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# WARRANTY, PRODUCT LIABILITY AND TRANSACTION STRUCTURE: THE PROBLEM OF AMAZON

Edward J. Janger\* Aaron D. Twerski\*\*

Amazon, and other internet sales platforms, have revolutionized the manner in which goods are purchased.<sup>1</sup> This was true even before the current pandemic.<sup>2</sup> While the centrality of Amazon in the sale and distribution of consumer goods in America is now in high relief,<sup>3</sup> the obligations undertaken by Amazon in those sales are unclear, both as a matter of transparency, and as a matter of legal doctrine. Is it a store? Is it a shipper? Is it a telephone? In various transactions Amazon can play some or all of these roles.<sup>4</sup> Choosing the right metaphor has consequences. Amazon knows this and has done everything it can to deploy the metaphors selectively to its best legal and practical advantage, even when the chosen characterizations are inapt or even mutually inconsistent.

Consumer goods of all sorts are sold using the Amazon platform. Some are sold directly by Amazon or its subsidiaries such as Whole Foods, but many goods sales are, Amazon argues, merely intermediated.<sup>5</sup> Buyer and seller find each other on the Amazon platform; Amazon merely facilitates their transaction.<sup>6</sup> Sometimes, however, items bought through the Amazon platform explode.<sup>7</sup> E-Cigarettes and hoverboards have caught fire.<sup>8</sup> Faucets have malfunctioned flooding houses,<sup>9</sup> and dog collars have snapped.<sup>10</sup> In these cases, Amazon has claimed to be a stranger to the transaction, and until

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1. Marcelo Prince & Sarah Slobin, *How 20 Years of Amazon Changed Retail* WALL ST. J. (Jul. 15, 2015) <https://www.wsj.com/articles/how-20-years-of-amazon-changed-retail-1436998020>.

2. Compare Prince & Slobin, *supra* note 3 with Sharon Terlep & Allison Prang, *Amazon Launches Online Pharmacy*, WALL ST. J. (Nov. 17, 2020), [https://www.wsj.com/articles/amazon-com-adds-prescription-medicine-options-to-its-site-11605613679?mod=hp\\_lead\\_pos7](https://www.wsj.com/articles/amazon-com-adds-prescription-medicine-options-to-its-site-11605613679?mod=hp_lead_pos7).

3. Annie Palmer, *How Amazon managed the coronavirus crisis and came out stronger*, CNBC (Sep. 29, 2020), <https://www.cnbc.com/2020/09/29/how-amazon-managed-the-coronavirus-crisis-and-came-out-stronger.html>.

4. Edward J. Janger & Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller not a Neutral Platform*, 14 BROOK. J. CORP. FIN. & COM. L. 259 (2020) (hereinafter *Heavy Hand of Amazon*).

5. *Heavy Hand of Amazon*, *supra* note 6, at 261 (describing Amazon's argument in *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496 (M.D. Pa. 2017)).

6. *Id.*

7. Alana Samuels, *When Your Amazon Purchase Explodes*, ATLANTIC (Apr. 30, 2019), <https://www.theatlantic.com/technology/archive/2019/04/lithium-ion-batteries-amazon-are-exploding/587005/> (hereinafter *Amazon Explodes*).

8. *Id.*

9. Jay Greene, *Burning laptops and flooded homes: Courts hold Amazon liable for faulty products*, WASH. POST (Aug. 29, 2020), <https://www.washingtonpost.com/technology/2020/08/29/amazon-product-liability-losses/>.

10. *Oberdorf v. Amazon.com, Inc.* 295 F. Supp. 3d 496, 497 (M.D. Pa. 2017)).

recently, courts have been willing to go along.<sup>11</sup> In an earlier article, we explored whether Amazon should be considered a “seller” for the purposes of product liability when a customer purchases goods from a third-party seller using the Amazon platform.<sup>12</sup> We concluded that the answer was, “Yes.” We examined the relationship between Amazon and the third-party seller, and considered the extent to which Amazon controlled all aspects of the sale.<sup>13</sup> We also noted, to a lesser extent, the way in which the consumer experienced the sale process.<sup>14</sup>

The purpose of this article is, to extend that analysis to include the law of contracts—principally the law of warranty. We ask the next question: Should Amazon be considered a “warrantor” for the purposes of making the implied warranty of merchantability when it serves as an intermediary between a third-party seller and a consumer buyer?

We conclude that it does. While Amazon manipulates the structure of its transactions, both legally and practically seeking to have its cake and eat it too, the same characteristics that make Amazon a seller for tort purposes should and do make them a warrantor for contract purposes. Unfortunately, the doctrinal argument is a bit tortured, and we fear that it will not make much difference as a practical matter. The tendency of courts to engage in formal readings of the Uniform Commercial Code, as well as their willingness to enforce boilerplate disclaimers is likely to provide a functional, if not doctrinal obstacle to warranty recovery.

To illustrate both points, we conclude with a tale of two contrasting Restatements: The proposed *Restatement (Third) of Contracts: Consumer Contracts*; and the *Restatement (Third) of Torts: Products Liability*.<sup>15</sup> On the one hand, the proposed consumer contracts restatement, takes a formal view of assent. If adopted, it would grant presumptive enforceability to boilerplate waivers of warranty, eliminating any practical benefit to consumers.<sup>16</sup> On the other hand, the product liability restatement extends liability for defects to include “one engaged in the business of selling or otherwise distributing products.” This functional definition of seller cuts through the formalities of transaction structure, and may provide the best practical hope for consumer recourse.<sup>17</sup>

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11. See *infra* text and notes 138–140, 154.

12. See *Heavy Hand of Amazon*, *supra* note 6.

13. *Id.* at 264.

14. *Id.* at 264–66.

15. The enforceability of boilerplate in consumer contracts is the centerpiece of current debates over the American Law Institute’s proposed Restatement (Third) of Contracts: Consumer Contracts. PROPOSED RESTATEMENT (THIRD) OF CONTRACTS: CONSUMER CONTRACTS (available at: <https://www.ali.org/projects/show/consumer-contracts/>); RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY (AM. LAW INST. 1998).

16. See *infra* text and notes at 111–120.

17. See RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 20 (AM. LAW INST. 1998).

To summarize, the realities of the relationship between Amazon and its third-party vendors render it a seller for product liability purposes under Section 402A of the Restatement (Second) of Torts.<sup>18</sup> In our view these factors and others render it a warrantor as well. Warranty focuses on the transaction between the seller and the buyer, so we will focus on the customer's relationship with Amazon. We argue that there is a textual argument that Amazon is a warrantor, but also that Amazon creates the appearance that it is the seller, and that the buyer consumer should be entitled to rely on Amazon's self-characterization.

Having concluded that Amazon should be considered a warrantor, however, we find that whether warranty protection will be of any use turns on larger questions regarding the enforceability of boilerplate waivers and "click-wrap" assent, as well as in the longstanding problems of notice and the statute of limitations. We are not particularly optimistic. So just as the problem of product liability found its solution in tort rather than contract, we predict that the same is likely to be true for sales that are intermediated by internet platforms.

This article will proceed in four steps. First, it will explore the formal legal problems that transaction structure creates when sales are intermediated by an internet platform like Amazon. The problem created by Amazon's manipulation of transaction structure is the same for contract and for tort, but as we shall see, the doctrinal response is not symmetric. Second, it will explore whether that transaction structure should affect substantial rights. To address that question we will look at what a customer actually sees when they purchase something from Amazon. We will show that what the consumer experiences is at odds with the formal transaction structure claimed by Amazon. We will examine the text of the Uniform Commercial Code (UCC), and show that the statute does not preclude Amazon from being considered a warrantor. Further, Amazon could, and probably should be considered a warrantor-by-estoppel, or as an agent. Third, we will consider whether Amazon should be viewed as successfully disclaiming warranty. Here we conclude that the answer is tied inextricably to ongoing debates about the enforceability of boilerplate in consumer contracts. Those debates are reflected in the current battle royal of the Restatement of Consumer Contracts, but more importantly, in uncertainty in the courts. For that reason, warranty will offer an imperfect solution at best. So, finally, fourth, we return to tort, and argue that the Third Restatement of Torts – Product Liability offers an elegant solution.

