Journal of Law and Policy

Volume 28 | Issue 2 Article 7

5-15-2020

Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond

Aaron Doyer

WHO SELLS? TESTING AMAZON.COM FOR PRODUCT DEFECT LIABILITY IN PENNSYLVANIA AND BEYOND

*Aaron Doyer**

Pennsylvania, like other states, has struggled over the past few decades to apply the policy principles of product defect law—a tort characterized by strict liability. Because strict liability bypasses the traditional requirement in tort that a plaintiff prove the defendant's negligence, and instead requires only a showing that the plaintiff was injured by a product sold in a defective condition, these inquiries raise a deceptively simple question: who sells? Recently, in a landmark case in Pennsylvania, the Third Circuit made waves by declaring Amazon.com, an enormous online marketplace, the legal "seller" of a product shipped and sold by a vendor through its website. Amazon.com has challenged that ruling and continues to assert its innocence for its part in the transaction. Pennsylvania, like many other states, relies on the Restatement (Second) of Torts Section 402A as controlling its products liability jurisprudence. Accordingly, the ultimate result of Amazon's battle in Pennsylvania will have implications for its online marketplace throughout the country. This Note examines the history of products liability in Pennsylvania and proposes an analysis born out of that history to more appropriately determine seller status that, by virtue of Section 402A's widespread adoption, should be largely applicable in many other states.

INTRODUCTION

Owing largely to the business model of Amazon.com, Inc.,[1] consumers live in a new world where there are few things one must

* J.D. Candidate 2021, Brooklyn Law School. Thank you to the *Journal of Law and Policy* members and staff for your support. Thank you to my friends for tolerating several late-night tirades regarding products liability and other topics

actually leave the home to purchase. Groceries, clothing, beauty products, furniture, electronics—all the necessities of life are just a quick search and two-day delivery away. But while the conveniences of shopping continue to advance exponentially, the quality and safety of products placed on online markets may actually be suffering.[2] On August 23, 2019, the Wall Street Journal ("WSJ") published an investigative piece illustrating this paradox.[3] The report, which was quickly picked up by multiple media outlets, revealed a list of over 4,000 products listed for sale on Amazon's website that were known to be dangerous, maliciously labeled, or banned.[4] The blistering exposé detailed several decidedly harmful and even potentially fatal products listed on the web giant's third-party marketplace, prompting U.S. lawmakers to call on Amazon for answers.[5] The report immediately caught Amazon's attention as well; the company responded the same day on its aptly named blog—Day One—reassuring consumers that products sold on its site "must comply with relevant laws and regulations" and that its "sophisticated tools prevent non-compliant products from being listed."[6]

For some, the WSJ report was "shocking and deeply troubling,"[7] but for others, the report only confirmed what they had known all

---

on the law. Finally, thank you to my mother, who has sacrificed so much for her children. I'm almost there, Mom.

[1] I hereinafter refer to Amazon.com, Inc. by its trade name "Amazon."

[2] *See infra* notes 3–4 and accompanying text.

[3] Alexandra Berzon et al., *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products*, WALL ST. J. (Aug. 23, 2019), https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990.

[4] Kenneth Corbin, *Lawmakers Call On Amazon to Take Down Unsafe Products*, FORBES (Aug. 30, 2019), https://www.forbes.com/sites/kennethcorbin/2019/08/30/lawmakers-call-on-amazon-to-take-down-unsafe-products/amp/.

[5] Letter from Richard Blumenthal, Robert Menendez, & Edward J. Markey, Senators, U.S. Senate, to Jeff Bezos, CEO & Chairman, Amazon.com, Inc. (Aug. 29, 2019) (on file with the United States Senate).

[6] Day One Staff, *Product Safety and Compliance in Our Store*, AMAZON BLOG: DAY ONE (Aug. 23, 2019), https://blog.aboutamazon.com/company-news/product-safety-and-compliance-in-our-store.

[7] Corbin, *supra* note 4.

along: Amazon's third-party marketplace has become a veritable "Wild West, with little or no accountability for the merchants hawking their wares."[8] How is it that Amazon could allow such products—products that are clearly known to be dangerous or mislabeled—on its platform? Unfortunately, this culture of lax oversight is unlikely to be harmless error on Amazon's part, as the tech giant has come to rely on its distance from its third-party sellers as a justification for disclaiming its own liability in product defect actions against it.[9]

When a defective product causes personal injury or damage to property, an aggrieved consumer may bring suit under state law for redress.[10] Such an action for product defect is a strict liability tort[11]—the modern version of which is born largely from the Restatement (Second) of Torts Section 402A—and can only be

---

[8] Scott Duke Kominers, *Amazon Should Be Held Partially Responsible for Third Party Sellers: Viewpoint*, INS. J. (July 26, 2019), https://www.insurancejournal.com/news/national/2019/07/26/534036.htm.

[9] *Id.* ("Amazon provides relatively little oversight. That's not just because Amazon doesn't have to; filtering as little as possible bolsters Amazon's claim that it's just hosting content[, not selling it.]").

[10] *See infra* note 11 and accompanying text.

[11] Generally speaking, a plaintiff succeeds on a strict liability claim of product defect by showing that the product was defective when sold and that the defect caused an injury, regardless of whether the seller was negligent or otherwise took all possible precautions in making or selling the product. A product may be defective in its design, from the manufacturing process, or by virtue of the seller's failure to warn against an inherent risk associated with the product. Accordingly, a charge of negligence is an additional, separate claim. *See* RESTATEMENT (SECOND) OF TORTS § 402A. Although there remains some controversy over whether *design* defect claims truly sound in strict liability or are simply a rebranding of negligence, that debate is beyond the capacity of this Note. For discussion on the topic, see, for example, Aaron D. Twerski, *Chasing the Illusory Pot of Gold at the End of the Rainbow: Negligence and Strict Liability in Design Defect Litigation*, 90 MARQ. L. REV. 7 (2006) (asserting that proving design defect necessarily means proving the manufacturer was negligent in not adopting a "reasonable alternative design").

brought against those who are considered "sellers"[12] under the law.[13] The definition of who sells, the primary focus of this Note, has proven to be more complicated than one might expect. Generally speaking, a finding of whether an entity is a seller or not turns on the degree of involvement with or "control" over the product that entity had as it moved through the distribution chain.[14] Although many courts have recognized a broad definition of seller to include, for example, such entities as lessors,[15] courts have also summarily refused to attach that status to Amazon for products sold through its third-party marketplace.[16] This traditional analysis to determine the potential for liability under products liability jurisprudence has had a perverse impact on product safety in online marketplaces like Amazon's marketplace.[17] The effect is inversely and directly

---

[12] This Note generally uses the word "seller" synonymously with "retailer," "distributor," and "manufacturer" for the sake of convenience, even though some courts stress the definitional difference between them when analyzing whether a particular entity is reachable for suit. *See, e.g.*, State Farm Fire & Cas. Co. v. Amazon.com, Inc., No. 18-CV-261(JDP), 2019 U.S. Dist. LEXIS 122316, at *9 (W.D. Wis. July 23, 2019) (attempting to ascertain whether Amazon is a "seller" or "distributor"). However, the Restatement (Second) of Torts, Section 402A, comment *f* defines each of these as being in the "business of selling."

[13] § 402A.

[14] Fox v. Amazon.com, Inc., 930 F.3d 415, 423–24 (6th Cir. 2019); Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738(FLW)(LHG), 2018 U.S. Dist. LEXIS 123081, at *20 (D.N.J. July 24, 2018); *see also* Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 399 (S.D.N.Y. 2018) (assessing Amazon's level of control in the transaction and finding it was not a seller or distributor but a "provider of services").

[15] *See* Francioni v. Gibsonia Truck Corp., 372 A.2d 736, 739 (Pa. 1977) (reviewing various courts' extension of the definition of "seller" to include lessors).

[16] Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J.L. & TECH. ON. 181, 183–84 (2019).

[17] Although Amazon, with its impressive share of the online retail market, is the quintessential example of a third-party marketplace, similar implications exist for other online market platforms such as Walmart, Etsy, and perhaps even eBay. *See* Max Mitchell, *Amazon Seeks En Banc Review of Panel Decision Holding It Liable for Products Sold by Third-Party Vendors*, LEGAL INTELLIGENCER (July 22, 2019), https://www.law.com/thelegalintelligencer/2019/07/22/amazon-seeks-en-banc-review-of-panel-decision-holding-it-liable-for-products-sold-by-third-party-vendors/.

proportional: Amazon maintains as little involvement with the products its third-party vendors sell as possible to avoid being found a "seller" under the law, which in turn allows those poorly vetted sellers to proliferate dangerous products on its site.[18] The consistent punting of responsibility operates to liberate the company from what would otherwise be a significant incentive to meaningfully police its marketplace.[19]

This model of accountability avoidance was working well for Amazon until July 3, 2019, when the United States Court of Appeals for the Third Circuit ruled in *Oberdorf v. Amazon.com, Inc.*, in an unprecedented decision, that Amazon could be considered a "seller" and thus held it strictly liable in the chain of distributors for products sold by third-party vendors through its marketplace.[20] Twenty days later, the United States District Court for the Western District of Wisconsin in *State Farm Fire & Casualty Co. v. Amazon.com, Inc.* ruled similarly against Amazon on the grounds that it was properly considered a "seller."[21] The decisions reverberated throughout the products liability landscape, with one commentator calling the result "legal fireworks."[22] Nevertheless, the online retailer's legal position remains very strong, especially in states that require a transfer of title as a prerequisite for strict liability.[23] Thus, it is unsurprising that on the same day Amazon was reassuring customers through its blog that unregulated and illegal products could never find their way onto

---

[18] *See supra* note 8 and accompanying text.

[19] *Id.* (arguing that customer trust is not a strong enough incentive because "marketplace quality issues aren't apparent to most users").

[20] Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 153 (3d Cir. 2019).

[21] State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 974 (W.D. Wis. 2019).

[22] Michael Hoenig, *Is Products Liability Closing In on Amazon?*, N.Y. L.J. (Aug. 9, 2019), https://www.law.com/newyorklawjournal/2019/08/09/is-products-liability-closing-in-on-amazon/; Anthony Juzaitis, *Analysis: Amazon Makes Products Liability a 'Middleman' Issue*, BLOOMBERG L. (Nov. 4, 2019, 7:19 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-amazon-makes-products-liability-a-middleman-issue; Mitchell, *supra* note 17; Michael Wolfer, *How Amazon Disrupted Product Liability*, NU PROP. & CASUALTY 360 (Oct. 28, 2019), https://www.propertycasualty360.com/2019/10/28/how-amazon-disrupted-product-liability/?slreturn=20191027152310.

