵⁸ "The common thread connecting these entities is they are not liable for defects in products sold or distributed with the help of the services they provide." Amazon.com, Inc.'s Motion for Summary Judgment at 1, *Erie Ins. Co. v. Amazon.com, Inc.*, No. 8:16-cv-02679, 2017 WL 4230197 (D. Md. Jan. 22, 2017).

⁵⁹ See *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 500–01 (M.D. Pa. 2017) (quoting *Musser v. Vilsmeier Auction Co.*, 562 A.2d 279, 282 (Pa. 1989)) (comparing Amazon's role in these third-party transactions to an auctioneer's role in an auction).

market as the agent of the seller.”⁶⁰ As a facilitator in transactions between third-party vendors and customers, Amazon is not a “product seller.”⁶¹

2. Amazon's Lack of Control

Courts frequently look to a seller's control over the allegedly defective product when determining liability.⁶² Notably, every example of a seller that the *Restatement* provides is an entity that owns and controls the product it later sells, even though the *Restatement* does not explicitly include a title requirement.⁶³

In transactions between third-party vendors and customers, Amazon does not exercise sufficient control over the third-party vendors' products to make it a seller. Amazon does not set the price of third-party vendors' products⁶⁴ because the BSA requires “that sellers set their own prices, constrained only by the prices they set in other channels.”⁶⁵ Amazon also does not create the online listings which describe and make representations about the third-party vendors' products.⁶⁶ Further, at no point in a transaction between a customer and a third-party vendor does Amazon hold title to the product sold. Even if a third-party vendor participates in the FBA program, the third-party vendor retains title to its products.⁶⁷

⁶⁰ *Id.* at 500.

⁶¹ *See, e.g., Allstate*, 2018 WL 3546197, at *10 (“[W]here . . . Amazon facilitates rather than drives the sale, it does not act as a ‘product seller’”).

⁶² Courts in some states, such as New Jersey, view control over the product as dispositive. *See Allstate*, 2018 WL 3546197, at *7 (explaining that “control over the product is the touchstone that New Jersey courts have considered to determine whether a party has the requisite involvement to be a product seller”).

⁶³ *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 20 (AM. LAW INST. 1997) (listing as a seller “manufacturers, wholesalers, . . . retailers[,] . . . lessors, bailors, and those who provide products to others as a means of promoting . . . such products or some other commercial activity”).

⁶⁴ The BSA “does not grant Amazon the discretion to raise prices; so, unlike a manufacturer or seller, Amazon would not be able to ‘recapture the expense of an occasional defective product by an increase in the cost of the product.’” *Allstate*, 2018 WL 3546197, at *11 (quoting *Oscar Mayer Corp. v. Mincing Trading Corp.*, 744 F. Supp. 79, 84 (D.N.J. 1990)).

⁶⁵ *Allstate*, 2018 WL 3546197, at *8.

⁶⁶ *See id.* (explaining that the third-party vendor must provide the content for the product's online listing page and noting that “Amazon's control over the content of the page is limited to ensuring that it fits within the website's format and that the listing contains all the material[s]” required by law).

⁶⁷ *See Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 396 (S.D.N.Y. 2018) (explaining that third-party vendors who participate in the FBA program “retain title to their products and pay for storage space”); *see also Allstate*, 2018 WL 3546197, at *8 (noting that Amazon's

Throughout the sales process, decisions about whether to sell or alter products remains with the actual title holder—that is, the third-party vendor.⁶⁸

3. The Advancement of the Policies Behind Product Liability Laws

“Product[] liability law is a matter of public policy”⁶⁹ and “is based on concepts of fairness, feasibility, practicality, and functional responsibility.”⁷⁰ Subjecting Amazon to liability for third-party vendors’ defective products does not advance the public policies behind product liability law. Specifically, one policy focuses on “the notion that the cost of injury may be overwhelming to the person injured, but the risk of injury can be insured by the manufacturer and distributed to the public as a cost of doing business.”⁷¹ Imposing liability on Amazon for defective third-party products would not further this policy goal for three reasons. First, Amazon does not participate in the selection of the goods to be sold.⁷² Second, because of the high volume of third-party vendors on its marketplace, Amazon cannot verify the quality of each and every product listed on its marketplace.⁷³ Third, Amazon has no direct impact on the manufacturing of the products and thus cannot encourage increased safety in products.⁷⁴ For these reasons, the public policy goals

only role in the FBA program is to “locat[e], box[], and ship[] an already packaged and assembled product”).