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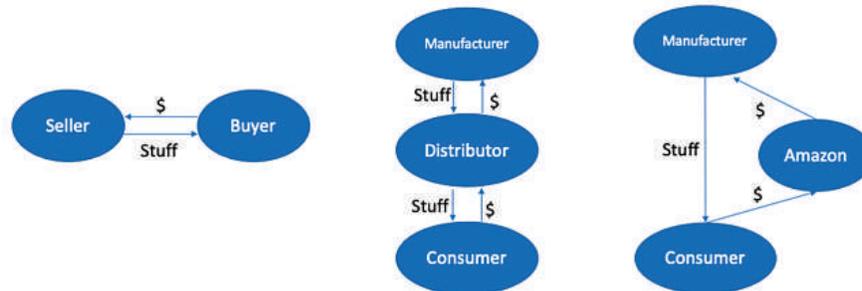
18. *Heavy Hand of Amazon*, *supra* note 6, at 261.

## I. THREE TRANSACTIONS STRUCTURES AND TWO THEORIES OF LIABILITY

For centuries, the law relating to liability for the sale of defective products has adjusted to the markets it regulates.<sup>19</sup> As the world of face-to-face sales of simple goods between acquainted parties gave way to mass-produced, technologically sophisticated consumer products, both contract law and tort law were forced to adjust. The advent of the internet, and particularly of internet-based sales platforms has again transformed the shape of consumer sales. The law is still in the process of adapting. In thinking about the direction the law should take, it is useful to think in terms of three transaction structures and two theories of liability. Ideally, the doctrinal responses would be symmetric, or at least complementary. It is not, however, clear, by any means, that this will be the case.

Two of the transaction structures are familiar: (1) the face-to-face sale; and (2) the mass-produced product sold through a lengthy distribution chain. The third is relatively new: a remote sale, intermediated by an internet platform like Amazon. The three platonic forms are set forth in Figure 1 below:

**Figure 1**



Face-to-face sales have several salient characteristics. The buyer and seller operate together within a local market. They may even know each other. The items sold can be physically inspected prior to purchase. They are in direct privity. This is, of course, an oversimplification. Not all products are simple, and not all defects can be detected by physical inspection. Similarly, two-party sales can occur over distance. In a world of relatively equal bargaining power, however, these risks can be allocated or reallocated by contract.

The industrial revolution brought the advent of standardized goods sold through distribution networks. The goods were more complex, and, while the buyer might have dealt directly with its seller, the seller was not the

19. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, 198-99 (Harvard University Press 1977).

manufacturer. Once one was talking about a car or a vacuum cleaner, defects were no longer apparent on inspection. The development of modern product liability law, comprising both warranty and the tort of strict liability, reflects adaptation to deal with the market for consumer contracts. In contract, *caveat emptor* yielded to statutory implied warranties of fitness and merchantability.<sup>20</sup> In tort, the citadel of privity crumbled, giving rise first to a duty of care owed to foreseeable consumers, and ultimately to strict liability in tort of any seller in the distribution chain to consumers.<sup>21</sup>

The advent of the internet has led to a second transformation—the advent of remote sales over an internet platform. In the face-to-face transaction, the buyer knew its seller, and could inspect the goods. In the vertically structured mass-market consumer transaction, the buyer knew their immediate seller, and usually the identity of the manufacturer. Sales over an internet platform, however, add a second type of distance.<sup>22</sup> The goods may be complex. The manufacturer may be known or unknown, and the seller too may be unknown and difficult to ascertain. The only entity with whom the buyer deals directly is the platform, whatever that is.<sup>23</sup>

Intermediated sales on an internet platform do not fit neatly into either of the existing transactional or doctrinal structures. Different platforms handle this distance differently. Direct merchants, like LL Bean or Lands' End, situate themselves within the brick-and-mortar model, stepping into the transaction at the same place as a physical store.<sup>24</sup> Online auction sites or true marketplace sites like e-Bay make it clear to the consumer that they must rely on the third-party seller.<sup>25</sup> As we will discuss below, Amazon straddles the line opportunistically, in a way that is likely to be a trap for the unwary. When

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20. Compare, e.g., *Seixas v. Woods*, 2 Cai. R. 48 (N.Y. Sup. Ct. 1804) (holding a seller of low-quality wood made no warranty as to its quality despite having advertised the wood as high-quality brazilto wood, thus finding no remedy for the buyer absent an allegation of fraud) with U.C.C. §§ 2-314, 2-315 (AM. LAW INST. & UNIF. LAW COMM'N 1951) (describing implied warranties of merchantability and of fitness for a particular purpose).

21. See, e.g., *McPherson v. Buick*, 111 N.E. 1050 (N.Y. 1916) (holding that products need not be poisonous, explosive, or otherwise destructive in nature for a product to foreseeably cause harm and thus create a duty for manufacturers as to all foreseeable users of the product, irrespective of contract law, and therefore make manufacturers liable for negligence); *Codling v. Paglia*, 32 NY.2d 330, 338 (1973) (“As we are aware, the erosion of the citadel of privity has been proceeding apace and even more rapidly in other jurisdictions, all with the enthusiastic support of text writers and the authors of law review articles as evidenced by an extensive literature. Once one exception has been made, others have followed as appealing fact situations presented instances in which, in language of result, liability has been imposed to avoid injustice and for the protection of the public.”).

22. See *infra* text and notes at 44–49 (describing the difficulty of locating a third-party seller and manufacturer of a product sold on Amazon). See also *Heavy Hand of Amazon*, *supra* note 6, at 261 (describing how the purported seller in *Oberdorf v. Amazon.com, Inc.* was nowhere to be found).

23. See, e.g., *Heavy Hand of Amazon*, *supra* note 6, at 261 (describing how the purported seller in *Oberdorf v. Amazon.com, Inc.* was nowhere to be found).

24. L.L.BEAN, <https://www.llbean.com/> (last visited Aug. 25, 2020); LANDS END, <https://www.landsend.com> (last visited Aug. 25, 2020).

25. EBAY, <https://www.ebay.com/> (last visited Aug. 25, 2020).

a third-party sale occurs on the Amazon platform, Amazon makes clear that it never takes title.<sup>26</sup> This is true for the majority of goods sold on Amazon's site.<sup>27</sup> So, it argues, it is neither a seller nor a warrantor.

The effect of Amazon's transaction structure is to reconstitute the old, discredited, defense of privity for both available theories of liability—tort and warranty.<sup>28</sup> The consumer buys from the, largely unknown and impossible to verify, remote seller. But the consumer only deals directly with Amazon, which in turn seeks to hide behind the seller, whose identity is often a complete mystery. In the sections that follow we explore whether this formal dodge works as a doctrinal matter, first in contract, and then in tort, and conclude that both contract law and tort law have the capacity to elevate substance over form, but that, as it did for products generally, tort is likely to get there first.

## II. DOES AMAZON MAKE THE IMPLIED WARRANTY OF MERCHANTABILITY?

Defective consumer products and personal injury happen with actuarial frequency. With Amazon sitting at the center of the post-COVID supply chain, it is predictable that products sold on the platform will malfunction and cause injury. Warranty liability under the UCC is one source of redress. When a consumer buys goods from a store or directly from an online merchant, they make the implied warranty of merchantability under UCC Section 2-314. This renders the seller liable for harm caused to the buyer by defective goods, including consequential damages such as personal injury.<sup>29</sup> UCC Section 2-318 offers three versions, depending on a state's preferences. The warranty may reach only to the purchaser and their family (Option A), or it may reach to foreseeable users of the product, at least to the extent of personal injury damages (Option B), or it may reach to foreseeable users for all types of damage (Option C). However, if Amazon is treated as the direct seller, then privity is not an issue.

Amazon seeks to sidestep the entire conversation, however. Instead of interposing an intermediary between itself and the buyer it seeks to take itself out of the transaction entirely. It argues that, because it never takes title to goods sold on the platform by others, it is neither a seller for tort purposes nor a warrantor for contract purposes.<sup>30</sup> In this section we consider whether

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26. *Heavy Hand of Amazon*, *supra* note 6, at 264.

27. *Heavy Hand of Amazon*, *supra* note 6, at 262 n. 20 (citing J. Clement, Percentage of Paid Units Sold by Third-Party Sellers on Amazon Platform as of 4th Quarter in 2019, STATISTA (Jan. 31, 2020), <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/>).