[23] *State Farm Fire & Cas. Co.*, 390 F. Supp. 3d at 972.

its platform,[24] the Third Circuit voted to review *en banc*[25] its decision in *Oberdorf*,[26] foreshadowing a potential reversal that could quickly extinguish any fireworks before they begin. Amazon contends that the majority's "new rule [in *Oberdorf*] was not grounded on clear and unmistakable precedent from any Pennsylvania court. Rather, the majority relied on . . . policy considerations—acting, in effect, as a super-legislature."[27]

This Note explores the "new rule" incensing Amazon that bridges the gap from traditional notions of the "seller" to a more modern approach—an approach that is unafraid to confront modern business realities to achieve the goals of tort deterrence without unduly broadening the definition of seller beyond its means.[28] Although, as Amazon points out, the rule is rooted mainly in public tort policy considerations,[29] it still fits neatly alongside an analysis of the "control" requirement that various states, such as Arizona and New Jersey, require for strict liability to attach.[30] As this Note endeavors to show, such states need only consider all the relevant factors in relation to the policy purpose of a "control" requirement to find that in most cases, Amazon does, in fact, exert enough control over products sold through its site to be considered a seller. This Note proposes the marriage of these two ideas—the public policy test in *Oberdorf*[31] and a new, refined control requirement[32]—to satisfy the prudential need for a succinct, cogent, and practical test to determine, in a contemporary online marketplace, who sells.

---

[24] Day One Staff, *supra* note 6.

[25] A review *en banc* of a decision rendered by a panel of judges is reexamined by *all* judges of the appellate court—in this case, the Third Circuit Court of Appeals.

[26] Oberdorf v. Amazon.com, Inc., 930 F.3d 136 (3d Cir. 2019).

[27] Mitchell, *supra* note 17.

[28] *See Oberdorf*, 930 F.3d at 144–49.

[29] Mitchell, *supra* note 17.

[30] State Farm Fire & Cas. Co. v. Amazon.com, Inc., No. CV-17-01994 (PHX)(JAT), 2019 U.S. Dist. LEXIS 168734, at *6–10 (D. Ariz. Sep. 26, 2019); Papataros v. Amazon.com, Inc., No. 17-9836(KM)(MAH), 2019 U.S. Dist. LEXIS 144253, at *37–41 (D.N.J. Aug. 26, 2019).

[31] *Oberdorf*, 930 F.3d at 144.

[32] *See* discussion *infra* Section III.D.ii.

Additionally, the test is intended to obviate the "title" requirement that some states, such as Maryland and New York, still cling to,[33] rendering it a meaningless formality of the past.

Because the ruling in *Oberdorf* was pronounced based on an interpretation of Pennsylvania law,[34] this Note will explore the evolution of "seller" status in strict tort liability using that state as an example, examining the origins and application of the public policy reasoning *Oberdorf* articulates and which this Note proposes as part of a uniform test to determine who sells. This Note then turns to the "control" requirement, discussing how the application of a "control" standard that takes into account all relevant factors[35] would complement the policy goals of strict liability in tort and round out a complete test for application in any case to determine who sells.

I. AMAZON'S LEGAL STRATEGY: IMMUNITY, LACK OF LEGAL TITLE, AND ABSENCE OF CONTROL

Over the past two years, Amazon's legal strategy to avoid liability for injuries caused by defective products sold through its third-party vendors has remained consistent and is premised on three basic defenses: (1) products liability claims against Amazon are barred by the Communications Decency Act's ("CDA") Section 230;[36] (2) Amazon does not take title to or transfer title of products sold by third-party vendors;[37] and (3) Amazon does not exercise sufficient control over the products of third-party vendors during the manufacturing, distributing, or retail phase to be considered a seller.[38]

---

[33] Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 142 (4th Cir. 2019); Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018).

[34] *Oberdorf*, 930 F.3d at 143.

[35] There are several facts that could be pleaded to show that an entity has substantial market control in association with a given product. *See* discussion *infra* Section III.D.ii & Part IV.

[36] *E.g.*, *Oberdorf*, 930 F.3d at 151–52.

[37] *E.g.*, *Erie Ins. Co.*, 925 F.3d at 142.

[38] *E.g.*, Fox v. Amazon.com, Inc., 930 F.3d 415, 425 (6th Cir. 2019).

The first defense is starting to lose steam for a fairly straightforward reason: the CDA was never meant to protect persons from claims that do not "derive[] from the defendant's status or conduct as a 'publisher or speaker.'"[39] Amazon relies on CDA Section 230, which provides 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."[40] The tech giant argues that, because it merely provides a place where other vendors can market their wares, it cannot be held responsible for representations and, ultimately, defects in products associated with those representations made on its platform by other information content providers.[41] Although this defense may still apply in cases alleging failure to warn[42] and other cases where the speech provided by the vendor is at issue, some courts are finally dispensing with the notion that the CDA bars all claims associated with product defects sold by third-party vendors in Amazon's marketplace.[43] As the Tenth Circuit articulated in *FTC v. Accusearch, Inc.*,[44] courts are unwilling to "immunize a party's conduct outside the realm of the Internet just because it relates to the publishing of information on the Internet."[45]

The second and perhaps most ornery of Amazon's defenses is particularly effective in states that require an entity to have taken

---

[39] *Oberdorf*, 930 F.3d at 152 (quoting Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1102 (9th Cir. 2009)).

[40] 47 U.S.C. § 230(c)(1) (2018).

[41] *Oberdorf*, 930 F.3d at 151–52.

[42] Failure to warn of risks inherent in the product. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. j.

[43] *See, e.g.*, Papataros v. Amazon.com, Inc., No. 17-9836(KM)(MAH), 2019 U.S. Dist. LEXIS 144253, at *46–47 (D.N.J. Aug. 26, 2019).

[44] In *Accusearch*, the offending website, Abika.com, allowed the publishing of private phone records and other personal information on its platform by third-party researchers. When it was discovered the researchers were obtaining the information illegally, the FTC filed suit against Abika's operator, Accusearch. Accusearch sought immunity under the CDA, claiming, much like Amazon, that it was not responsible for the illegal activities of the third-party providers of content for its website. FTC v. Accusearch, Inc., 570 F.3d 1187 (10th Cir. 2009).

[45] *Id.* at 1206 (Tymokovich, J., concurring).

title[46] to a product before it can be considered a seller. In these situations, the web giant argues that because it does not take legal title to the products sold by its third-party vendors, it should not be held accountable for them.[47] Although not all states require the taking and passage of title as a prerequisite for liability as a seller, those that do present a monumental obstacle to recovery for injured plaintiffs, who for obvious reasons face great difficulty in pinning liability to Amazon where it never formally took title to the goods that were sold.[48]

In jurisdictions that do not maintain a rigid requirement that a seller be one who takes and transfers title of the product, Amazon turns to its third defense—that it did not exercise sufficient control over the product to be included under the "seller" umbrella.[49] In such a jurisdiction, transfer of title may be a consideration for determining who sells, but it is only one factor among many.[50] In determining whether an entity exercised enough control over a product to be considered a seller, courts look at additional factors such as whether the defendant itself listed the item for sale, directly set the price for the item, or made "representations about the safety or specifications" of the item.[51] Because these factors (and indeed, a title requirement) are more relevant to brick and mortar retail stores[52] than to enormous online sales platforms, Amazon has

---

[46] Generally stated, transfer of title occurs when a retailer formally purchases and takes ownership of goods from a manufacturer or distributor, thus giving it the right to control and dispose of the property as it wills. *See Title*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[47] Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018); Stiner v. Amazon.com, Inc., 120 N.E.3d 885, 897–98 (Ohio Ct. App. 2019).

[48] *See, e.g.*, Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135 (4th Cir. 2019).

[49] *See, e.g.*, Fox v. Amazon.com, Inc., 930 F.3d 415, 425 (6th Cir. 2019).

[50] *See, e.g.*, *id.*; State Farm Fire & Cas. Co. v. Amazon.com, Inc., No. CV-17-01994(PHX)(JAT), 2019 U.S. Dist. LEXIS 168734, at *10–11 (D. Ariz. Sept. 26, 2019).

[51] *Fox*, 930 F.3d at 425.

[52] Traditional stores that one would physically travel to and shop at, as opposed to an online web market. Recent decisions involving Amazon's liability for product defects have based their analyses on Section 402A of the Restatement (Second) of Torts or similar statutes. The Second Restatement was promulgated over the course of the 1960s and 70s, long before the advent of the internet as we

asserted with success that it does not exercise enough control over third-party products to be considered a seller under the law.[53] Nonetheless, it is in this environment that the courts in *Oberdorf v. Amazon.com, Inc.* and *State Farm Fire & Casualty Co. v. Amazon.com, Inc.* have found footing to confront the realities of Amazon's business model.[54] When the requirement to take title is dropped, and the court instead looks at a broad range of modern business factors associated with the alleged seller, it finds itself liberated to acknowledge the realities of contemporary online retail sales practices while realizing the policy underpinnings of products liability.[55]

A. Amazon's Services for Third-Party Vendors: Fulfillment by Merchant and Fulfillment by Amazon

For contextual purposes, it is important to understand the different levels of service Amazon offers third-party sellers who wish to utilize its platform in their businesses, even if this difference may become less relevant to the analysis of Amazon's participation in any given sale.[56] Simply put, Amazon offers two basic levels of

---

know it today, and thus long before lawmakers and jurists of the time could consider the implications of web-based marketplaces. *See, e.g.*, Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 151 (3d Cir. 2019); *State Farm Fire & Cas. Co.*, 2019 U.S. Dist. LEXIS 168734, at *16–17 (citing numerous court decisions utilizing 402A to find in favor of Amazon's status as a non-seller entity); Papataros v. Amazon.com, Inc., No. 17-9836(KM)(MAH), 2019 U.S. Dist. LEXIS 144253, at *41 (D.N.J. Aug. 26, 2019); State Farm Fire & Cas. Co. v. Amazon.com, Inc., No. 18-CV-261(JDP), 2019 U.S. Dist. LEXIS 122316, at *6 (W.D. Wis. July 23, 2019).

[53] *See, e.g.*, *Fox*, 930 F.3d at 425 (holding that although there was no requirement for Amazon to take or pass title, nonetheless, it had not exercised sufficient control over the product to be considered a seller of the product and was thus immune from liability under the Tennessee Products Liability Act).