⁶⁸ See *Allstate*, 2018 WL 3546197, at *9 (explaining that Amazon is not a seller because it lacks the basic discretion of whether to sell or alter a third-party vendors’ product).

⁶⁹ See *Zaza v. Marquess & Nell, Inc.*, 675 A.2d 620, 635 (N.J. 1996).

⁷⁰ See *id.* at 636.

⁷¹ See Donald E. Stuby, *Status and Trends in State Product Liability Law: Theories of Recovery*, 14 J. LEGIS. 216, 219 (1987) (discussing one of the first decisions to explore the rationales for applying strict liability).

⁷² See *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 498 (M.D. Pa. 2017) (explaining that “third-party vendors decide which products they wish to sell”).

⁷³ See *id.* at 500–01 (quoting *Musser v. Vilsmeier Auction Co.*, 562 A.2d 279, 282 (Pa. 1989)) (noting that an auctioneer, like Amazon, is “not equipped to pass upon the quality of the myriad of products” available on its Marketplace); see also Amazon.com’s Memorandum of Law in Support of Rule 12(b)(6) Motion to Dismiss Amended Complaint at 8, *McDonald v. LG Elecs. USA, Inc.*, 219 F. Supp. 3d 533 (D. Md. 2016) (No. 1:16-cv-01093-RDB) (explaining that “no website providing an online marketplace (whether Amazon, eBay, Google, Etsy, or others) could ever inspect and guarantee every product offered by every third-party seller”).

⁷⁴ See *Oberdorf*, 295 F. Supp. 3d at 501 (analogizing the Amazon Marketplace to a “newspaper classified ad section, connecting potential customers with eager sellers in an efficient, modern, streamlined manner”).

underlying product liability laws are not advanced by subjecting Amazon to liability for third-party vendors' sale of defective products on the marketplace.

A plaintiff may still defend the imposition of strict liability with the corrective justice rationale for strict liability. This rationale places the loss on the party who created the dangerous condition, not on the party who suffered from it.⁷⁵ In this context, it might make more sense to place the burden of loss on Amazon, a large business, rather than on those who are injured by defective products sold on the Amazon Marketplace.⁷⁶ While there certainly is some merit in this argument due to the innocence of the customers,⁷⁷ Amazon, like the innocent customer, did not create the dangerous condition. Amazon merely facilitates the transaction and lacks control over the defective product, meaning Amazon is not in a great position to remediate the dangerous condition.

The current definition of "product seller" simply does not encompass Amazon in its role in third-party vendor transactions. Categorizing Amazon as a "product seller" with regard to its role in third-party transactions would require an expansion of the current definition of "product seller." Any expansion of the definition to include Amazon's role should come from state legislatures, not the judicial system because weighing policy goals is the responsibility of the legislature.⁷⁸

⁷⁵ See Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO MASON L. REV. 329, 347 (2007) ("Proponents of [the] corrective justice [rationale] argue that the law requires 'a person whose morally culpable behavior has violated another's autonomy to restore the latter as nearly as possible to his or her pre-injury status.'").

⁷⁶ See *Fox v. Amazon.com, Inc.*, No. 3:16-cv-03013, 2018 WL 2431628, at *8 (M.D. Tenn. May 30, 2018) (explaining the plaintiffs' argument that "holding Amazon liable as a seller supports the policy justifications of the [Tennessee Products Liability Act] by promoting safety in the products sold to the public, and by placing the burden of loss on businesses like Amazon" rather than on the injured purchaser).

⁷⁷ See *id.* (noting that these policy justifications are somewhat persuasive for extending liability to businesses like Amazon).

⁷⁸ See *id.* (dismissing the public policy arguments and concluding that an expansion of the current definition of seller is a decision for the Tennessee legislature).