28. Anita Bernstein, *Privity 2.0* (unpublished manuscript on file with author).

29. U.C.C. 2-314 (AM. LAW INST. & UNIF. LAW COMM'N 1951).

30. *See, e.g., Heavy Hand of Amazon*, *supra* note 6, at 261 and *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020).

this approach works under the UCC, and further consider whether other contract principles such as promissory estoppel and agency can be used to protect consumers in these transactions. In our view, the formal structure of the transaction should not matter, and substance should triumph over form, but the answer is far from certain.

#### A. THE SUBSTANCE AND THE FORM: WHAT DOES THE CONSUMER SEE?

When a customer purchases goods over the Amazon platform, it is not always clear from whom they are buying: Is it Amazon or somebody else? This confusion is buried deep in the history of Amazon's business. Amazon started in 1995 as an online bookseller that sold and shipped books online for its own account.<sup>31</sup> In this regard it was different from other internet businesses, like E-Bay, which operated as an online auction platform, or brick and mortar stores that opened websites in order to expand their business.<sup>32</sup> At its inception, Amazon was more like L.L. Bean or Land's End—catalogue sellers that moved online.<sup>33</sup>

In 2000, however, Amazon added the Amazon Marketplace, where third-party sellers could sell things alongside Amazon on its website.<sup>34</sup> This allowed Amazon to increase the variety of products sold, without having to finance additional inventory.<sup>35</sup> Amazon offered third party sellers two methods of selling on Amazon.<sup>36</sup> The seller could ship directly to customers, or it could choose “fulfillment by Amazon,” in which case the inventory would be stored at and shipped from Amazon's own fulfillment centers.<sup>37</sup>

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31. Press Release, Amazon, World's Largest Bookseller Opens on the Web (Oct. 4, 1995) (<https://press.aboutamazon.com/news-releases/news-release-details/worlds-largest-bookseller-opens-web/>).

32. See *Our History*, EBAY, <https://www.ebayinc.com/company/our-history/> (last visited Aug. 25, 2020); *History*, BARNES AND NOBLE, <https://www.barnesandnobleinc.com/about-bn/history/> (last visited Aug. 25, 2020).

33. See *Company Information*, L.L.BEAN, <https://www.llbean.com/llb/shop/516920?nav=In-516918> (last visited Aug. 25, 2020); *About Us*, LANDS' END, <https://www.landsend.com/aboutus/company/> (last visited Aug. 25, 2020).

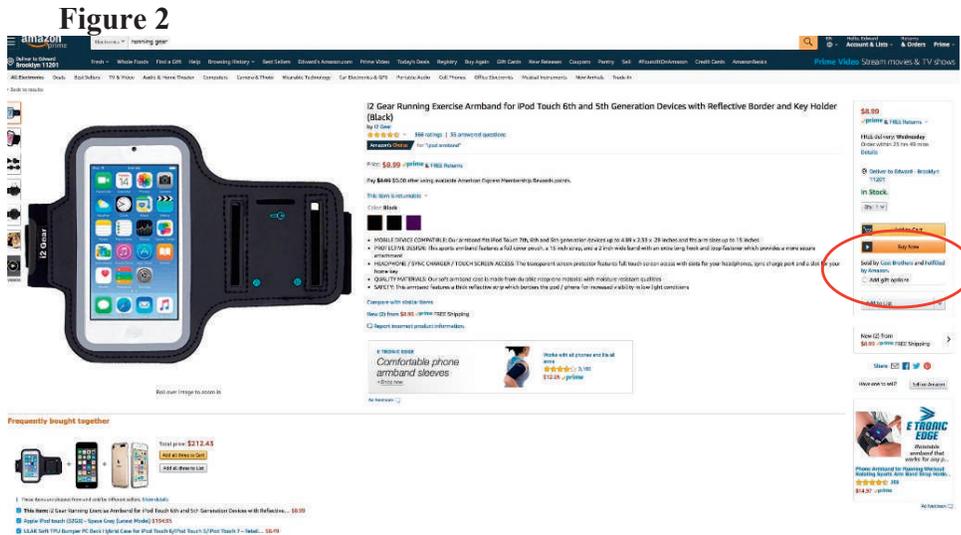
34. Press Release, Amazon, Amazon Marketplace a Winner for Customers, Sellers, and Industry; New Service Grows Over 200 Percent in First Four Months (Mar. 19, 2001), <https://press.aboutamazon.com/news-releases/news-release-details/amazon-marketplace-winner-customers-sellers-and-industry/>.

35. Matt Day & Jackie Gu, *The Enormous Numbers Behind Amazon's Market Reach*, BLOOMBERG (March 27, 2019), <https://www.bloomberg.com/graphics/2019-amazon-reach-across-markets/?sref=DmtH4HH5>.

36. See *Amazon Services Business Solutions Agreement*, AMAZON SELLER CENTRAL, [https://sellercentral.amazon.com/gp/help/external/G1791?language=en\\_US](https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US) (last visited Nov. 21, 2020). See also *The Beginner's Guide to Selling on Amazon*, AMAZON, <https://sell.amazon.com/beginners-guide.html> (last visited Au. 25, 2020).

37. *The Beginner's Guide to Selling on Amazon*, AMAZON, <https://sell.amazon.com/beginners-guide.html> (last visited Au. 25, 2020).

For the customer, the structure of the transaction might not be completely obvious. Figure 2 displays a typical product page on the Amazon website. It was found in response to a search for an “iPhone armband.” It is not easy to figure out who the seller is. The identity of the seller is disclosed, but the disclosure is in fine print, and purely formal. The identity of the nominal seller could easily be missed.

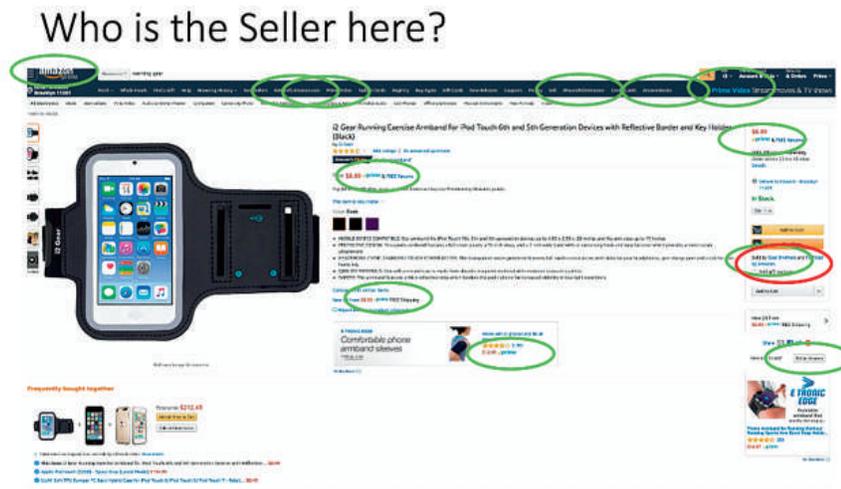


The transaction described in Figure 2 has three participants: (1) the manufacturer—I2 Gear; (2) the seller—Cost Brothers; and (3) Amazon. What is striking, (as demonstrated in Figure 3) is that on this page, the seller’s name appears once, in the circled (very) small print, while the words “Amazon” or “Prime” (an Amazon trademark) appear 12 times. Meanwhile, inconspicuously, under the “Buy now” button one finds the legend, “Sold by Cost Brothers. Fulfilled by Amazon.”<sup>38</sup> The customer could not be blamed if they thought they were buying the item from Amazon. Nonetheless, Amazon would forcefully argue that the purchase was not from them, but from Cost Brothers.<sup>39</sup>

38. This is one of three possible legends. When one purchases goods on the Amazon website, the page will indicate that the goods are “sold by Amazon and shipped by Amazon,” “Sold by XXX and shipped by Amazon,” or “Sold by XXX and shipped by XXX.”

39. *Should Amazon Be Responsible When Its Vendors’ Products Turn Out to Be Unsafe?*, WALL ST. J. (Feb. 28, 2020), <https://www.wsj.com/articles/should-amazon-be-responsible-when-its-vendors-products-turn-out-to-be-unsafe-11582898971>.