[54] *Oberdorf*, 930 F.3d at 153; *State Farm Fire & Cas. Co.*, 390 F. Supp. 3d at 974.

[55] *Papataros*, 2019 U.S. Dist. LEXIS 144253, at *29 ("The definition of 'seller' . . . is not simply a matter of looking in the dictionary; it is highly dependent on the policies underlying the development of strict liability in tort.").

[56] *Id.* at *40 (discussing the lessening weight given to title or physical possession and increased weight given to "substantial market control").

service to third-party proprietors: "Fulfillment by Amazon" ("FBA") and "Fulfillment by Merchant" ("FBM").[57] Merchants that contract with Amazon through its FBA program pay higher costs and fees than FBM merchants in exchange for a host of more valuable services.[58] For FBA merchants, Amazon will handle the storage, shipping, and customer service needs of the merchant, including complaints and returns.[59] Importantly, FBA merchants also have direct access to Amazon Prime customers, which access increases visibility and attractiveness of their products (via two-day shipping) and may increase their sales significantly.[60] FBM differs from FBA in that FBM merchants must handle storage, shipping, and customer service on their own, and they do not have access to Amazon Prime unless they pay a premium and submit themselves to stringent shipping and quality guidelines.[61]

Despite their differences, both the FBA and FBM programs share some important elements. First is that a participant in either program may only communicate with customers using Amazon's proprietary interface.[62] Second, Amazon takes orders and handles payment processing regardless of the program in which a merchant is enrolled.[63] Third, and perhaps obviously enough, Amazon charges fees for the use of either service.[64] Although it may be tempting to immediately conclude that only sales through the FBA program should implicate Amazon as a seller, a thorough analysis of tort policy justifications, as well as a modern approach to the "control" requirement, both suggest that FBM sales often should incur the same standards of liability.[65]

---

[57] John E. Lincoln, *The Ultimate Guide to Amazon Fulfillment*, IGNITE VISIBILITY (July 25, 2017), https://ignitevisibility.com/fulfillment-amazon-vs-fulfillment-merchant-vs-seller-fulfilled-prime-ultimate-guide/.

[58] *Id.*

[59] *Id.*

[60] Bullard, *supra* note 16, at 194.

[61] Lincoln, *supra* note 57.

[62] Bullard, *supra* note 16, at 225; *see* Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 147 (3d Cir. 2019).

[63] Bullard, *supra* note 16, at 193–96.

[64] Lincoln, *supra* note 57.

[65] *Oberdorf*, 930 F.3d at 147–48.

II. WHY STRICT LIABILITY?

Before turning to an examination of the evolution of strict products liability doctrine in Pennsylvania, some brief exposition is necessary in support of the analytical framework proposed *infra*,[66] beginning with Judge Roger Traynor's influential concurrence in *Escola v. Coca Cola Bottling Co.*, where the modern approach to strict products liability arguably was born.[67] Judge Traynor laid out compelling reasons for assigning strict liability to manufacturers for product defects: (1) manufacturers are in the best position to anticipate defects and thus guard against them, and so it follows that the force of incentivizing product safety should focus on the manufacturer; (2) the risk of injury can be insured by the manufacturer and distributed among the public as "a cost of doing business;" and (3) even if a manufacturer was not negligent in designing or manufacturing the product, it is still the entity "responsible for its reaching the market."[68] The impetus of Traynor's proposed strict liability approach was a need to dispose of a popular fiction justifying product defect actions at the time: where courts had been trying to package such cases as negligence actions (typically advanced under a *res ipsa loquitur* theory),[69] plaintiffs had been prevailing without proving actual negligence.[70] Thus, he wrote, "It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that

---

[66] For a more detailed history of the foundations of products liability, see, for example, AARON TWERSKI ET AL., TORTS CASES AND MATERIALS 633–35 (Rachel E. Barkow et al. eds., 4th ed. 2017); Bullard, *supra* note 16, at 184–93.

[67] Bullard, *supra* note 16, at 186.

[68] Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440–41 (Cal. 1944).

[69] *Res ipsa loquitur* is a theory of negligence in which the jury is permitted to infer that a defendant was negligent when "the accident causing the plaintiff's physical harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is a relevant member." In other words, the plaintiff need not point to a specific negligent act, but instead may show that the event causing the injury is one that does not occur in the absence of negligence. *See* RESTATEMENT (SECOND) OF TORTS § 402A.

[70] *Escola*, 150 P.2d at 442.

responsibility openly."[71] Persuasive in his reasoning was the growing reality in the then-burgeoning manufacturing economy that consumers rarely, if ever, would reasonably be in a position on their own to assess the risks associated with product usage, or have the relevant understanding of the manufacturing process to prove negligence in the event of injury.[72] Thus, Traynor implored courts to dispense with the fiction of negligence and come to grips with the reality that those responsible for introducing dangerous products into the market are uniquely positioned to manage the risks they might pose to the public.[73]

Twenty years after *Escola*, Traynor wrote that other members of the distributive process, including retailers and distributors themselves, were sometimes the only entities "reasonably available to the injured plaintiff," that they could meaningfully exert pressure on manufacturers to produce safer products, and that attaching liability to these entities would further incentivize product safety.[74] In 1966, the ALI captured the spirit of Judge Traynor's entreaty for strict products liability in Section 402A of the Restatement (Second) of Torts, extending liability to any entity in the "business of selling."[75] Most commonly, these types of entities will be manufacturers, distributors, or retailers.[76] However, it is important to note that neither Judge Traynor nor the Second Restatement sought to expressly limit liability to a narrow, specific list of

---

[71] *Id.* The drafters of the Restatement (Third) of Torts have since recognized that circumstantial evidence (*i.e.*, *res ipsa loquitur*) can also support an inference of product defect. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3.

[72] *Escola*, 150 P.2d at 441. Interestingly, the problem of consumer assessment of risk also exists in an online marketplace like Amazon's—but for a different reason. Aside from the inability of the consumer to physically examine the product before purchase, third-party online marketplaces, with their dizzying array of third-party vendors, make it very difficult to detect issues in marketplace quality. *See* Kominers, *supra* note 8.

[73] *Escola*, 150 P.2d at 443.

[74] Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262–63 (1964).

[75] RESTATEMENT (SECOND) OF TORTS § 402A.

[76] *Id.* (providing in comment *f* that the rule "applies to any manufacturer . . . to any wholesale or retail dealer or distributor").

"sellers."[77] Instead, both sources in their language convey a broad policy objective of assigning liability for product defects to those who are best positioned to manage and absorb the risk.[78] Unfortunately, instead of seeking to apply this principled justification for strict products liability, some modern courts have sought to limit liability by imposing a requirement that sellers obtain and transfer title before they are reachable for suit, or by applying an unduly restrictive "control" analysis.[79] That is, did the defendant have sufficient control over the product before its introduction into the market to have been able to assess and manage its risk and thus be considered in the business of selling the product under the law?[80] Unfortunately, such an analysis, when woodenly applied to a business model like Amazon's, produces absurd results where the identified "seller" is concealed, judgement proof, or an unreachable foreign entity[81] because such a seller will never be one in the position to "most effectively reduce the hazards to life and health inherent in defective products that reach the market."[82] Such a strict liability scheme is all bark and no bite. An analysis more consistent with Section 402A and the public policy reasoning behind strict

---

[77] *See id.*; *see also* Bullard, *supra* note 16, at 190–91 ("The Restatement . . . extends liability to *any party* that makes a defective product available to the marketplace." (emphasis added)).

[78] *Escola*, 150 P.2d at 441; § 402A cmt. f.

[79] Fox v. Amazon.com, Inc., 930 F.3d 415, 425 (6th Cir. 2019); Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 141 (4th Cir. 2019); State Farm Fire & Cas. Co. v. Amazon.com, Inc., No. CV-17-01994(PHX)(JAT), 2019 U.S. Dist. LEXIS 168734, at *9–10 (D. Ariz. 2019); Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018).

[80] *Fox*, 930 F.3d at 425; *Erie Ins. Co.*, 925 F.3d at 141; *Eberhart*, 325 F. Supp. 3d at 398.

[81] *Erie Ins. Co.*, 925 F.3d at 144 (Motz, J., concurring) ("Amazon's business model shields it from traditional products liability whenever state law strictly requires the exchange of title for seller liability to attach, in many cases forcing consumers to bear the cost of injuries caused by defective products (particularly where the formal 'seller' of a product fails even to provide a domestic address for service of process)."); *see also* Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 145 (3d Cir. 2019) ("There are numerous cases in which neither Amazon nor the party injured by a defective product, sold by Amazon.com, were able to locate the product's third-party vendor or manufacturer.").

[82] *Escola*, 150 P.2d at 440.

products liability should examine not just those entities who physically possess or take title to products,[83] but those that facilitate the introduction of the product into the market and either actually exert, or have the capability to exert, control over third-party retailers or manufacturers to reduce the risks associated with the products they unleash on the consuming public. Amazon, as will be discussed, fits this bill.

III. *FRANCIONI*'S PROGENY: BUILDING ON STRICT LIABILITY TORT THEORY

As discussed above, courts that apply a strict title test to determine whether an entity should be considered a seller foreclose certain entities from that definition that, through a faithful application of strict products liability theory, should be included. A more appropriate analysis for determining who sells begins with the four-factor test adopted by the Third Circuit in *Oberdorf v. Amazon.com, Inc.*[84] On July 3, 2019, in reversing a dismissal by the district court, the Third Circuit adopted a rule that assessed seller status based on a list of public policy factors derivative of *Escola v. Coca Cola Bottling Co.* and Section 402A.[85] Interpreting Pennsylvania tort law, the majority opinion purported to apply a test developed in *Musser v. Vilsmeier Auction Co.*, though in reality the test was more properly attributed to *Francioni v. Gibsonia Truck Corp*.[86] *Francioni* was the seminal case in Pennsylvania expanding the definition of "seller" in the products liability context beyond the traditional retailer.[87]

In *Francioni*, the plaintiff was seriously injured when the tractor-trailer he was driving crashed due to a defective steering

---

[83] *See supra* note 46 and accompanying text.

[84] *Oberdorf*, 930 F.3d at 144.

[85] *See id.* at 144; RESTATEMENT (SECOND) OF TORTS § 402A.