B. AMAZON IS NOT A BAILOR

When a third-party vendor participates in the FBA program, plaintiffs argue that Amazon is a bailor of the defective product,⁷⁹ which would make Amazon a “seller.” The general argument advanced by plaintiffs—that is, holding a bailor accountable for a defective product under the *Restatement* or a state product liability statute—has support in the law. For example, Pennsylvania courts apply § 402A of the *Restatement* to bailors and lessors,⁸⁰ and the Tennessee Products Liability Act defines “seller” to include “a lessor or bailor engaged in the business of leasing or bailment of a product.”⁸¹

Nonetheless, the bailment argument ultimately fails. A bailment arises when the owner of the property (the bailor) temporarily transfers custody of the property to another party (the bailee).⁸² Amazon cannot be a bailor because it is not the owner of the products sold by third-party vendors. When a third-party vendor participates in the FBA program, the third-party vendor retains title to its products;⁸³ Amazon simply stores the products and ships the products upon purchase.⁸⁴ Even if the relationship between third-party vendors and Amazon creates a bailment, Amazon acts as the bailee (not the bailor), and bailees do not fall within the definition of a “product seller.”⁸⁵ Consequently, Amazon is not a bailor of the defective products sold on its marketplace.

⁷⁹ See, e.g., *id.* (explaining the plaintiffs’ argument that Amazon was a bailor of the allegedly defective hoverboard that triggered a fire that consumed their house and resulted in physical and psychological injuries to the plaintiffs).

⁸⁰ See *Kalumetals, Inc. v. Hitachi Magnetics Corp.*, 21 F. Supp. 2d 510, 515 (W.D. Pa. 1998).

⁸¹ See TENN. CODE ANN. § 29-28-102(7) (West 2018).

⁸² See Mark S. Dennison, *Bailee’s Liability for Damage, Loss, or Theft or Bailed Property*, 46 AM. JUR. PROOF OF FACTS 3d 361 (1998) (explaining that parties in a bailment relationship have some special purpose in mind that requires the transfer of possession of the particular property and noting that a bailment can be express or implied).

⁸³ See *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 396 (S.D.N.Y. 2018) (noting that FBA participants retain title to their products).

⁸⁴ See *Fox v. Amazon.com, Inc.*, No. 3:16-cv-03013, 2018 WL 2431628, at *2 (M.D. Tenn. May 30, 2018) (explaining that FBA participants “place products in Amazon’s possession . . . in an Amazon Fulfillment Center” and then Amazon ships the products once they are purchased).

⁸⁵ See *id.* at *8 (explaining in the alternative that if a bailment relationship did in fact exist then Amazon is better categorized as the bailee of the defective hoverboard).

C. AMAZON IS NOT A MERCHANT NOR A SELLER UNDER THE UNIFORM COMMERCIAL CODE

As an alternative to product liability theories, plaintiffs have further attempted to hold Amazon liable using the *Uniform Commercial Code* (UCC) and breach of warranty claims. The UCC is a collection of proposed rules that seek to harmonize the law of sales and commercial transactions across the United States.⁸⁶ As a model code, the UCC has the effect of law in a state only when it is adopted by that state.⁸⁷ Notably, all fifty states have adopted the UCC either in whole or in part.⁸⁸

Under the UCC's definition, Amazon is not a seller. Professor Prosser explains that the UCC was not "drawn with anything in mind but a contract between a 'seller' and his immediate 'buyer.'"⁸⁹ Section 2-103 of the UCC defines "seller" as "a person who sells or contracts to sell goods."⁹⁰ Further, while the passage of title might hold talismanic significance in the ordinary meaning of a sale, the UCC explicitly requires the passage of title for a sale to have occurred: Section 2-106 of the UCC defines a "sale" as consisting of "passing of title from the seller to the buyer for a price."⁹¹ Notably, Amazon never holds title to third-party vendors' products, even when the third-party vendor participates in the FBA program.⁹² Because Amazon lacks title to third-party vendors' products, it is incapable of conducting a sale of these products. For this reason, Amazon cannot be classified as a seller under the UCC.