Figure 3



Notwithstanding their protestations, however, Amazon does not, and cannot contend that it does not have a contract with the consumer. If one is that rare, mythical, person who clicks through to Amazon’s “terms of service”, one would find:

Welcome to Amazon.com. Amazon.com Services LLC and/or its affiliates (“Amazon”) provide website features and other products and services to you when you visit or shop at Amazon.com, use Amazon products or services, use Amazon applications for mobile, or use software provided by Amazon in connection with any of the foregoing (collectively, “Amazon Services”). Amazon provides the Amazon Services subject to the following conditions.<sup>40</sup>

Under the contract, the consumer uses “Amazon Services.”<sup>41</sup> As such, the contract is characterized as a services contract, rather than a sale contract, but the definition is broad, and it includes when “Amazon.com . . . provide[s] products,” which includes when “you . . . shop at Amazon.com.”<sup>42</sup>

Even though there is a contract, and the contract will lead to the sale of goods, it is still an open question whether it is a contract under which the UCC’s implied warranties arise. The “Amazon Service” provided is to form and arrange performance of the contract for “sale” to a consumer by Cost Brothers of an iPhone armband. It is Cost Brothers that will transfer title to the purchaser for a price. But who is Cost Brothers? What does the buyer know about them? Does the buyer even know they exist? How can they ascertain Cost Brothers’ creditworthiness, or their reliability? Assuming the

40. *Conditions of Use*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=201909000&pop-up=1> (last visited Aug. 25, 2020) (emphasis added).

41. *Id.*

42. *Id.*

buyer wanted to, what could they find out? At least on the Amazon website, the only information is a list of items sold by them,<sup>43</sup> and a summary of feedback from customers who have purchased items from them.<sup>44</sup> There is merely a business address naming Faber Graphics.<sup>45</sup>

To the extent that a potential buyer wanted information about the manufacturer “I2 Gear,” the situation is similar. The only information available is a list of other products the company sells, mostly iPhone armbands and fanny packs for runners.<sup>46</sup> It is not a known brand name by any means.

From Cost Brothers’ perspective, there is never any contact directly with the consumer,<sup>47</sup> and Cost Brothers may not actually do anything to effectuate the sale. To the consumer, there would appear to be a contract between the consumer and Amazon.<sup>48</sup> While the goods sold are nominally going to be transferred directly from Cost Brothers to the buyer,<sup>49</sup> the reality is that the iPhone armband is at an Amazon fulfillment center.<sup>50</sup> Amazon will take the armband, put it in an Amazon box and arrange for shipment.<sup>51</sup> Cost Brothers may not even know about the sale until Amazon processes the order and reimburses them.<sup>52</sup> All Cost Brothers may do is deliver a bunch of armbands to the Amazon warehouse, and authorize Amazon to sell them on their behalf.

While both Cost Brothers and I2 Gear can be considered sellers for the purpose of warranting the armband, it is not clear that the customer is even aware of their existence. As far as the customer is concerned, they dealt with Amazon. So, which should control, the formal transaction structure or the consumer’s expectations? This is not just a question of tort law under strict product liability. It is a question of contract law under the law of warranty. When warranties are created, by whom, and how they are disclaimed in consumer goods contracts is regulated by both the UCC<sup>53</sup> and by federal law.<sup>54</sup>

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43. *Cost Brothers Products on Amazon.com*, AMAZON, <https://www.amazon.com/s?me=A1UZXX8GKKGIIR&marketplaceID=ATVPDKIKX0DER> (last visited Aug. 25, 2020).

44. *Cost Brothers Amazon.com Seller Profile*, AMAZON, [https://www.amazon.com/sp?\\_encoding=UTF8&asin=&isAmazonFulfilled=1&isCBA=&marketplaceID=ATVPDKIKX0DER&orderID=&protocol=current&seller=A1UZXX8GKKGIIR&sshPath=](https://www.amazon.com/sp?_encoding=UTF8&asin=&isAmazonFulfilled=1&isCBA=&marketplaceID=ATVPDKIKX0DER&orderID=&protocol=current&seller=A1UZXX8GKKGIIR&sshPath=) (last visited Aug. 25, 2020).

45. *Id.*

46. *Search of I2 Gear on Amazon.com*, AMAZON, <https://www.amazon.com/s?k=i2+gear> (last visited Aug. 25, 2020).

47. *Cf.* Amazon, Conditions of Use, AMAZON *supra* note 42.

48. *Id.*

49. *See Amazon Services Business Solutions Agreement*, *supra* note 38.

50. *Id.*

51. *Id.*

52. *Id.*

53. U.C.C. §§ 2-312–316 (AM. LAW INST. & UNIF. LAW COMM’N 1951).

54. *See* Magnuson-Moss Warranty Act, 15 U.S.C. § 2310 (2018).

**B. WHY DOES IT MATTER IF AMAZON IS A WARRANTOR?**

The question, in a nutshell, is whether the law of contracts will require Amazon to stand behind goods sold on its website. Liability in warranty is “strict.” If Amazon makes the implied warranty of merchantability, then under UCC Section 2-314 Amazon would be guaranteeing that the goods are merchantable.<sup>55</sup> To be merchantable, they must:

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promise or affirmations of fact made on the container or label if any.<sup>56</sup>

If the armband turns out to rip, tear, or fall off due to faulty materials, then the purchaser would have an action for breach of warranty and would be entitled to the remedies set forth in UCC Section 2-714.<sup>57</sup>

- (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.<sup>58</sup>
- (3) In a proper case any incidental and consequential damages under the next section may also be recovered.<sup>59</sup>

Thus, the purchaser would be entitled to the lost value. Here, the armband would be valueless, so the purchaser would be entitled to a refund of the purchase price. If the purchaser instead decided that they wanted to return the armband and receive a replacement, they would be entitled to the cost of shipping as incidental damages:

- (1) Incidental damages resulting from the seller’s breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges,

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55. See U.C.C. § 2-314(2) (AM. LAW INST. & UNIF. LAW COMM’N 1951).

56. *Id.*

57. U.C.C. § 2-714 (AM. LAW INST. & UNIF. LAW COMM’N 1951).

58. U.C.C. § 2-714(2) (AM. LAW INST. & UNIF. LAW COMM’N 1951).

59. U.C.C. § 2-714(3) (AM. LAW INST. & UNIF. LAW COMM’N 1951).

expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.<sup>60</sup>

But wait, there's more. If somehow, the defect was to prove dangerous and cause injury, then the purchaser would be entitled to incidental and consequential damages under Section 2-715.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.<sup>61</sup>

To be sure, an exploding hoverboard, a cellphone that catches fire, and/or a faulty dog collar that breaks causing personal injury would not be merchantable, and a warranty theory is available against the seller for personal injury.

### C. IS AMAZON A WARRANTOR?

While the third party seller is a warrantor, it remains a question whether Amazon also warrants the merchantability of goods sold by its third party sellers. Whether Amazon makes the implied warranty of merchantability turns on the language of UCC Section 2-314(1):

Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a *contract for their sale* if the *seller* is a *merchant* with respect to *goods of that kind*. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.<sup>62</sup>

In our view, the answer is not clear cut. Figuring this out requires a quick tour through Article 2 of the UCC. In particular, how does the UCC define "seller," "merchant" and a "contract for their sale." We will look at each of these in order.

As noted above, Amazon would argue that, where third party sellers are involved, Amazon is not the seller because: (1) it does not take title to the goods; and, (2) it is not a party to the contract for sale. It is not clear that either of these facts matter for the purpose of being a warrantor.

"Seller" is defined in Section 2-103 as "a person who sells or contracts to sell goods."<sup>63</sup> A "contract" must "relat[e] to the present or future sale of

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60. U.C.C. § 2-715(1) (AM. LAW INST. & UNIF. LAW COMM'N 1951).

61. U.C.C. § 2-715(2) (AM. LAW INST. & UNIF. LAW COMM'N 1951).

62. U.C.C. § 2-314(1) (AM. LAW INST. & UNIF. LAW COMM'N 1951) (emphasis added).

63. U.C.C. § 2-103 (AM. LAW INST. & UNIF. LAW COMM'N 1951).

goods.”<sup>64</sup> A “contract for sale” “includes both a present sale of goods and a contract to sell goods at a future time.”<sup>65</sup> A “sale” is defined as “the passing of title from the seller to the buyer for a price.”<sup>66</sup> On this narrow reading, in the transaction described in Figures 2 and 3, Amazon does not contract to sell goods.<sup>67</sup> And the contract entered into between Amazon and the customer would not be a “contract for sale.” However, this is not the end of the inquiry.