[86] Musser v. Vilsmeier Auction Co., 562 A.2d 279, 282 (Pa. 1989); Francioni v. Gibsonia Truck Corp., 372 A.2d 736, 740 (Pa. 1977).

[87] Before *Francioni*, many other states were expanding their definitions of seller as well, tracking public policy considerations. *See Francioni*, 372 A.2d at 739 (citing to several other decisions in other states expanding the definition of seller to include lessors).

component.[88] The plaintiff brought a strict liability suit against the lessor of the truck citing Section 402A of the Restatement (Second) of Torts.[89] The defendant truck-leasing company argued that lessors were not sellers under Section 402A, a position with which the trial court agreed, dismissing the strict liability claim.[90] The plaintiff appealed to the Supreme Court of Pennsylvania, which considered for the first time whether lessors could be sellers in strict products liability.[91]

The *Francioni* court began by rejecting a federal interpretation of Pennsylvania law from ten years prior which found that lessors could not be sellers as intended under Section 402A, writing that such a position "too easily disregard[ed] the policy basis for strict liability which supports application of the rule to any supplier of a product who, because he is in the business of supplying products, assumes a special responsibility toward the consuming public."[92] The court followed by quoting Judge Traynor's explanation of the fundamental policy basis in *Escola*: "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[93]

Thus, the court refused to rigidly constrain strict liability to the traditional definition of seller, but instead focused on the underlying policy reasons for the doctrine in the first place. Indeed, as the court explained, "[w]hile Section 402A speaks only in terms of 'sellers', the foregoing policy statement and accompanying citations demonstrate the propriety of extending its application to anyone 'who enters into the business of supplying human beings with products which may endanger the safety of their persons and property.'"[94] To make things abundantly clear, the decision

---

[88] *Id.* at 737.

[89] Pennsylvania adopted Section 402A as its law governing products liability suits. *Id.* at 737–38; § 402A.

[90] *Francioni*, 372 A.2d at 737–38.

[91] *Id.* at 737.

[92] *Id.* at 738.

[93] *Id.* (quoting Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944)).

[94] *Id.*

emphasized that a court should always focus on the underlying policy reasons that give strict liability its effect: "What is crucial to the rule of strict liability is not the means of marketing but rather *the fact of marketing*. . . . Where the fundamental principles are applicable, the imposition of artificial distinctions will only frustrate the intended purpose."[95]

Having laid out its position, the *Francioni* court then examined a litany of cases across several jurisdictions in the country,[96] finding a wealth of support for extending strict liability to lessors.[97] After a thorough review of the relevant case law, the court pulled out four common factors that would become the test used in Pennsylvania for determining who sells:

> (1) In some instances the lessor, like the seller, may be the only member of the marketing chain available to the injured plaintiff for redress; (2) As in the case of the seller, imposition of strict liability upon the lessor serves as an incentive to safety; (3) The lessor will be in a better position than the consumer to prevent the circulation of defective products; and (4) The lessor can distribute the cost of compensating for injuries resulting from defects by charging for it in his business, [*i*].*e.*, by adjustment of the rental terms. We . . . hold that all suppliers of products engaged in the business of supplying products for use or consumption by the public are subject to strict liability.[98]

It is important to stress two things about the holding in *Francioni*. First is that the four-factor test is born out of similar-minded opinions from courts across the United States, not simply the law of

---

[95] *Id.* at 738–39 (emphasis added).

[96] The court cites ten different cases to support its holding, from states as far away as Hawaii. *Id.* at 739; *see also* Stewart v. Budget Rent-A-Car Corp., 470 P.2d 240, 243 (Haw. 1970) (holding liable one who "leases a defective product to the . . . consumer" if the lessor is "engaged in the business of . . . leasing such product").

[97] *Francioni*, 372 A.2d at 739.

[98] *Id.*

Pennsylvania.[99] Thus, it is built upon a nationwide understanding of the fundamental basis for strict products liability.[100] Second, the rule moves away from the language of "selling" and speaks instead of "marketing" and "suppliers," an effort that extends the outer bounds of the definition of seller to recognize those actors who substantially facilitate the exposure of products to consumers regardless of whether there was a sale or purchase.[101]

The court ultimately concluded that "all suppliers of products engaged in the business of supplying products for use or consumption by the public are subject to strict liability."[102] It is easy to see how this sentence alone could be misinterpreted to imply that only "suppliers" of goods can be subject to strict liability. However, a reading of the relevant reasoning preceding the holding, and the recognition of the court's adoption of the underlying policy justifications for strict liability, makes it clear that by referring to "suppliers of products engaged in the *business* of supplying products," the court refers to any entity that both facilitates the entrance of a product into the market and satisfies the policy factors of the four-factor test.[103] After all, what is important is the "*fact* of marketing," not the means.[104]

---

[99] *See supra* note 96 and accompanying text; *see also infra* note 100 and accompanying text (highlighting the defining role Section 402A of the Restatement (Second) of Torts has had on products liability law across the United States).

[100] *See Francioni*, 372 A.2d at 739. It is hard to overstate the profound impact Section 402A has had on products liability law in the United States. It has been said that it "defined American products liability law." Michael J. Toke, Note, *Restatement (Third) of Torts and Design Defectiveness in American Products Liability Law*, 5 CORNELL J.L. & PUB. POL'Y 239, 239 (1996). Having been cited in "thousands upon thousands of product liability decisions," Section 402A has "rise[n] to the dignity of holy writ . . . achiev[ing] the status of sacred scripture." James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1512–13 (1992).

[101] *Francioni*, 372 A.2d at 739.

[102] *Id.*

[103] *See id.*

[104] *See id.* at 738.

Armed with the new rule articulated in *Francioni* to identify the status of seller consistent with the principles and purpose of strict liability, Pennsylvania courts set out to apply it *ad hoc* in other contexts.[105] Though Pennsylvania has excluded certain actors from that definition in some cases, it has also confirmed seller status, most notably in *Hoffman v. Loos & Dilworth, Inc.*, based on the rule articulated in *Francioni*.[106] As will be discussed, the differences between the decision in *Hoffman* and the other progeny of *Francioni* demonstrate why *Oberdorf*'s holding is an entirely defensible interpretation of Pennsylvania law.[107] These differences also demonstrate the immense utility of the test adapted from *Francioni* in successfully applying the policy goals of strict liability in tort. However, because the court's treatment of the issue in *Hoffman* involved a mixed analysis of policy and control,[108] the decision also demonstrates that a test reliant solely on public policy can be bolstered by a practical analysis of the level of control possessed by the alleged seller. Such an analysis would satiate the desire for a control requirement that constructs a reasonable boundary on the application of pure public policy.

A. Financial Lessors: Nath v. National Equipment Leasing Corp.

Four years after *Francioni* in *Nath v. National Equipment Leasing Corp.*,[109] one of Pennsylvania's first efforts to apply *Francioni*, the state's supreme court decided whether a financier, who had purchased property at the behest of a consumer strictly for the purpose of leasing it to them, could be considered a seller.[110] The decision was colored by a court that perhaps felt uneasy about the

---

[105] *See* discussion *infra* Sections III.A–C.

[106] *See* Hoffman v. Loos & Dilworth, Inc., 452 A.2d 1349, 1355 (Pa. Super. Ct. 1982).

[107] *See id.* at 1349; *see, e.g.*, Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 153 (3d Cir. 2019); *Francioni*, 372 A.2d at 736.

[108] *See Hoffman*, 452 A.2d at 1354–55.

[109] Nath v. Nat'l Equip. Leasing Corp., 439 A.2d 633 (Pa. 1981); *Francioni*, 372 A.2d at 736.

[110] *Nath*, 439 A.2d at 633–64.

disruption that might occur in the finance sector if such a lessor could be held strictly liable for having played the role of financier in a transaction.[111] As a result, the court decided the case not just on the factors outlined in *Francioni*, but also heavily relying on a control analysis, ultimately finding that financial lessors were uniquely not considered sellers.[112] In doing so, the court remarked, "It would be novel indeed to suggest that financing agencies should be responsible for detecting defects in the products financed. . . . Financing institutions are not equipped to pass upon the quality of the myriad of products they are called upon to finance."[113] Thus, the court, notwithstanding the policy considerations, demanded that a defendant seller be one that has the ability to examine the goods for defects in order to assess their quality. This restrictive "ability to pass upon the quality of the goods" theory has found its way into the opinions of other courts affording liability escape routes in contemporary cases.[114] Those courts, as well as the court in *Nath*, held that the primary ingredient of "control" is the opportunity to pass upon the quality of a product.[115] This is an unfortunate development that perhaps struck too far by assuming an overly narrow view of what factors are relevant to determine how much "control" an alleged seller had over the associated release of a given product into the market.[116]

Judge Larsen, dissenting in *Nath*, perhaps cut too far in the opposite direction by proposing holding the defendant liable purely on the policy reasoning "cited in [*Francioni*] for extending Section 402A coverage to lessors," writing that he found "compelling

---

[111] *Id.* at 636.

[112] "That which provides the basis for fastening liability upon suppliers of products is that the supplier or manufacturer is the one that has the control over the product and places it within the stream of commerce." *Id.*

[113] *Id.*

[114] *See, e.g.*, State Farm Fire & Cas. Co. v. Amazon.com, Inc., 2019 U.S. Dist. LEXIS 168734, at *15 (D. Ariz. Sept. 26, 2019); Antone v. Greater Ariz. Auto Auction, Inc., 155 P.3d 1074, 1079 (Ariz. Ct. App. 2007); Stiner v. Amazon.com, Inc., 120 N.E.3d 885, 893 (Ohio Ct. App. 2019); Long v. Tokai Bank, 682 N.E.2d 1052, 1058 (Ohio Ct. App. 1996).

[115] *See supra* notes 112–113 and accompanying text.

[116] Practically speaking, it also probably means, in most cases, that the alleged seller would have held title to the goods in question.

Justice Traynor's observation: ' . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.'"[117] The judge wrote that he would have decided the case based on "the pertinent factors" developed in *Francioni*, finding them to be "no less present and no less compelling in the context of financial leases."[118] In his application of the factors, Judge Larsen found that:

> [t]he availability of the lessor for redress, the incentive to safety, the possible prevention of the circulation of defective products, and finally cost-distribution for injuries sustained are all factors dictating 402A coverage no less for financial lessors than for commercial lessors, wholesalers, or retailers. Indeed I would expect that inclusion of finance lessors would enhance the likelihood of realizing these objectives, because of the greater number and diversity of interested parties.[119]

The split in opinion between majority and dissent in *Nath* reveals a space left to be filled by the policy test in *Francioni*.[120] Although imposition of a restrictive control requirement is perhaps a recognition of the need to ensure practical application of the policy objectives of strict products liability, a more refined test of control, as will be discussed, would be more effective in capturing those entities that rightfully should be held accountable for injuries caused by product defects.