Nor is Amazon a merchant under the UCC. The UCC defines "merchant" as:

⁸⁶ See Uniform Commercial Code (UCC), DUKE LAW (Oct. 8, 2018, 8:44 AM), <https://law.duke.edu/lib/researchguides/ucc/> (explaining that the UCC is written by experts in commercial law and approved by the National Conference of Commissioners on Uniform State Laws and the ALI).

⁸⁷ See *id.*

⁸⁸ See *id.* (noting that the UCC has been adopted in some form in all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands).

⁸⁹ WILLIAM L. PROSSER, LAW OF TORTS 655 (4th ed. 1971).

⁹⁰ U.C.C. § 2103(1)(d) (AM. LAW INST. & UNIF. LAW COMM'N 1987).

⁹¹ *Id.* at § 2-106(1).

⁹² See *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 396 (S.D.N.Y. 2018) (noting that FBA participants retain title to their products).

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practice or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.⁹³

Given Amazon's limited role in transactions between third-party vendors and customers, Amazon does not fall within the definition of a merchant. Amazon merely provides an online listing service that connects third-party vendors with customers.⁹⁴

Regardless of how plaintiffs attempt to categorize Amazon's role in the transaction between third-party vendors and customers on the Amazon Marketplace, Amazon does not fit these categorizations. In these transactions, Amazon is not a seller, a bailor, nor a merchant and cannot be held liable for defective products sold through its marketplace.

Interestingly, every court to consider the question of Amazon's liability has found that Amazon is not liable for defective products sold on its marketplace.⁹⁵ Consequently, a plaintiff attempting to bring a claim against Amazon for defective products sold by third-party vendors will encounter an emerging consensus against construing Amazon as a seller. In the event plaintiffs recognize this emerging consensus and thus bring other products-related tort claims against Amazon, plaintiffs still face an uphill battle because of the Communications Decency Act.

V. COMMUNICATIONS DECENCY ACT

With the advent of the Internet, a brave new world of free speech emerged. In 1996, with the enactment of the Communications Decency Act (CDA), Congress attempted to provide structure to the

⁹³ MD. CODE ANN., COM. LAW. § 2-104(1) (West 2018).

⁹⁴ See *McDonald v. LG Elecs. USA, Inc.*, 219 F. Supp. 3d 533, 542 (D. Md. 2016) (concluding that "Amazon's role as the 'platform' for the third-party sales does not qualify it as a merchant or a seller under Maryland's UCC").

⁹⁵ See *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738 (FLW) (LHG), 2018 WL 3546197, at *10 (D.N.J. July 24, 2018) (listing judicial opinions from courts in other jurisdictions that have found that Amazon is not liable).

wild west of the World Wide Web.⁹⁶ Because the legislation was originally intended to curb indecent speech on the Internet, it is rather surprising that § 230 of the CDA provides “one of the most valuable tools for protecting freedom of expression and innovation on the Internet.”⁹⁷ Section 230's broad grant of protection provides a non-traditional defense for Amazon.

Section 230 provides in part that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁹⁸ Essentially, § 230 creates federal immunity against claims that service providers are liable for information originating from a third-party user of the service.⁹⁹ The Fourth Circuit articulated the legislative purpose behind the enactment of § 230:

Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.¹⁰⁰

In fact, Congress explicitly listed policy objectives in the legislation. Among other policy rationales, the CDA is intended “to promote the continued development of the Internet” and “to

⁹⁶ *Section 230 of the Communications Decency Act*, EFF, <https://www.eff.org/issues/cda230> (last visited Oct. 16, 2018).

⁹⁷ *See id.* (noting that the “original purpose of the legislation was to restrict free speech on the Internet”).

⁹⁸ 47 U.S.C. § 230(c)(1) (West 2018).

⁹⁹ *See* Jason Schossler, *Amazon Seeks Dismissal of Insurer's House Fire Subrogation Action*, WESTLAW J. INS. COVERAGE, Oct. 6, 2017, at *1 (explaining that Section 230 “provides federal immunity against claims relating to third-party content on online marketplaces like Amazon”).