The question is not whether Amazon enters into a “contract for sale,” or is a “seller,” but whether it is a “warrantor.”<sup>68</sup> It does not appear that one needs to be a seller to make a warranty: “a warranty that the goods shall be merchantable is implied in a *contract for their sale* if the *seller* is a *merchant* with respect to *goods of that kind*.”<sup>69</sup> The language in UCC Section 2-314 does not say “contract for sale.”<sup>70</sup> It is possible that a contract can be entered into between two parties that contemplates the sale of goods, but where the contracting parties are not the buyer and seller. I can bind myself to a contract where I (Party A) may commit to ensure that somebody else (Party B) will deliver title to goods to a buyer (Party C). In other words, a contract for sale can be made with one person, where the actual deliveries will be fulfilled by another. For example, a general contractor will often warrant the work of a subcontractor. In sum, while a “contract for sale” requires a transfer of title from the seller (a party to the contract) to a buyer (also a party to the contract), a “contract for their sale” need not, necessarily, be a “contract for sale.”

There is no point in the Amazon transaction where the consumer actually engages with the third-party seller, other than Amazon revealing its identity.<sup>71</sup> Amazon undertakes to make the sale happen, and if there are problems, the complaints run through Amazon as well.

Again, under UCC Section 2-106, a “contract” governed by Article 2 must “relate to the sale of goods,” but it need not be a “contract for sale.”<sup>72</sup> This question is non-trivial. Consignment merchants, for example, often enter into contracts where they sell a product, owned by someone else out of their store.<sup>73</sup> The consignment merchant acts as an agent for the seller—who the buyer never sees. Certain inventory floor planning arrangements may work this way as well, where a manufacturer’s inventory is displayed and sold from a showroom floor.<sup>74</sup> The language of UCC Section 2-314 leaves open the

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64. U.C.C. § 2-106 (AM. LAW INST. & UNIF. LAW COMM’N 1951).

65. *Id.*

66. *Id.*

67. *See also Amazon Services Business Solutions Agreement, supra* note 38.

68. *See* U.C.C. § 2-314 (AM. LAW INST. & UNIF. LAW COMM’N 1951).

69. *Id.* (emphasis added).

70. *Id.*

71. *See* Figures 2 and 3.

72. U.C.C. § 2-106 (AM. LAW INST. & UNIF. LAW COMM’N 1951).

73. *See* U.C.C. § 9-102(a)(20) (AM. LAW INST. & UNIF. LAW COMM’N 2010)

74. *See* LYNN M. LOPUCKI ET AL, *COMMERCIAL TRANSACTIONS: A SYSTEMS APPROACH* 1111-20 (7<sup>th</sup> ed. 2020) for documentation of a floor planning arrangement.

possibility that the contracts for the sale of consigned goods, or floor-planned cars would be viewed as “a contract for their sale,” and would contain the implied merchantability as an implied term.<sup>75</sup> The argument, therefore, is that Amazon enters into a contract with the consumer under which the goods purchased will be supplied by a third-party seller, and that this is a “contract for their sale.”

This approach elevates substance over form and has much to recommend it. In the non-virtual world, it would be odd if a purchaser were to walk into a store and the remedies against the merchant were to change depending, not on what the buyer could see, but on the title arrangement between the merchant and their supplier.

### 1. Privity

While one could argue that the word “their” in “contract for their sale” was merely a grammatical move to clarify that the warranty related to the specific goods, there is another equally plausible reading, which inheres in the logic of warranty. Article 2 does not appear to require a warrantor to have a contract with the plaintiff – the ultimate user of the product. Under all versions of UCC Section 2-318, a seller’s warranty extends beyond the immediate purchaser to cover personal injury of guests and family members (Alternative A).<sup>76</sup> However, in close to half of the states, warranties run beyond guests and family members to all foreseeable users (Alternative B) for personal injury. In some jurisdictions, it goes even further, covering economic loss as well as personal injury (Alternative C). This extension of the warranty operates when a manufacturer seeks to insulate itself from liability by hiding behind the distribution chain.

Section 2-318 operates as a limited relaxation of the requirement of privity. In the classic case, a seller makes a warranty, and the warranty runs beyond the immediate purchaser. Again, this prevents the seller from elevating the form of the transaction over its substance. In the face of Section 2-318, Amazon has sought to create a slightly different, but equally formal version of non-privity. While Amazon’s contract is the only contract directly with the consumer, Amazon seeks to present itself as a stranger to the transaction.<sup>77</sup> Our suggested reading of 2-314, treating Amazon’s contract with the consumer as a “contract for their sale,” vindicates the policy of Section 2-318 and operates symmetrically without regard to formal transaction structure.

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75. See U.C.C. § 2-314 (AM. LAW INST. & UNIF. LAW COMM’N 1951).

76. See U.C.C. § 2-318.

77. See *Amazon Services Business Solutions Agreement*, *supra* note 38.

## 2. Seller by Estoppel

To the extent that Amazon seeks to shift any warranty liability to third party sellers, there is also an argument that Amazon is a seller by estoppel. As we noted above, when a consumer visits Amazon to purchase an iPhone armband, it accomplishes this transaction in an “Amazon” branded space.<sup>78</sup> Indeed, if one wants to purchase something from Cost Brothers, on “costbrothers.com,” it is impossible to purchase it anywhere but an Amazon branded space.<sup>79</sup> Amazon is the only place where Cost Brothers seems to exist, and their only function is to sell iPhone armbands and USB lamps produced by a company called I2 Gear, and yoga straps from a company called Paloma.<sup>80</sup>

In other words, Amazon makes it very difficult to see who, besides Amazon, is involved in the sale. For these purposes, it is Amazon’s reputation, not Cost Brothers or I2Gear that drives the sale. To the extent that Amazon structures the sale such that it appears that Amazon is a seller, and the customer relies on that fact, there is a strong argument that estoppel principles should operate to hold Amazon responsible for the impression it creates.

## 3. Seller’s Agent

Finally, and most importantly, Amazon may also be treated as an agent for the seller. Under the law of agency, when someone is dealing with an agent for an undisclosed principal, the law typically imposes on the agent whatever responsibilities would otherwise be on the principal.<sup>81</sup> Here, it can be argued that Amazon is acting as an agent, and that Amazon makes it rather hard for a typical buyer to figure out (i) that Amazon is acting only as an agent, and (ii) the identity of the principal could justify a legal conclusion that Amazon should be treated as an agent for an undisclosed principal (or, perhaps, be estopped from denying that status).

Thus, while it may not be open and shut, there is a powerful argument that Amazon is a merchant seller who makes the implied warranty of merchantability notwithstanding its claim that it never takes title.

## III. CAN AMAZON AVOID WARRANTY LIABILITY FOR PERSONAL INJURY

If a court were to find that Amazon does make the implied warranty of merchantability, it would be liable for personal injury damages caused to its

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78. *Supra* Figures 2 and 3.

79. *See, e.g., Search of Cost Brothers on Google.com*, GOOGLE, <https://www.google.com> (search “Cost Brothers”) (last visited Aug. 25, 2020).

80. Cost Brothers Products on Amazon.com, *supra* note 45.

81. *See, e.g., AcBel Polytech, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 928 F.3d 110, 117-18 (1<sup>st</sup> Cir. 2019).

customers, and possibly also to family members, guests, and in many jurisdictions, foreseeable users of the product. In this section, we will analyze a third attempt by Amazon to avoid such liability – disclaimer. In this regard, Amazon may actually have been too cute by half. Their attempts to conceal the identity of the actual seller and their own role in the transaction undercuts their attempt to disclaim warranty. First, their concealment of the true seller undercuts the conspicuousness of any warranty disclaimer. Second, the attempt to avoid liability completely, through transaction structure, may cause the remedies in the transaction to fail of their essential purpose.