---

[117] *Nath*, 439 A.2d at 637–38 (quoting Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Larson, J., dissenting)).

[118] *Id.* at 638.

[119] *Id.*

[120] *Compare id.* at 633–36 (majority opinion), with *id.* at 363–38 (Larsen, J., dissenting) (showing a sharp contrast between the majority, which expressed unwillingness to impose liability without the opportunity to inspect, and the dissent, which would impose liability based on a strict application of the four-part policy test from *Francioni*).

B. Sales Agents: Hoffman v. Loos & Dilworth, Inc.

A year after using a restrictive control requirement to override policy considerations in *Nath*, Pennsylvania walked it back when it applied *Francioni* in *Hoffman.*[121] The dispute in *Hoffman* concerned linseed oil which had spontaneously combusted, setting the plaintiff's home alight, killing one member of the family and severely injuring others.[122] E.W. Kaufmann Company, the defendant sales agent, was involved in the transaction of the defective product. Its sole responsibility was to take orders for the linseed oil and transmit those orders to the manufacturer.[123] In finding Kaufmann's role to be that of a seller, the court began by comparing the facts to *Nath*, writing, "[W]e do not believe that the role of E.W. Kaufmann Company in the chain of events was tangential. It was not a financial lessor. The product was not mere collateral."[124] The court did not explain whether it believed this implicated the amount of control the defendant exerted in relationship to the product, instead reiterating the importance of the policy underpinnings outlined in *Francioni* in writing, "As was pointed out in *Francioni*, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health . . . . What is crucial to the rule of strict liability is not the means of marketing, but rather the fact of marketing . . . . 'Where the fundamental principles are applicable, the imposition of artificial distinctions will only frustrate the intended purpose.'"[125] Thus, at the end of the day, Pennsylvania seemed to have swung back to the pure policy foundation of *Francioni* with very little, if any, treatment of the control requirement to determine liability, showing a willingness to find that sales agents, whose only involvement was to collect and transmit orders of sales, could be found to have a role,

---

[121] Hoffman v. Loos & Dilworth, Inc., 452 A.2d 1349 (Pa. Super. Ct. 1982).

[122] *Id.* at 1350.

[123] *Id.*

[124] *Id.* at 1354.

[125] *Id.* at 1355 (quoting Francioni v. Gibsonia Truck Corp., 372 A.2d 736, 739 (Pa. 1977)).

interest, and amenability to suit such that they were sellers under the law.[126]

The decision in *Hoffman* has not been overruled,[127] and like the dissent in *Nath*,[128] it represents a deficiency in applying a pure policy or a restrictive control test to determine seller status. Presumably, if the court had applied the control requirement it demanded in *Nath*, *Hoffman* would have come out differently, since the sales agent at E.W. Kaufmann never took title to the goods or had an opportunity to examine their quality.[129]

C. Auctioneers: Musser v. Vilsmeier

Decided after *Hoffman*, *Musser v. Vilsmeier* arguably answered the question of what result would have occurred had the court applied a strict control test in the former.[130] In *Musser*, the plaintiff was injured when a tractor he had purchased three days prior at auction ran him over as he tried to start it.[131] The defendant was the auctioneer for the tractor which was the product of a corporation in the throes of liquidation.[132] Naturally, the question before the Pennsylvania Supreme Court was whether an auctioneer should be

---

[126] One can easily see the parallels able to be drawn between the defendant's conduct in *Hoffman* and that of Amazon; it follows as no surprise that the appellate review of *Oberdorf* made much of the facts of *Hoffman* in supporting its holding. Never having been overruled, *Hoffman* is conceivably the prodigious indicator that Pennsylvania never completely subscribed to a strict control requirement and that public policy is still an important aspect of determining seller status under the state's products liability regime. It remains to be seen whether the Third Circuit, sitting *en banc*, will draw the same conclusion, but one would think it wise and prudent, to survive review, to cite *Hoffman* as the *Oberdorf* court did. Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 148–49 (3d Cir. 2019).

[127] *Id.* at 148.

[128] Nath v. Nat'l Equip. Leasing Corp., 439 A.2d 633, 636–38 (Pa. 1981).

[129] "The manufacturer's sales agent, E.W. Kaufmann Co., would transmit orders for linseed oil from the packager to the distributor. That was Kaufmann's only role in the sales process." *Oberdorf*, 930 F.3d at 148.

[130] *See* Musser v. Vilsmeier Auction Co., 562 A.2d 279 (Pa. 1989).

[131] *Id.* at 280.

[132] *Id.* at 279.

considered a seller of the tractor.[133] To answer the question, the majority purported to apply the public policy factors in *Francioni*, stating that the first factor was not satisfied in the instant case because in every auction there is a "seller, who is served by the auctioneer . . . and who is or might be amenable to suit."[134] For the second factor, the court wrote (without explanation) that it "fail[ed] to see how the imposition of strict liability would be more than a futile gesture in promoting the manufacture and distribution of safer products."[135] Moving on to the third factor, the court found that, in order for the auctioneer to be better positioned than consumers to prevent defective products from reaching the market, it must have some "ongoing relationship with the manufacturer from which some financial advantage inures to the benefit of the latter and which confers some degree of influence on the auctioneer."[136] As the court cited no authority for this contention, it is unclear from where it derived its reasoning, though it may have been an attempt to distinguish the liable salesman in *Hoffman* from the non-liable "*ad hoc* salesman" auctioneer.[137] It does seem clear, however, that such a temporal limitation is not derived from *Francioni*, which provides simply: "(3) the [actor] will be in a better position than the consumer to prevent circulation of defective products."[138] It is difficult indeed to see how the consumer at an auction is in no better position than the auctioneer to prevent the sale of defective products, if for no other reason than the auctioneer's volunteering to assume the risk of agreeing to sell such goods.

---

[133] *Id.* at 280.

[134] *Id.* at 282.

[135] *Id.*

[136] *Id.*

[137] An auctioneer is generally an agent, an *ad hoc* salesman of the goods of another for a specific purpose and a specific time. He bears no relation to the manufacturer or the goods, beyond their immediate sale. Unless an auctioneer deals exclusively for a manufacturer or business enterprise, or buys and deals regularly in his product, he is the medium and the message but not a regular seller.

Id. at 283.

[138] *Id.* at 282.

Finally, as to the fourth factor concerning cost spreading, the majority conceded that the auctioneer could "pass on the costs of imposing strict liability upon him; possibly, as Appellant suggests, by [an] indemnity agreement[]."[139] Here, although identifying one viable cost spreading measure, the majority overlooked the simple act of incorporating a fee into a pricing schedule to insure against defects.[140] Indeed, it seems clear in the fourth factor of the *Francioni* test, which reads "the [actor] can distribute the cost of compensating for injuries resulting from defects by charging for it in his business," that the ability to incorporate a fee for service in association with the product was contemplated as a policy reason for assigning strict liability.[141]

Notwithstanding its application of *Francioni*, and perhaps ostensibly based on it, the heavy lifting in *Musser* was more likely achieved by means of a strict control test. As the court pointed out before even discussing the four factors of *Francioni*, the auction company was "not equipped to pass upon the quality of the myriad of products" it auctioned, upon which the control it exercised was "momentary[,] merely fortuitous and not undertaken specifically."[142] Thus, the court arguably had its mind made up before even proceeding to the policy considerations engendered by *Francioni*.[143] Taken together, *Nath*, *Hoffman*, and *Musser* show the need for a uniform test that dispenses with the fiction of pure policy or pure control requirements. Recently, the Third Circuit Court of Appeals, interpreting Pennsylvania law in *Oberdorf*, took a large step in filling this gap.[144]

---

[139] *Id.* at 283.

[140] *See generally id.* (lacking any discussion of adjusting prices to insure against defects). The court in *Oberdorf* recognized this possibility. See *infra* note 165 and accompanying text.

[141] *Musser*, 562 A.2d at 282.

[142] *Id.*

[143] *See* Francioni v. Gibsonia Truck Corp., 372 A.2d 736, 739 (Pa. 1977).

[144] *See* Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 148 (3d Cir. 2019).

D. Reconciling Tests for Policy and Control: Oberdorf v. Amazon.com, Inc.

Oberdorf may accurately be called the flagship case imposing liability for product defects on Amazon.[145] Plaintiff Heather Oberdorf brought suit against the web giant when a retractable dog leash she ordered from an Amazon third-party vendor, "The Furry Gang," suddenly broke and snapped back into her face, causing permanent blindness in one of her eyes.[146] The District Court for the Middle District of Pennsylvania found against Oberdorf at the summary judgment stage, relying on *Musser*'s reasoning to hold that Amazon could not be a seller because it was "not equipped to pass upon the quality of the myriad of products available on its Marketplace[a]nd because Amazon has no role in the selection of the goods to be sold."[147] Thus, the court interpreted the holding in *Musser* to be based on a strict control theory.[148] The Third Circuit Court of Appeals, in reversing the district court, instead applied the public policy factors outlined in *Francioni* in conjunction with a more refined test for the "control" element.[149]

i. *Oberdorf v. Amazon.com, Inc.*: The Four-Factor Public Policy Test

The appellate court in *Oberdorf* enumerated the four policy factors as follows:

---

[145] *State Farm* is aspiring to similar ends in Wisconsin, where the court noted its reasoning was similar to that of the appellate court in *Oberdorf*. *See* State Farm Fire & Cas. Co. v. Amazon.com, Inc., No. 18-CV-261(JDP), 2019 U.S. Dist. LEXIS 122316, at *18 (W.D. Wis. July 23, 2019) ("The Third Circuit's reasoning [in *Oberdorf*], particularly its careful consideration of the factors in [Section] 402A of the Restatement (Second) of Torts, would be persuasive under Wisconsin law, too.").

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

[147] *Id.* at 501 (internal quotations omitted).

[148] *See* discussion *supra* Section III.C.

[149] *See Oberdorf*, 930 F.3d at 136.