¹⁰⁰ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (West 2018).

preserve the vibrant and competitive free market” of ideas on the Internet.¹⁰¹

A split of authority exists on whether § 230 immunizes Amazon’s conduct in these third-party transactions.¹⁰² Some courts have expressed reluctance to find § 230 immunity because the Internet has become widely available and “is no longer a fragile new means of communication” like it was when Congress enacted the CDA.¹⁰³ Consequently, these courts have become reluctant to dismiss tort claims based on § 230 immunity. While these concerns are reasonable in the abstract, they simply do not have a basis in the law. The CDA does not contain a qualification that it only applies when the Internet is new and vulnerable. Further, if Congress wanted to amend the CDA to limit the § 230 immunity because of the Internet’s dominant role in the communication and commerce landscapes, it certainly has the power to do so. Notably, Congress has chosen not to amend the CDA in this manner. This congressional inaction can be viewed as legislative acquiescence. While the theory of legislative acquiescence has received criticism,¹⁰⁴ it remains a viable argument for why courts should continue to interpret § 230 the same way they have been despite the now widespread availability of the Internet.

To determine whether claims are barred by § 230, courts typically examine three factors: (1) whether the defendant is a

¹⁰¹ See 47 U.S.C.A. § 230(b) (explaining why Congress chose to develop a sphere of immunity for providers of interactive computer services).

¹⁰² Compare, e.g., *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 502–03 (M.D. Pa. 2017) (concluding that Section 230 of the CDA does immunize Amazon because the plaintiff’s claims were “attempting to hold Amazon liable for its role in publishing an advertisement for The Furry Group’s product”) with *McDonald v. LG Elecs. USA, Inc.*, 219 F. Supp. 3d 533, 537 (D. Md. 2016) (concluding that Section 230 of the CDA does not immunize Amazon because the plaintiff did “not necessarily seek to hold Amazon liable as a ‘publisher or speaker’” because “the issue pivots around the battery itself, Amazon’s involvement in the sale of same, and Amazon’s guarantee regarding its condition, regardless of how the battery was posted on Amazon’s website”).

¹⁰³ See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164–65 n.15 (9th Cir. 2008) (en banc) (explaining that the Internet’s “vast reach into the lives of millions is exactly why [the court] must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts”).

¹⁰⁴ See, e.g., Blair C. Warner, *The Hypocrisy of the Acquiescence Canon* (Mar. 24, 2010) (unpublished manuscript) (on file with BePress from the SelectedWorks of Blair C. Warner), https://works.bepress.com/blair_warner/2/ (arguing that legislative acquiescence is based on numerous faulty assumptions).

provider of an interactive computer service;¹⁰⁵ (2) whether the postings at issue contain information provided by another information content provider;¹⁰⁶ and (3) whether the plaintiff's claims seek to treat the defendant as a publisher or speaker of the information.¹⁰⁷ If a defendant meets all three elements of § 230, then the claims against that defendant will be barred. Amazon easily satisfies the first two elements—it is an “interactive computer service” and the product listings at issue in these cases contain information provided by third-parties.¹⁰⁸

The analysis regarding the third element presents more of a challenge. To determine whether a plaintiff seeks to treat Amazon as the “publisher or speaker of . . . information provided by” a third-party vendor, the court assesses whether the plaintiff's claims inherently require the court to treat the defendant as the publisher or speaker of content provided by a third party.¹⁰⁹ However, the clear language of § 230 weighs heavily in favor of granting Amazon immunity for content provided by third-party vendors.¹¹⁰ Courts

¹⁰⁵ Section 230 defines “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2) (West 2018).

¹⁰⁶ Section 230 defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3) (West 2018).

¹⁰⁷ See *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 689 (S.D. Miss. 2014) (listing the elements that courts generally provide when holding that the plaintiff's claims are barred by Section 230(c)(1) of the CDA).

¹⁰⁸ See *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 498 (M.D. Pa. 2017) (noting that third-party vendors “provide a description (including, perhaps, a photograph) of the product to Amazon” for the online product listing); see also *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738 (FLW) (LHG), 2018 WL 3546197, at *8 (D.N.J. July 24, 2018) (explaining that the Amazon Services Business Solutions Agreement “does not provide Amazon the ability to . . . exercise control over the online listing”).

¹⁰⁹ See *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101–02 (9th Cir. 2009) (“[W]hat matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress—what matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.”).