#### A. DISCLAIMER

Notwithstanding its protestations to the contrary, Amazon appears to be sensitive to the possibility that it might turn out to be a warrantor under its contract with the consumer for services. To deal with this, the company does just what you might expect.<sup>82</sup> It seeks to disclaim all warranties, exclude consequential damages, and limit the remedy to “repair and replacement,” proclaiming all services to be provided “AS IS.”<sup>83</sup> Below is the disclaimer that one can find on Amazon:

#### **DISCLAIMER OF WARRANTIES AND LIMITATION OF LIABILITY**

THE AMAZON SERVICES AND ALL INFORMATION, CONTENT, MATERIALS, PRODUCTS (INCLUDING SOFTWARE) AND OTHER SERVICES INCLUDED ON OR OTHERWISE MADE AVAILABLE TO YOU THROUGH THE AMAZON SERVICES ARE PROVIDED BY AMAZON ON AN “AS IS” AND “AS AVAILABLE” BASIS, UNLESS OTHERWISE SPECIFIED IN WRITING. AMAZON MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AS TO THE OPERATION OF THE AMAZON SERVICES, OR THE INFORMATION, CONTENT, MATERIALS, PRODUCTS (INCLUDING SOFTWARE) OR OTHER SERVICES INCLUDED ON OR OTHERWISE MADE AVAILABLE TO YOU THROUGH THE AMAZON SERVICES, UNLESS OTHERWISE SPECIFIED IN WRITING. YOU EXPRESSLY AGREE THAT YOUR USE OF THE AMAZON SERVICES IS AT YOUR SOLE RISK.

TO THE FULL EXTENT PERMISSIBLE BY LAW, AMAZON DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. AMAZON DOES NOT WARRANT THAT THE AMAZON SERVICES, INFORMATION, CONTENT, MATERIALS, PRODUCTS (INCLUDING SOFTWARE) OR OTHER SERVICES INCLUDED ON

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82. See Conditions of Use, *supra* note 42.

83. *Id.*

OR OTHERWISE MADE AVAILABLE TO YOU THROUGH THE AMAZON SERVICES, AMAZON'S SERVERS OR ELECTRONIC COMMUNICATIONS SENT FROM AMAZON ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. TO THE FULL EXTENT PERMISSIBLE BY LAW, AMAZON WILL NOT BE LIABLE FOR ANY DAMAGES OF ANY KIND ARISING FROM THE USE OF ANY AMAZON SERVICE, OR FROM ANY INFORMATION, CONTENT, MATERIALS, PRODUCTS (INCLUDING SOFTWARE) OR OTHER SERVICES INCLUDED ON OR OTHERWISE MADE AVAILABLE TO YOU THROUGH ANY AMAZON SERVICE, INCLUDING, BUT NOT LIMITED TO DIRECT, INDIRECT, INCIDENTAL, PUNITIVE, AND CONSEQUENTIAL DAMAGES, UNLESS OTHERWISE SPECIFIED IN WRITING.<sup>84</sup>

So, the next question is whether Amazon can make this disclaimer of warranty stick.

As a formal matter, Amazon appears to have jumped through all of the hoops.<sup>85</sup> If Amazon is a warrantor, then, to disclaim, it must comply with UCC Section 2-316 which states that, a disclaimer of the implied warranty of merchantability must be “conspicuous” and it must mention “merchantability.”<sup>86</sup>

As a formal matter Amazon seems to comply. The word “merchantability” appears in the disclaimer paragraph.<sup>87</sup> Further, the language is in all “BOLD” type.<sup>88</sup> However, as a practical matter, the disclaimer is presented in “click wrap,” that must be accessed through a link on one of the four transaction screens involved in processing the sale. Suffice it to say that in our view this disclaimer is “conspicuous,” in only the most technical way. We will discuss the enforceability of “click wrap” disclaimers below. Here, our point is that Amazon’s disclaimer through transaction structure is inconspicuous in and of itself.

## **B. REMEDY LIMITATION**

Recognizing that right and remedy are linked, the Amazon terms of service also seek to exclude “consequential damages,” and limit the consumer’s remedy to “repair and replacement.”<sup>89</sup> This is a fairly common move, and it would seem to be important for Amazon, given that one of the services that Amazon provides to its third-party sellers is that it handles returns and customer complaints.<sup>90</sup>

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84. *Id.*

85. *See id.*

86. *See* U.C.C. § 2-316 (AM. LAW INST. & UNIF. LAW COMM’N 1951).

87. *See* Conditions of Use, *supra* note 42.

88. *See id.*

89. *See id.*

90. *See* Beginners Guide to Selling on Amazon.com, *supra* note 39.

However, the UCC also regulates the power of sellers to limit remedies. UCC Section 2-719(3) provides:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.<sup>91</sup>

Indeed, when an attempt to limit a remedy overreaches, UCC Section 2-719(2) goes further. It provides:

Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.<sup>92</sup>

A recent application of this provision can be found in the case of *Sanchelima International v. Walker Stainless Equipment*.<sup>93</sup> In that case, a distributor of milk silos entered into a distributorship agreement with the manufacturer that contained a limitation on consequential damages that limited remedy to the loss on each transaction.<sup>94</sup> The manufacturer then violated the agreement by entering into direct sales.<sup>95</sup> The distributor sought lost profits. The court found that the limitation of remedy prevented the distributor from obtaining a meaningful remedy and invalidated the limitation of damages.<sup>96</sup>

The basic point here is that limitations of remedies cannot be used to fundamentally undermine the concepts of “efficient breach” and compensatory damages. The UCC, like the law of contracts generally, polices liquidated damages clauses and limited remedy provisions to honor the so-called “spirit of the remedies.” UCC Section 1-305 states that “the remedies provided by [the UCC] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed.”<sup>97</sup>

A problem remains. The principle of compensation is hostage to the underlying bargain. While it is prima facie unconscionable to disclaim liability for personal injury as consequential damages, it is not unconscionable to disclaim the implied warranty of merchantability. Thus, as a logical matter, there would be no breach of contract to form the basis for damages at all.<sup>98</sup>

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91. U.C.C. § 2-719(3) (AM. LAW INST. & UNIF. LAW COMM’N 1951).

92. U.C.C. § 2-719(2) (AM. LAW INST. & UNIF. LAW COMM’N 1951).

93. *Sanchelima Int’l v. Walker Stainless Equipment*, 920 F.3d 1146 (7th Cir. 2019).

94. *Id.* at 1143.

95. *Id.*

96. *Id.* at 1144.

97. U.C.C. § 1-305 (AM. LAW INST. & UNIF. LAW COMM’N 2001).

98. See William M. Musser III, *Restricting Disclaimer of the Warranty of Merchantability in Consumer Sales: Proposed Alternatives to the UCC*, 12 WM. & MARY L. REV. 895, 895-896 (1971).

This circularity, however, creates another argument. While Amazon may try to characterize the bargain as an “as is” sale, subject to the principle of *caveat emptor*, that is not how the consumer understands the sale. Indeed, it is not how Amazon characterizes the sale. There is no indication in any of the documentation of the sale (of which we are aware) that indicates that Cost Brothers or any other third-party seller on Amazon is making an “as is” sale, or disclaiming implied warranties.<sup>99</sup> Thus, when the transaction is looked at “as a whole,” the combination of Amazon’s claim not to be a seller and attempt to disclaim all warranties seeks to shift all liability to a basically undisclosed (and unlocatable) seller. This is a paradigmatic “circumstance” where the limitation of remedy may fail its essential purpose.<sup>100</sup>

### C. ENFORCEABILITY OF BOILERPLATE WARRANTY DISCLAIMERS

In sum, the text of the UCC and underlying principles of contract law such as estoppel and agency *should* render Amazon a warrantor and make its attempts to disclaim unenforceable. Our arguments from transparency and substance run headlong, however, into a modern trend toward formalism in contract interpretation, that runs directly counter to the anti-formalism embodied in the UCC.<sup>101</sup> This new formalism is embodied in the ongoing and controversial efforts by the American Law Institute to restate the law of consumer contracts.<sup>102</sup> The Restatement seeks to address the fundamental paradox of consumer contracts – that they are never read, and that they are not expected to be read.<sup>103</sup> This raises a profound question about the enforceability of waivers contained in boilerplate and non-transparent transaction structure. The enforceability of contract terms is rooted in assent. But, as a functional matter, the consumer assents to the transaction but not the terms.<sup>104</sup> The realist anti-formalism of Article 2 would have suggested

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99. See Conditions of Use, *supra* note 42

100. See U.C.C. § 2-719(2) (AM. LAW INST. & UNIF. LAW COMM’N 1951).

101. See, generally, David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999).

102. Allison Frankel, *State AGs protest ALI consumer contract restatement ahead of May 21 Vote*, REUTERS, (May 21, 2019), <https://www.reuters.com/article/us-otc-ali/state-ags-protest-ali-consumer-contract-restatement-ahead-of-may-21-vote-idUSKCN1SL2VB>.