> (1) Whether the actor is the "only member of the marketing chain available to the injured plaintiff for redress";
> (2) Whether "imposition of strict liability upon the [actor] serves as an incentive to safety";
> (3) Whether the actor is "in a better position than the consumer to prevent the circulation of defective products"; and
> (4) Whether "[t]he [actor] can distribute the cost of compensating for injuries resulting from defects by charging for it in his business, *i.e.*, by adjustment of the rental terms."[150]

Beginning with the first factor, whether Amazon is the "only member of the marketing chain available to the injured plaintiff for redress," the court found that Amazon's requirement that all communications between consumer and vendor take place through its platform allowed vendors to conceal themselves from customers, resulting in "numerous cases in which neither Amazon nor the party injured . . . were able to locate the product's third-party vendor or manufacturer."[151] Remarking on Amazon's woeful vetting process for the vendors it allowed to sell through its marketplace, and noting the disappearance of any trace of "The Furry Gang," the court found Amazon was by definition the only "member of the marketing chain available to the injured plaintiff for redress."[152]

In applying the second factor, whether "imposition of strict liability upon the [actor would] serve[] as an incentive to safety," the court found that by virtue of the business agreement[153] that all vendors must sign onto, giving Amazon substantial control over payments and the ability to "terminate or suspend" service to a third-party vendor at their discretion, Amazon was more than able to directly remove or exert pressure on others to remove unsafe

---

[150] *Id.* at 144.

[151] *Id.* at 144–45.

[152] *Id.* at 145.

[153] *Id.* at 146 (internal quotations omitted); *see also Amazon Services Business Solutions Agreement*, AMAZON (last visited Nov. 10, 2019), https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US.

products from its website.[154] Furthermore, imposing strict liability "would be an incentive to do so."[155] Curiously, the court did not mention, despite its misgivings about Amazon's vetting process (or lack thereof) in its discussion of the previous factor,[156] the likelihood that Amazon would take steps to improve its gatekeeping for those vendors it allows to sell through its site—another important reason why imposing strict liability would be an incentive for safety.[157]

Considering the third factor—whether "Amazon is in a better position than the consumer to prevent the circulation of defective products"—the court found that "Amazon is uniquely positioned to receive reports of defective products, which in turn can lead to such products being removed from circulation."[158] In reaching its conclusion, the court considered that Amazon reserves the right to collect customer feedback while simultaneously curtailing "the channels that third-party vendors may use to communicate with customers."[159] The court then nearly tackled the issue in *Musser* of whether a continuity of relationship between the alleged seller and manufacturer was a necessary component of seller status.[160] Instead, it assumed the logic in *Musser* and found that, although such relationships were not always present, "the potential for continuing sales encourages an on-going relationship between Amazon and the third-party vendors."[161]

Finally, addressing the fourth factor of "whether Amazon can distribute the cost of compensating for injuries resulting from defects," the court again derived its authority from *Musser*, where it

---

[154] *Oberdorf*, 930 F.3d at 146.

[155] *Id.* Of course, this starts to speak of the element of control that Amazon maintains over the product in question, which the court discusses in more detail later in its opinion. *See* discussion *infra* Section III.D.ii.

[156] *See* Kominers*, supra* note 8 and accompanying text.

[157] As was discussed in Part II *supra*, one important rationalization for strict products liability is that retailers will be incentivized to deal only with reputable and solvent vendors.

[158] *Oberdorf*, 930 F.3d at 146 (internal quotations omitted).

[159] *Id.* at 147.

[160] *Id.* at 146.

[161] *Id.* (citing Musser v. Vilsmeier Auction Co., 562 A.2d 279, 282 (Pa. 1989)).

was suggested that indemnification would be one way to absorb the costs of imposition of strict liability.[162] As the court pointed out, Amazon already required an indemnification agreement from all of its vendors.[163] Without committing the same oversight as in *Musser*,[164] the court also explained that Amazon could simply adjust its fees for service "based on the risk that the third-party vendor presents."[165]

The court, having found against Amazon on each factor of the four-factor test, could have stopped there and rested its holding purely on the public policy basis engendered by *Francioni*.[166] Wisely, the court did not do so, and instead added a second, distinct part to its analysis—a control test.[167]

ii. *Oberdorf v. Amazon.com, Inc.*: The Control Test

A holding based only on the four-factor public policy test derived from *Francioni* would have easily put the *Oberdorf* court at risk of being overturned based on existing law in Pennsylvania[168] as well as persuasive law from other jurisdictions militating in favor of a strict control element to determine seller status.[169] Perhaps

---

[162] *Id.* at 147.

[163] *Id.*

[164] *See supra* note 140 and accompanying text.

[165] *Oberdorf*, 930 F.3d at 147.

[166] *Id.* at 145–48.

[167] *Id.* 148–49.

[168] *See* discussion *supra* Sections III.A–C (Note, for example, the *Nath* and *Musser* courts' reluctance to allow the four-factor test to control.).

[169] The dissent in *Oberdorf* points out as much, writing:

> The plaintiffs weigh in detail policy reasons for allowing them to sue Amazon. Plaintiffs' theory would substantially widen what has previously been a narrow exception to the typical rule for identifying [sellers] . . . . [E]very court to consider the question thus far has found Amazon Marketplace not a "seller" for products liability or other purposes; several of those courts have done so under products liability regimes similar to Pennsylvania's.

The dissent then goes on to find that Amazon did not warrant the defective product or limit the seller's ability to offer it by selecting it, choosing its price, or choosing

knowing this, the majority, in the second substantial part of its analysis, discussed Pennsylvania precedent, namely *Hoffman*, to find that Amazon meets the requirements of a control test as well.[170]

Comparing Amazon's behavior in the instant case to the facts in *Hoffman*, the court found that the company actually went beyond the role of the latter's sales agent because it "not only accept[ed] orders and arrange[d] for product shipments, but it also exert[ed] *substantial market control* over product sales by restricting product pricing, customer service, and communications with customers."[171] Indeed, as the court had noted previously, Amazon limits third-party product prices directly by prohibiting vendors from charging "more on Amazon than they charge in other sales channels."[172] Additionally, Amazon prohibits vendors from communicating with customers through any means other than its own platform.[173] Finally, Amazon collects and handles the transmission of every order and every payment and may, "in its sole discretion[,] withhold any payments to [any] vendor."[174] Taken altogether, the court decided Amazon had exerted the requisite amount of "control," in conjunction with the result of the four-factor test, to properly be considered a seller for the purposes of strict products liability.[175] It coined the phrase "substantial market control" to describe the types of behaviors that would bring an entity within the realm of a seller.[176]

Other courts have since affirmed and expanded on the idea of "substantial market control." For example, in *Papataros v. Amazon.com, Inc.*, following *Oberdorf*'s lead, the U.S. District Court for the District of New Jersey found:

---

its source, and thus would have held that Amazon did not exert requisite control to be considered a seller under Section 402A. *See Oberdorf*, 930 F.3d at 154–56 (Scirica, C.J., concurring in part and dissenting in part).

[170] *Id.* at 148 (majority opinion).

[171] *Id.* at 149.

[172] *Id.* at 141.

[173] *Id.*

[174] *Id.* at 142.

[175] *Id.* at 149.

[176] *Id.*

> Not only did Amazon take physical possession; it also shipped the product to the customer in its own box. While Amazon never took title to the property, it adopted a proprietary stance with respect to the sale. It physically delivered the product, confirmed the sale with a "thank you for shopping with us" message, and allowed communication between the third-party vendor and the buyer only through Amazon's own website. In short, even by its own statements, Amazon indicated that it was more than just a "mere negotiator" in this sale . . . . It is true that the agreements did not make Amazon the ultimate decisionmaker as to the prices or physical qualities of the product. As to the sale process, however, the level of control was greater. For example, Amazon processed all payments. [The vendor] was required to provide information about its product in the manner that Amazon prescribed. Amazon exercised control over the listing itself—in particular, it retained the right to change, suspend, prohibit or remove listings. If notified that a product was defective, Amazon had the power to take it off the shelf, *i.e.*, to remove the website listing and thereby shield innocent consumers. Under the FBA program, Amazon even had the right to dispose of products that were defective.[177]

Similarly, in *State Farm Fire & Casualty Co. v. Amazon.com, Inc.*, the U.S. District Court for the Western District of Wisconsin found Amazon's behavior, in relation to a transaction with foreign vendor "XMJ," amounted to exertion of substantial market control:

> Amazon provided the only conduit between XMJ, the Chinese seller, and the American marketplace. Without Amazon, XMJ products would not be available at all in Wisconsin. Amazon did not directly set the price for the faucet adapter, but it set the substantial fees that it would retain for itself, so

---

[177] Papataros v. Amazon.com, Inc., No. 17-9836(KM)(MAR), 2019 U.S. Dist. LEXIS 144253, at *39–40 (D.N.J. Aug. 26, 2019) (citations omitted).

> it was positioned to insure against the risk of defective products. As part of the FBA agreement, Amazon required XMJ to register each product, and Amazon reserved the right to refuse to sell any of them. So Amazon was in a position to halt the flow of any defective goods of which it became aware. And Amazon took steps to protect itself by requiring XMJ to indemnify Amazon. Amazon also implicitly represented that the adapter was safe by listing it for sale among its own products, and it expressly guaranteed timely delivery in good condition. And, under Amazon's A to Z guarantee, Amazon agreed to process returns and refunds if XMJ did not respond. Amazon took on all the roles of a traditional—and very powerful—reseller/distributor. The only thing Amazon did not do was take ownership of XMJ's goods.[178]

What can be distilled from the findings in *Oberdorf*, *Papataros*, and *State Farm* is that the determination of whether an entity exerted "substantial market control" such that it should be considered a seller turns on a variety of different factors suggesting such control;[179] no concrete list seems to cover all the possible behaviors that might implicate an actor's liability. However, some common themes emerge that provide a solid foundation for the inquiry, suggesting that the analysis for substantial market control should begin with examining the alleged seller's involvement in the preparation, sale, and marketing stages,[180] and what stake it had in the transaction, such as a promised fee.[181] A control analysis should also investigate whether the alleged seller exerted, or could have exerted, direct or indirect control over the product's price.[182] Finally,

---

[178] State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 972–73 (W.D. Wis. 2019).

[179] *See Oberdorf*, 930 F.3d at 144–48; *Papataros*, 2019 U.S. Dist. LEXIS 144253, at *39–40; *State Farm Fire & Cas. Co.*, 2019 U.S. Dist. LEXIS 122316, at *16–17.

[180] *State Farm Fire & Cas. Co.*, 2019 U.S. Dist. LEXIS 122316, at *16–17.

[181] *Oberdorf*, 930 F.3d at 141.