¹¹⁰ See 47 U.S.C. § 230(c)(1) (West 2018) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

have generally accorded § 230 immunity a broad scope.¹¹¹ Section 230 “precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.”¹¹² Courts have interpreted publication to involve “reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.”¹¹³ Importantly, the third-party vendors—not Amazon—provide the content for the online product listings.¹¹⁴ Amazon possesses editorial and publishing functions by “retain[ing] the right to edit the content and determine the appearance of product listings.”¹¹⁵ Courts have routinely rejected lawsuits in which plaintiffs seek to treat defendants as a publisher or speaker of third-party content when the defendants merely edit and filter the third-party content.¹¹⁶ For these reasons, Amazon’s argument that dismissal is mandated under § 230 of the CDA should prevail.

VI. CONCLUSION

As online shopping continues to boom, Amazon faces lawsuits brought by plaintiffs who are injured by defective products sold by third-party vendors on the Amazon Marketplace. As courts begin to

¹¹¹ See *Oberdorf*, 295 F. Supp. 3d at 502 (noting the expansive reach of § 230 of the CDA); see also Claudia G. Catalano, Annotation, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act, 47 U.S.C.A. § 230*, 52 A.L.R. Fed. 2d 37 (2011) (noting that “courts across the country have repeatedly held that the CDA’s grant of immunity should be construed broadly”).

¹¹² *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

¹¹³ See *Barnes*, 570 F.3d at 1102 (explaining what publication entails and noting that “a publisher reviews material submitted for publication, perhaps edits it for style or technical fluency, and then decides whether to publish it”).

¹¹⁴ See *Oberdorf*, 295 F. Supp. 3d at 498 (noting that third-party vendors provide the information for the product’s online listing); see also *Amazon Services Business Solutions Agreement*, *supra* note 21 (requiring third-party vendors to “promptly update . . . [the product listing] information as necessary to ensure it at all times remains accurate and complete”).

¹¹⁵ See *Oberdorf*, 295 F. Supp. 3d at 498 (explaining the limited amount of control Amazon exerts over the product listings on its marketplace).

¹¹⁶ See *Zeran*, 129 F.3d at 330 (explaining that § 230 of the CDA bars “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone[,] or alter content”); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (explaining that plaintiffs may not hold liable “the interactive computer service provider who merely enables [third-party content] to be posted online”); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (acknowledging that “the interactive service provider receives full [§ 230] immunity regardless of the specific editing or selection process” as long as the third-party vendor “willingly provide[d] the essential published content”).

hear these cases, the decisions have huge implications for Amazon as well as other retailers that market third-party products on their websites. In deciding these cases, courts will look to the *Restatement* and the state's product liability statute.

Based on Amazon's role in the sale of third-party products, plaintiffs attempt to categorize Amazon as a seller, bailor, or merchant for purposes of liability. Amazon should not be categorized as a seller for three reasons: (1) Amazon's is a facilitator of sales, not a seller; (2) Amazon does not exercise sufficient control over the third-party vendors' products to make it a seller; and (3) subjecting Amazon to strict liability for third-party vendors' defective products does not advance the policy behind product liability laws. Further, Amazon should not be categorized as a bailor because it is not the owner of the products sold by third-party vendors. Lastly, Amazon should not be categorized as a merchant under the UCC because Amazon plays a limited role in transactions between third-party vendors and customers; it merely provides an online listing service that connects third-party vendors with customers.

Amazon can find immunity in § 230 of the CDA. Section 230 creates a federal immunity against claims that attempt to make service providers liable for information originating from a third-party user of the service. Importantly, the third-party vendors, not Amazon, provide the information for the online product listings. Amazon merely retains the ability to edit the online product listing. Amazon will likely find success with this defense because courts have routinely rejected lawsuits in which plaintiffs seek to treat defendants as a publisher or speaker of third-party content when the defendants merely edit and filter the third-party content.

Notably, the few cases that have dealt with this issue have all found that Amazon is not liable for defective products sold on its marketplace. Therefore, while Amazon's liability in these cases is a relatively novel issue, plaintiffs who bring these claims in the future will encounter an emerging consensus against holding Amazon liable.