103. See THE AMERICAN LAW INSTITUTE, *Restatement of the Law – Consumer Contracts* (Tentative Draft) (April 18, 2019) (Reporters’ Memorandum, Page XIX), [https://www.ali.org/media/filer\\_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer\\_contracts\\_-\\_td\\_-\\_online.pdf](https://www.ali.org/media/filer_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer_contracts_-_td_-_online.pdf) (“Recognizing that consumers often do not read the fine print of terms in a contract, this Restatement establishes the rules (which must be followed) for determining the terms of the agreement.”)

104. See THE AMERICAN LAW INSTITUTE, *Restatement of the Law – Consumer Contracts* (Tentative Draft) (April 18, 2019) (Reporters’ Introduction, Page 1), [https://www.ali.org/media/filer\\_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer\\_contracts\\_-\\_td\\_-\\_online.pdf](https://www.ali.org/media/filer_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer_contracts_-_td_-_online.pdf) (“On one side stands a well-informed and counseled business party, entering numerous identical transactions, with the tools and sophistication to understand and draft detailed legal terms and design practices that serve its commercial goals. On the other side stand consumers who are

that the substance of the transaction should control.<sup>105</sup> That is not the approach taken by the reporters to the consumer contracts restatement.<sup>106</sup> Instead, they read current law as treating consumer boilerplate terms as presumptively enforceable.<sup>107</sup> Section 2 of the Proposed Restatement would read assent to standard terms into assent to the transaction, so long as there was an opportunity to review the terms of the contract.<sup>108</sup> That section has met with substantial opposition, with commentators forcefully arguing that it does not properly restate the law.<sup>109</sup> For the moment at least, it seems that the enforceability of Amazon's click-wrap warranty disclaimer and formal self-characterization is likely to be held hostage to this larger debate. We are convinced that warranty can, and should, be capable of responding to the challenge of Amazon, but we are uncertain about the timing.

In the next section we note a striking historical parallel to the way in which the common law of warranty and strict liability first evolved half a century ago. We conclude that, ultimately, the solution to the problem of platforms and product liability will lie in tort and the restatement of the law of product liability, rather than in the law of contracts and its tortured attempt to address the problem of consumer boilerplate.

#### IV. DÉJÀ VU—ALL OVER AGAIN

This attempt to fit personal injury for defective products into the framework of the UCC leads one to the immortal words of the late Yogi Berra—it is Déjà vu—all over again. Prior to the adoption of strict liability in tort under Section 402A of the Restatement (Second) of Torts, the traditional learning was that liability without fault was covered by UCC Sections 2-314 (implied warranty of merchantability), 2-316 (warranty disclaimers) and 2-719 (limitation of remedies), discussed above.<sup>110</sup> Indeed the landmark case of *Henningsen v. Bloomfield Motors, Inc.*, applied the

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informed only about some core aspects of the transaction, but rarely about the list of standard terms.”).

105. See, e.g., Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 623-24 (citing KARL LLEWELLYN, *THE COMMON LAW TRADITION* (1960) and H.M. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1958)).

106. See THE AMERICAN LAW INSTITUTE, *Restatement of the Law – Consumer Contracts* (Tentative Draft) (April 18, 2019) (Reporters' Introduction, Page 3), [https://www.ali.org/media/filer\\_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer\\_contracts\\_-\\_td\\_-\\_online.pdf](https://www.ali.org/media/filer_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer_contracts_-_td_-_online.pdf).

107. *Id.*

108. *Id.*

109. Adam J Levitin, Nancy S Kim, Christina L Kunz, Peter Linzer, Patricia A. McCoy, Juliet M. Moringiello, Elizabeth A Renuart & Lauren E. Willis, *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 Yale J. on Reg. (2019) (Available at: <https://digitalcommons.law.yale.edu/yjreg/vol36/iss1/7>).

110. See generally, William L. Prosser, *The Fall of the Citadel, (Strict Liability to the Consumer)* 50 MINN. L. REV. 791 (1966).

Code's implied warranty of merchantability to decide a classic products liability case against an auto manufacturer.<sup>111</sup>

Prior to *Henningsen*, the UCC was viewed as having significant impediments to plaintiffs seeking recovery in products liability. The “four horsemen”—(1) privity, (2) disclaimers (3) the four-year statute of repose that limits liability to actions brought within four years of tender of delivery and (4) notice of breach under UCC Section 2-607—were downright hostile to actions against manufacturers of defective products.<sup>112</sup> The late Dean William Prosser led the battle to impose strict liability under a tort regime free of the strictures of the UCC.<sup>113</sup>

*Henningsen* was able to work around the Code by declaring privity to be an unrealistic requirement given the reality of mass-marketing and finding disclaimers to be unconscionable.<sup>114</sup> But it was too late. Prosser's critique had taken hold. Two years after *Henningsen*, the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*, decided that products liability personal injury cases would impose strict tort liability.<sup>115</sup> The Second Restatement enshrined strict tort liability into Section 402A.<sup>116</sup> Within several years almost all American jurisdictions adopted Section 402A.<sup>117</sup> The formalism of the UCC would no longer serve as an impediment to plaintiffs seeking recovery for personal injury arising from defective products.

The discussion above shows that even now, attempting to pin liability on Amazon for products it sells on its platform through warranty is no easy matter. The easy answer would seem to be “escape to tort” where one does not have to deal with the formalism of the Code.

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111. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 100 (N.J.1960) (“By a parity of reasoning, it is our opinion that an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of the car, members of his family, and to other persons occupying or using it with his consent. It would be wholly opposed to reality to say that use by such persons is not within the anticipation of parties to such a warranty of reasonable suitability of an automobile for ordinary highway operation. Those persons must be considered within the distributive chain.”)

112. See, e.g., Morton R. Covitz, *Products Liability: The Rise and Fall of Privity*, 3 B.C. L. REV. 259 (1962); U.C.C. § 2-316 (AM. LAW INST. & UNIF. LAW COMM'N 1951) (providing requirements sufficient for the exclusion and modification of warranties); U.C.C. § 2-725 (AM. LAW INST. & UNIF. LAW COMM'N 1951) (providing the statute of limitations for breach of goods contracts); *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 898–901 (Cal. 1962) (holding a manufacturer strictly liable in tort under the common law, thus escaping the notice of breach requirement apparent in the Uniform Sales Act for liability under contract law).

113. See, generally, William L. Prosser, *The Assault Upon the Citadel, (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960) and *The Fall of the Citadel, (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791 (1966).

114. *Henningsen*, 161 A.2d at 83-84.

115. *Greenman*, 377 P.2d 897.

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

117. See Victor E. Schwartz, et al. , PROSSER, WADE, AND SCHWARTZ'S TORTS, CASES AND MATERIALS 837 (14th ed. 2020) (describing that Section 402A literally swept the country).

But this time around, it has not been so easy. Section 402A imposes liability for a “seller” of a defective product.<sup>118</sup> Though the term “seller” clearly includes any member of the distributive chain,<sup>119</sup> Amazon has contended that it is only a neutral platform that brings buyers and sellers together—not a seller and not in the distributive chain.<sup>120</sup> While common law courts who are free to interpret the term “seller” within the context of products liability law and should feel free to interpret that term within the context of classic tort law, several courts have acceded to Amazon’s formalistic approach. They have found Amazon not to be a seller because (1) Amazon did not take title to the third-party seller’s product and (2) it did not play an integral role in bringing the product to market.<sup>121</sup> Rather, courts have found Amazon has merely provided a service in which a buyer and seller may get together.<sup>122</sup> Those courts paid little attention to the following:

- (1) Amazon in its sole discretion determines the content, appearance, design and functionality of any product that it puts on its online platform;<sup>123</sup>
- (2) Amazon prohibits third-party vendors from communicating with Amazon customers without its permission;<sup>124</sup>

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118. § 402A *Special Liability of Sellers of Products for Physical Harm to User or Consumer*

(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.

119. See RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965). Comment f provides:

*f. Business of selling.* The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home. *Id.*

120. *Oberdorf v. Amazon.com, Inc.* 930 F.3d 136, 143 (3d Cir. 2019) (hereinafter *Oberdorf II*). Amazon has taken this position in all cases in which it has been named as a defendant in a products liability case. See *Heavy Hand of Amazon*, *supra* note 6, at 260 n. 9.. For a recent case rejecting Amazon’s position, see *and Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020).