[182] *Id.* at 146–47; *Papataros*, 2019 U.S. Dist. LEXIS 144253, at *43–44.

a factfinder should judge whether the alleged seller was clearly a "mere negotiator," or if instead it "adopted a proprietary stance with respect to the sale."[183]

IV. ADDITIONAL CONSIDERATIONS THAT IMPLICATE AMAZON'S MARKET CONTROL IN PRODUCT DEFECT CASES

Although the courts in *Oberdorf v. Amazon.com, Inc.*, *Papataros v. Amazon.com, Inc.*, and *State Farm Fire & Casualty Co. v. Amazon.com, Inc.* identified many factors that implicated Amazon's substantial market control over the transactions in those cases, not all factors that might indicate Amazon's level of market control over a given product have been discussed in the context of products liability.[184] Future courts may look to more of the tech giant's practices that indirectly—but nonetheless substantially—exert control over the sales of third-party products through its platform.

A. Branding, Market Share, and Counterfeit Products

When assessing a defendant's interest in a product's introduction to the market, as well as the consumer's reliance on the defendant's implied propriety in a given transaction, courts should consider the defendant's business practices as they relate to branding, market expansion, and combating fraud. Modern web-based corporations may defy traditional notions of good business practices.[185] Amazon, for example, values its brand's dominance in

---

[183] *Papataros*, 2019 U.S. Dist. LEXIS 144253, at *39.

[184] *See Oberdorf*, 930 F.3d at 144–48; *Papataros*, 2019 U.S. Dist. LEXIS 144253, at *39–40; *State Farm Fire & Cas. Co.*, 2019 U.S. Dist. LEXIS 122316, at *16–17.

[185] For a thorough treatment of Amazon's business strategy and its defiance of traditional business strategies, such as the Chicago School approach, see Lina M. Kahn, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 746–90 (2017). *See also* Matt Day & Jackie Gu, *The Enormous Numbers Behind Amazon's Market Reach*, BLOOMBERG (Mar. 27, 2019), https://www.bloomberg.com/graphics/2019-amazon-reach-across-markets/ (discussing Amazon's rapid infiltration of various markets).

the market more than the potential profits from such recognition.[186] Furthermore, it has leveraged its dominance in the market[187] to continue building its brand by resisting efforts to reduce the sale of counterfeit products on its platform.[188] The implications for exerting control over third-party vendors' products by way of brand power is less clear than direct tactics such as removing offending listings and withholding payments from vendors,[189] but it exists in an important (albeit indirect) way.[190]

The Amazon brand is a controlling force on vendors chiefly because Amazon has taken pains to become "one of the most recognizable brands on the planet." Some vendors on Amazon's platform, especially foreign vendors from countries like China, would find it very difficult, or even impossible, to hawk their wares without relying on Amazon's brand recognition.[191] For those

---

[186] "Even as Amazon became one of the largest retailers in the country, it never seemed interested in charging enough to make a profit. Customers celebrated and the competition languished." Kahn, *supra* note 185, at 781–82 (quoting David Streitfeld, *As Competition Wanes, Amazon Cuts Back Discounts*, N.Y. TIMES (July 4, 2013), http://www.nytimes.com/2013/07/05/business/as-competition-wanes-amazon-cuts-back-its-discounts.html).

[187] *See id.* at 746–90 (discussing in detail how Amazon has established dominance in multiple business lines, as well as control of forty-six percent of the U.S. e-commerce market).

[188] *Id.* at 790–92.

[189] *See* discussion *supra* Section III.D.ii.

[190] As Amazon CEO Jeff Bezos once put it, "There's nothing about our model that can't be copied over time. But you know . . . [a] lot of it comes down to the brand name. Brand names are more important online than they are in the physical world." Bill Murphy, Jr., *Follow the Money and Other Lessons from Jeff Bezos*, INC. (Aug. 6, 2013), https://www.inc.com/bill-murphy-jr/follow-the-money-lessons-from-jeff-bezos.html.

[191] State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 972 (W.D. Wis. 2019) ("Amazon provided the only conduit between XMJ, the Chinese seller, and the American marketplace. Without Amazon, XMJ products would not be available at all in Wisconsin."); Kahn, *supra* note 185, at 781 (noting that "[y]ou can't really be a high volume seller online without being on Amazon") (internal quotations omitted); Jennifer Rankin, *Third-Party Sellers and Amazon – Double-Edged Sword in E-Commerce*, THE GUARDIAN (June 23, 2015), https://www.theguardian.com/technology/2015/jun/23/amazon-marketplace-third-party-seller-faustian-pact ("[M]any Amazon sellers [are] the heirs to flea-market traders, who would struggle to create a bricks-and-mortar business.").

vendors without the capability to store, ship, or competently manage orders, the option to forego selling through Amazon's platform is hardly a meaningful choice, as selling through Amazon could mean the difference between significant sales and any sales at all.[192] Such vendors are not alone, however, as even well-known, fully capable retailers can find themselves forced to sell through Amazon's website:

> [Amazon] seems to use its ability to decide whether or not to police counterfeits as leverage against brands who might otherwise refrain from selling on Amazon. Nike, for example, for years refused to list its products on Amazon. Faced with a situation where merchants were selling both authentic and fake Nike goods on Marketplace anyway, Nike ultimately signed an agreement to sell wholesale to Amazon in exchange for stricter policing of counterfeits. An executive from Birkenstock—which stopped supplying products to Amazon in 2017—stated that the only way a brand or supplier can get Amazon to fully commit to policing counterfeits is to sell its entire catalogue to Amazon.[193]

When Amazon was pressed with criticism for its lax counterfeit policing, it responded by introducing a new service for vendors—at a price of up to $60,000 per year.[194]

Although other commenters have (correctly) pointed out that Amazon should more often be held liable as a seller in product defect actions against it, none have discussed the impact such extended liability will have on the vast quantity of small-time vendors ("the heirs to flea-market traders") that depend on it. *See, e.g.*, Edward J. Janger & Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller Not a Neutral Platform*, 14 BROOK. J. CORP. FIN. & COM. L. (forthcoming May 2020).

[192] Angus Loten & Adam Janofsky, *Sellers Need Amazon, but at What Cost?*, WALL ST. J. (Jan. 14, 2015), http://www.wsj.com/articles/sellers-need-amazon-but-at-what-cost-1421278220.

[193] Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 990–91 (2019).

[194] *Id.* at 992.

Both vendors and consumers rely on Amazon's brand to connect them.[195] This creates an indisputable element of power and control in Amazon's favor for a significant number of products sold through its marketplace.

B. Anticompetition, Data Collection, and Third-Party Market Experimentation

In addition to throwing the weight of its coveted brand around, Amazon exerts control indirectly over vendors' sales by virtue of its proprietary "Buy Box" system[196] and inherent position of competition with its vendors.[197] Where there exists more than one vendor of the same product on its platform, Amazon uses a "Buy Box" to determine which vendor will be highlighted—*i.e.*, which vendor's product the customer would purchase if they simply click the buy button with no other action.[198] Amazon exploits the Buy Box system in some instances by highlighting itself as a "default seller" even if another third-party merchant is offering the same item for sale at a lower price.[199] Indeed, investigations into the corporation's website have revealed its Buy Box and promotional algorithms favor its own offerings and product lines over those of outside vendors.[200] It follows that third-party vendors, in an effort to combat Amazon's anticompetitive scheme, are compelled to drive down their prices to stay visible to consumers.[201] Unfortunately, Amazon's non-traditional business model exacerbates the fight, as

---

[195] Consider also that Amazon reaps considerable market share by tying up customers in its Amazon Prime service. Of course, the more vendors (and vendor products being offered through Amazon's site) there are, the more attractive Prime becomes. *See* Kahn, *supra* note 185, at 750.

[196] "The 'buy-box' is the area on an Amazon product page that includes the 'Add to Cart' button and the information surrounding it." Bullard, *supra* note 16, at 195 n.61. For a more in-depth discussion of the Buy Box and its control implications, see, for example, Janger & Twerski, *supra* note 191.

[197] Kahn, *supra* note 185, at 781 ("[S]ellers are very aware of the fact that Amazon is also their primary competitor.").

[198] Bullard, *supra* note 16, at 195 n.61.

[199] Khan, *supra* note 193, at 988.

[200] *Id.* at 988–89.

[201] *See* Rankin, *supra* note 191.

the tech giant has been designed to survive on thin (or even negative) profit margins for extended periods of time.[202] Accordingly, many vendors are faced with little choice but to keep prices low or throw in the towel.[203]

Operation of Amazon's algorithms, when considered together with its data collection practices,[204] presents another opportunity for Amazon to control third-party vendors' product sales. Consider one commentator's description of the company's information collection prowess:

> Amazon's ability to collect and analyze ecommerce data is unrivaled. In addition to tracking overall trends, it captures which goods a customer clicked on but did not buy, the exact price change that induced a customer to peruse an item or purchase it, how long a user hovers her mouse over a particular good, how customers are reacting to product images and videos, and a wealth of other microdetails that add up to a formidable—and constantly evolving—arsenal of market intelligence.[205]

Amazon, rather than providing this information to vendors,[206] instead appropriates it to engage in market experimentation[207] and undercut prices.[208] In this way, Amazon views its marketplace "as a vast laboratory to spot new products to sell, test sales of potential new goods, and exert more control over pricing."[209] By keeping

---

[202] Marc J. Veilleux, Jr., Note, *"Alexa, Can You Buy Whole Foods?" An Analysis of the Intersection of Antitrust Enforcement and Big Data in the Amazon-Whole Foods Merger*, 37 CARDOZO ARTS & ENT L.J. 481, 500 (2019).

[203] Rankin, *supra* note 191.

[204] "Specifically, reporting suggests that Amazon uses sales data from outside merchants to make purchasing decisions in order to undercut them on price and give its own items featured placement under a given search." Kahn, *supra* note 185, at 781 (internal quotations omitted).

[205] Khan, *supra* note 193, at 992–93.

[206] Veilleux, Jr., *supra* note 202, at 501.

[207] Khan, *supra* note 193, at 988.

[208] Kahn, *supra* note 185, at 781.

[209] *Id.* (quoting Greg Bensinger, *Competing with Amazon on Amazon*, WALL ST. J. (June 27, 2012, 6:15 PM), https://www.wsj.com/articles/SB10001424052702304441404577482902055882264).

third-party business analytics to itself and sleeping "quietly as it retain[s] data about other sellers' successes,"[210] Amazon allows those sellers to "bear the initial costs and uncertainties when introducing new products." If Amazon deems a new product to be a profitable one, it can "swoop in and undercut" the vendor[211]:

> Take the example of Pillow Pets, stuffed-animal pillows modeled after NFL mascots that a third-party merchant sold through Amazon's site. For several months, the merchant sold up to one hundred pillows per day. According to one account, just ahead of the holiday season, [the merchant] noticed Amazon had itself beg[u]n offering the same Pillow Pets for the same price while giving [its own] products featured placement on the site. The merchant's own sales dropped to twenty per day. Amazon has gone head-to-head with independent merchants on price, vigorously matching and even undercutting them on products that they had originally introduced.[212]

Perhaps one commentator summarized Amazon's market control over third-party vendors best, writing,

> The source of [Amazon's] power is: (1) its dominance as a platform, which effectively necessitates that independent merchants use its site; (2) its vertical integration—namely, the fact that it both sells goods as a retailer and hosts sales by others as a marketplace; and (3) its ability to amass swaths of data, by virtue of being an internet company.[213]

In other words, Amazon exerts substantial market control by forcing vendors onto its platform, appropriating their valuable business information, and using it to drive down prices and experiment in the market without assuming any resultant liabilities. A control test

---

[210] Khan, *supra* note 193, at 993.

[211] Veilleux, Jr., *supra* note 202, at 501.

[212] Kahn, *supra* note 185, at 781–82 (internal quotations omitted).

[213] *Id.* at 783.

should recognize such behavior as an attempt to establish control and dominance over third-party product sales.[214]

V. BRINGING IT ALL TOGETHER: THE CHAIN OF MARKETING ANALYSIS

Strict title or control requirements emerged in product defect law[215] as a response to critics'[216] arguments that an entity should not be held liable simply because it is the party most likely to be able to compensate.[217] As has been discussed, some states, including Pennsylvania, have foregone a strict title requirement in favor of (its perhaps less severe cousin) a "control" test.[218] Because strict liability assumes an entity who helps facilitate the introduction of a product into the market is in a position to exert some direct or indirect control over the price of the product, thereby spreading the risk of any defect to consumers "as a cost of doing business,"[219] a control requirement is a more appropriate alternative to a strict title

---

[214] This Note expresses no opinion on whether products liability actions should be used as a vehicle to combat anticompetitive business practice; they are detailed here only to highlight their relevance in determining how much control an actor exerts in the sale of a product.

[215] *See* Bullard, *supra* note 16, at 211 ("Any requirement for a retailer or distributor to hold title in a defective product in order for it to be subject to strict liability is absent from products liability statutes, from the Restatement and from relevant case law.").

[216] And, no doubt, very capable and determined barristers'.

[217] See, for example, *Cafazzo v. Cent. Med. Health Servs.*, where the defendant physician was sued for implanting the plaintiff with a defective prosthetic device. The appellate court, in affirming the trial court's dismissal of the claim, remarked rather derisively,

> In this instance, the manufacturer is in bankruptcy, and unable to sustain liability. Thus, an alternative, and solvent, payor was sought. All other considerations were subordinated to this objective, hence the unequivocal necessity, in appellants' view, for appellees to be designated as sellers irrespective of the actual facts of this matter.

668 A.2d 521, 524 (Pa. 1995).

[218] *See* discussion *supra* Sections III.A–C.

[219] Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944); *see also supra* note 78 and accompanying text.

requirement.[220] However, the most salient way of analyzing who sells, in conjunction with the policy goals of tort law and modern realities of business, is not to simply ask whether an entity took control of a product such that it had the opportunity "to pass upon" its quality,[221] but rather, to ask the slightly broader question of whether the entity is part of the product's "marketing chain."[222] A party should be found to be a part of the marketing chain if (1) it satisfies the underlying policy goals of strict liability in torts to hold the entity liable,[223] and (2) it exerted "substantial market control" over the product.[224] The policy goals of strict liability in torts, derivative of the reasoning in *Escola v. Coca Cola Bottling Co.* and the Restatement (Second) of Torts, Section 402A, are properly encapsulated in the four-factor test described and relied upon in *Oberdorf v. Amazon.com, Inc.*[225] Subsequently, determination of whether an entity exerted substantial market control should involve examining a variety of factors, including (1) the actual involvement of the entity in preparing, packaging, shipping, marketing, or

---

[220] A requirement of the passage of title also bears an unfortunate residual callback to the early days of products liability law and its obstacle to recovery that the injured party be in privity of contract with the seller. *See* TWERSKI ET AL., *supra* note 66.

[221] Long v. Tokai Bank, 682 N.E.2d 1052, 1058 (Ohio Ct. App. 1996); Musser v. Vilsmeier Auction Co., 562 A.2d 279, 282 (Pa. 1989).

[222] Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 144–45 (3d Cir. 2019). Moving away from the "chain of distribution" in favor of the "chain of marketing" recognizes entities like Amazon's responsibility as sellers without over-broadening the definition. *See* Bullard, *supra* note 16, at 231 ("[I]t may be more loyal to the policy motivations behind strict products liability to shift from a 'distribution chain' analysis to an inquiry more focused on determining the degree to which any given entity is responsible for placing a defective product on the consumer market."); *see also* discussion *supra* Part IV (discussing the control factors that properly put Amazon within the domain of having the requisite "control").

[223] *See* discussion *supra* Part II.

[224] *Oberdorf*, 930 F.3d at 149 ("Amazon not only accepts orders and arranges for product shipments, but it also exerts substantial market control over product sales by restricting product pricing, customer service, and communications with customers.").

[225] *Id.* at 144; *see also* discussion *supra* Section III.D.i.

providing support for the product,[226] (2) the party's interest in the product's introduction to the market,[227] (3) the pressure which the entity exerted, or could exert, directly or indirectly, on other members of the marketing chain to control the price of the product,[228] and (4) the level to which consumers relied on the entity's representations (implied or otherwise).[229] An entity that fits affirmatively within each factor of the four-factor test, and which, on balance, has exerted a substantial amount of control over the marketing of the product, is one that is properly liable as a seller in a strict products liability tort.[230]

---

[226] *See* discussion *supra* Section III.D.ii; *see also* State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 972 (W.D. Wis. 2019) (detailing Amazon's involvement in the transaction including contracting, fee scheduling, listing, shipping, and warranting).

[227] *See Oberdorf*, 930 F.3d at 141 ("In exchange for [its] services, Amazon collects fees from each third-party vendor."). An interest in unleashing a product upon the public need not be solely pecuniary. A corporation like Amazon, for example, finds more value in promoting its brand and acquiring larger and larger shares of various markets. For a great explanation of Amazon's strategy to obtain market share over profits, see Kahn, *supra* note 185, at 746–50. *See also* Veilleux, Jr., *supra* note 202 ("[W]here incumbent[third-party vendors] are charging above cost (earning healthy margins), they are ripe for disruption by Amazon, which is willing to earn smaller (or no) margins in return for market share.").

[228] And thereby allow for the spreading of costs among consumers. *Oberdorf*, 930 F.3d at 146–47; Papataros v. Amazon.com, Inc., No. 17-9836, 2019 U.S. Dist. LEXIS 144253, at *43–44 (D.N.J. Aug. 26, 2019).

[229] *State Farm Fire & Cas. Co.*, 390 F. Supp. 3d at 972 ("Amazon . . . implicitly represented that the [product] was safe by listing it for sale among its own products, and it expressly guaranteed timely delivery in good condition.").

[230] *See, e.g.*, *Oberdorf*, 930 F.3d at 144–48; *Papataros*, 2019 U.S. Dist. LEXIS 144253, at *37–45; *State Farm Fire & Cas. Co.*, 390 F. Supp. 3d at 964. Such an analysis also avoids the impracticality of demanding Amazon assess the quality of the over 500 million products sold through its site, since exerting substantial market control means Amazon can control quality in other ways. *See Oberdorf*, 930 F.3d 136, 144–48; Bullard, *supra* note 16, at 211 ("The number of products listed on [Amazon's U.S.] marketplace alone is in excess of 500 million separate listings.").

CONCLUSION

The widespread reliance on Section 402A of the Restatement (Second) of Torts to build up the law of products liability among the states means there is opportunity for the analysis proposed herein to be used beyond Pennsylvania.[231] As some commentators have suggested, Amazon has in some ways outsmarted courts, the broader products liability regime,[232] and traditional schools of business by engaging in novel and non-traditional corporate practice and behaviors.[233] The effectiveness of Amazon's business model cannot be denied, as it has propelled the web giant to become the world's most valuable retail company.[234] Unfortunately, Amazon's success has come, to some extent, at the expense of plaintiffs left without redress for their injuries.[235] Too often, Amazon has skirted liability for defective products flowing through its platform that burn,[236] maim,[237] and destroy.[238] Implementation of a "marketing chain" analysis, rooted both in the policy objectives of strict products

---

[231] For example, the court in *Francioni* acknowledged several different states that, interpreting Section 402A, had extended liability for product defects to lessors. *See supra* notes 96 and 100 and accompanying texts; *see also Papataros*, 2019 U.S. Dist. LEXIS 144253, at *41 (finding that both New Jersey and Pennsylvania law, by virtue of derivation from Section 402A, "substantially coincide," so that the reasoning in *Oberdorf* "complements" the analysis in *Papataros*); *see also State Farm Fire & Cas. Co.*, 390 F. Supp. 3d at 973 ("[*Oberdorf*'s] reasoning, particularly its careful consideration of the factors in [Section] 402A . . . would be persuasive under Wisconsin law, too.").

[232] Bullard, *supra* note 16, at 181; Kominers, *supra* note 8.

[233] *See* discussion *supra* Part IV.

[234] *Oberdorf*, 930 F.3d at 140.

[235] *See, e.g.*, *State Farm Fire & Cas. Co*., 390 F. Supp. 3d at 974 ("What recourse does a Wisconsin buyer have if one of these third-party products is defective and causes injury or damage? If, as in this case, the manufacturer and the third-party seller are foreign entities that cannot be sued in Wisconsin courts, Amazon's answer is that there is no recourse.").

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

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

[238] Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 137 (4th Cir. 2019).

liability and the substantial "control" test born out of it,[239] will more appropriately assess seller status than previous efforts and will result in liability being properly assigned to Amazon and similarly situated web platforms[240] in more instances.

---

[239] *See* discussion *supra* Part IV.

[240] *See supra* note 17 and accompanying text.