121. See, e.g., *Erie Ins. Co. v. Amazon.com Inc.*, 925 F. 3d 135, 141–42 (4<sup>th</sup> Cir. 2013) (applying Maryland law); *Carpenter v. Amazon.com, Inc.* No. 17C 3221, 2019 WL 1259158 at 4–5 (N.D. Cal. Mar. 19, 2019).

122. See, e.g., *Stiner v. Amazon.com, Inc.* 120 N.E. 3d 885, 891-92 (Oh. Ct. App. 2019) (“Whereas a store typically selects the products it places on its shelf and offers them for sale, Amazon has only provided the forum or marketplace which [a wholesaler] utilized to offer and sell its product.”).

123. *Heavy Hand of Amazon*, *supra* note 6, at 263 (citing *Oberdorf II*, at 141).

124. *Id.* at 263 n. 24 (citing *Oberdorf II*, at 145).

- (3) All payments for sales made on Amazon are made to Amazon, not to the third-party seller;<sup>125</sup>
- (4) Amazon controls the placement of third-party vendors' products on its website by a bidding process for priority listing and display for which Amazon receives payment. These products are listed as "Sponsored" by Amazon.<sup>126</sup>
- (5) Amazon products listed as fulfilled by Amazon (Prime) are warehoused by Amazon and shipped to consumers in packages bearing the Amazon label.<sup>127</sup>
- (6) Amazon is free to substitute one third-party seller's product for the identical product provided by another third-party seller without the buyer's knowledge;<sup>128</sup>
- (7) When the buyer makes the decision to purchase a product in the "Buy Box" the name of the seller is found in tiny print but the name of Amazon or Prime is prominently displayed multiple times.<sup>129</sup>

Given the above realities about how Amazon relates to its customers, courts should have had no trouble holding Amazon liable as a seller. Indeed, the Restatement, Third of Torts—Products Liability, Sections 1 and 20 provides an expansive definition of the term "seller."

### **§ 1 Liability of Commercial Seller or Distributor for Harm Caused by Defective Products**

- One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.<sup>130</sup>

### **§ 20 Definition of "One Who Sells or Otherwise Distributes"**

- For purposes of this Restatement:
  - (a) One sells a product when, in a commercial context, one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption. Commercial product sellers include, but are not limited to, manufacturers, wholesalers, and retailers.
  - (b) One otherwise distributes a product when, in a commercial transaction other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption. Commercial nonsale product distributors include, but are not limited to, lessors,

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125. *Id.* at 263 n. 27 (citing *Oberdorf II*, at 141).

126. *Id.* at 264 n. 32 (citing Amazon's sponsored products webpage).

127. *Id.* at 266 n. 40 (citing Amazon's fulfillment by Amazon webpage).

128. *Id.* at 269 n. 47 (citing Amazon's business services agreement).

129. See *Heavy Hand of Amazon*, *supra* note 6, at 267-268; *supra* Figure 2.

130. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (AM. LAW INST. 1998).

bailors, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity.

- (c) One also sells or otherwise distributes a product when, in a commercial transaction, one provides a combination of products and services and either the transaction taken as a whole, or the product component thereof, satisfies the criteria in Subsection (a) or (b).<sup>131</sup>

It is strange that none of the courts that have addressed the liability of Amazon as a seller have cited to the above Restatement section. Since the Second and Third Restatements of Torts are expressions of common law principles, there was no impediment to bringing Amazon within the definition of seller. Amazon's control of every aspect of the sale (sans the transfer of title) certainly qualify for seller liability.

More troubling is the host of state statutes written in response to the tort reform movement during the 1990s. Some of the statutes seek to either codify Section 402A<sup>132</sup> or otherwise set forth a comprehensive products liability code.<sup>133</sup> Others were written to immunize non-manufacturers from strict liability.<sup>134</sup> Invariably these statutes include sections defining who is a seller. The language of these statutes varies. Many of them include in the definition of seller "a distributor." The problem is that the term distributor is nowhere defined. It is clear that none of these statutes conceived of the Amazon phenomenon. Now we are forced to confront a problem of statutory interpretation rather than a common law analysis as to whether Amazon should be held liable given its extensive control of the marketing process.

One would hope that courts would use common sense and not opt for a wooden interpretation of the term seller but the evidence to date is mixed.<sup>135</sup>

## CONCLUSION AND POSTSCRIPT

In August 2020, in *Bolger v. Amazon.com, LLC*, a California Court of Appeals decided that Amazon was responsible in tort for damage caused by a defective computer battery provided by a third-party seller.<sup>136</sup> Amazon has not appealed *Bolger* to the California Supreme Court and it has settled the *Oberdorf* case. It appears that it is seeking to avoid an adverse decision from

131. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (AM. LAW INST. 1998).

132. *See, e.g.*, MONT. CODE ANN. § 27-1-719 (West); WIS. CODE ANN. § 895-047. (West).

133. *See, e.g.*, ALA. CODE § 6-5-50 (West); IDAHO CODE § 6-1401 (West); LA. STAT. ANN. § 9:2800.52 (West); N.J. STAT. ANN. §§ 2A:58C-1, 2A:58C-2 (West); N.D. CENT. CODE ANN. §§ 28-01.3.01 to 28.01.3.09 (West).

134. *See, e.g.*, COLO. REV. STAT. ANN. § 13-21-402 (West); DEL. CODE ANN., §18-7001 (West); MD. CODE ANN., CTS. & JUD. PROC. § 5-405(West); MISS. CODE ANN. § 11-1-63 (West); NEB. REV. STAT. ANN. § 25-224 (West); TEX. CIV. PRAC. & REM. CODE ANN. § 82.002 (West).

135. *See Heavy Hand of Amazon, supra* note 6, 260 (citing to seven cases holding that Amazon is not a seller).

136. *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020).

the highest court of a state. It believes that until state courts impose liability they will ride it out and take advantage of the lack of clarity. Legislation that would hold Amazon and other internet platforms liable for third-party seller torts has been introduced in the California legislature.<sup>137</sup> Strangely Amazon is supporting the legislation.<sup>138</sup> The legislation by its terms would sweep under its scope outfits such as E-Bay and Etsy.<sup>139</sup> Critics speculate that Amazon is willing to shoulder tort responsibility as long as the legislation sweeps any potential competitors into similar liability.<sup>140</sup> Amazon is able to carry tort liability whereas smaller competitors might not, thus leaving Amazon with a complete monopoly.<sup>141</sup> Where this will all end is at this point unknowable.

Commerce in goods has long relied on the existence of middlemen. Goods may pass through many hands before reaching the ultimate user. The basic allocation of risk created by the UCC assumed that parties who dealt with each other face to face would be liable to each other. The problem, historically, was reaching further back in the supply chain to manufacturers where there was no direct contractual relationship. That is the history of UCC 2-318 discussed above. The assumption was that the manufacturer would be the ultimate source of the defective product *and* the deep pocket. Buick should not be able to hide behind its distributorship network. Platforms like Amazon reverse this set of assumptions. The third-party seller, Cost Brothers, or, as in *Oberdorf* the “Furry Gang, may be small businesses, or even just virtual storefronts that exist only to finance inventory. Amazon, by contrast, is in the driver’s seat with regard to the transaction, and it is in the best position to police sellers on its platform, mandate insurance, and spread risk. Allowing Amazon to avoid liability by (1) hiding the terms of its contract behind layers of clickwrap, and (2) creating formal transaction structures that leave the buyer without recourse to a solvent party would render warranty liability meaningless.

As we have discussed, both the UCC and the law of contracts have the tools and concepts to look behind the curtain. The question remains whether courts will do so.

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137. *California Legislative Information, AB-3262 Product liability: electronic retail marketplaces* (Nov. 13, 2020, 11:00 AM), [https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=201920200AB3262](https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200AB3262)

138. Allison Frankel, *Amazon backs proposed Calif. product liability law for online sellers (with conditions)*, REUTERS (Aug. 25, 2020), <https://www.reuters.com/article/legal-us-otc-amazon/amazon-backs-proposed-calif-product-liability-law-for-online-sellers-idUSKBN25L2JS>.

139. *Id.*

140. *Id.*

141. *See Id.*