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## The Heavy Hand of Amazon: A Seller Not a Neutral Platform

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# THE HEAVY HAND OF AMAZON: A SELLER NOT A NEUTRAL PLATFORM

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## ABSTRACT

*Since the adoption of Section 402A of the Second Restatement of Torts, every party in a product's distribution chain has been potentially liable for injuries caused by product defects. Consumers who buy from reputable sellers are almost always guaranteed to have a solvent defendant if injured by a product defect. Amazon, though responsible for a vast number of retail sales, has sought to avoid liability by claiming that it is not a seller but a neutral platform that merely facilitates third-party sales to consumers. With two significant exceptions, most courts have sided with Amazon and concluded that Amazon is not a "seller" under Section 402A. These courts have left injured consumers without a remedy against insolvent or fly by night third-party sellers. All of the decided cases have failed to examine the nuances and complexity of how Amazon does business. This Article puts the lie to Amazon's claim that it is not a seller by demonstrating how Amazon controls third-party sales and hides its true role from consumers.*

## INTRODUCTION

Since the adoption of Section 402A of the Second Restatement of Torts, in 1965, every party in a product's distribution chain has been potentially liable for product defects.<sup>1</sup> The fundamental principle is that a manufacturer should bear the cost of the defective products it produces. That failing, the parties that put the product into the consumer marketplace should bear responsibility for their role in the sale. In some states, non-manufacturers are excused from liability, but only if the manufacturer is solvent and subject to the jurisdiction of the court (and even then, the seller is liable if negligent).<sup>2</sup>

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1. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. LAW INST. 1965). Comment c imposes strict liability for any seller of a defective product. *Id.* Liability for non-manufacturing sellers is specifically covered in comment e and the reporter's note of Section 1 of the Restatement (Third) of Torts: Products Liability. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. e (AM. LAW INST. 1998); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 reporter's note at 12. (AM. LAW INST. 1998).

2. Legislation providing for immunity from strict liability for non-manufacturers was first proposed by the Model Uniform Product Liability Act § 105, 44 Fed. Reg. 6200714 (1979). Many states have adopted the proposal that conditions immunity from strict liability on the ability of the plaintiff to attain jurisdiction over the manufacturer and the solvency of the manufacturer, with a small number of exceptions. For a list of states *see* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. RESTATEMENT § 1 reporter's note at 13. *See also* JAMES A. HENDERSON, JR., AARON D. TWERSKI & DOUGLAS A. KYSAR, PRODUCTS LIABILITY: PROBLEMS AND PROCESS, 57–58 (8th ed. 2016).

By design, when a plaintiff purchases a defective product from a reputable seller, the likelihood that a plaintiff would not have a solvent defendant is remote. Therefore, in any products transaction, it is crucial to know the identity of your seller. Is it Apple, or some nameless person selling from the back of a truck?

Before the advent of the internet, real world signals insured that this information was reasonably transparent. Amazon and a variety of other online platforms change all of that. It is a cruel truth of the retail world that online platforms are putting tremendous pressure on brick-and-mortar retailers. Toys “R” Us and Sears are the most prominent recent bankruptcy filings, but another twelve retailers entered bankruptcy in the first quarter of 2019.<sup>3</sup> Meanwhile, Amazon’s stock price has quadrupled in the last five years.<sup>4</sup> For better or for worse, goods are increasingly sold online rather than in stores.

But who are you dealing with when you buy goods on Amazon? It is not always clear: Amazon itself? A chain store? A local merchant? A fly-by-night manufacturer of cheap goods in a foreign country?<sup>5</sup> This is important because myriad products are sold through Amazon. Some of them explode causing serious injury. Examples of products causing injuries include cellphone chargers,<sup>6</sup> electronic cigarettes,<sup>7</sup> and hoverboards.<sup>8</sup> These cases have put this question squarely, asking “Is Amazon a seller for purposes of product liability?” Regrettably, until recently, the answer by all courts, had been a resounding “No.”<sup>9</sup>

3. Thomas Barrabi, *Retail Apocalypse: Pier 1 and the Other Retailers Closing, Filing for Bankruptcy*, FOX BUS. (Sept. 30, 2019), <https://www.foxbusiness.com/retail/features-retail-apocalypse-bankruptcy-stores-closing>.

4. See *Amazon Stock Price*, GOOGLE, <https://www.google.com/search?client=safari&rls=en&q=amazon+stock+price&ie=UTF-8&oe=UTF-8> (last visited Jan. 25, 2020).

5. See *infra* Figure 1.

6. Andrea Peterson, *Why Those Samsung Batteries Exploded*, WASH. POST: THE SWITCH (Sept. 12, 2016, 11:01 AM), [https://www.washingtonpost.com/news/the-switch/wp/2016/09/12/why-those-samsung-batteries-exploded/?utm\\_term=.cdc2b95cc794](https://www.washingtonpost.com/news/the-switch/wp/2016/09/12/why-those-samsung-batteries-exploded/?utm_term=.cdc2b95cc794); Alana Samuels, *When Your Amazon Purchase Explodes*, ATLANTIC (Apr. 30, 2019), <https://www.theatlantic.com/technology/archive/2019/04/lithium-ion-batteries-amazon-are-exploding/587005/> (hereinafter *Amazon Explodes*).

7. *Amazon Explodes*, *supra* note 6. Regina Boyle Wheeler, *The Vape Debate: What You Need to Know*, WEBMD (July 24, 2016), <https://www.webmd.com/smoking-cessation/features/vape-debate-electronic-cigarettes#1>.

8. See *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 428 (6th Cir. 2019) (applying Tennessee law).

9. See *Carpenter v. Amazon.com, Inc.*, No. 17C 3221, 2019 WL 1259158, at \*4–6 (N.D. Cal. March 19, 2019) (applying California law); *Stiner v. Amazon.com, Inc.*, 120 N.E.3d 885, 898 (Ohio Ct. App. 2019) (applying Ohio law); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 397–400 (S.D.N.Y. 2018) (applying New York law); *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17 C 2738, 2018 WL 3546197, at \*5–12 (D.N.J. July 24, 2018) (applying New Jersey law); *Fox v. Amazon.com, Inc.*, 2018 WL 2431628, at \*8 (M.D. Tenn. May 30, 2018) (applying Tennessee law), *aff’d in part, and rev’d in part*, *Fox v. Amazon.com, Inc.*, 926 F.3d 295, 305 (6th Cir. 2019) (Amazon is not a seller but may be liable because they failed to warn about the risks of hoverboards); *Erie Ins. Co. v. Amazon.com Inc.*, 2018 WL 3046243, at \*1–3 (D. Md. Jan. 22, 2019) (applying Maryland law); *Garber v. Amazon.com, Inc.*, No. 17 C 673, 2019 WL 1437877 (N.D. Ill. 2019).

*Oberdorf v. Amazon.com* illustrates both the majority view (at trial) and (prior to being vacated preceding *en banc* review) constituted the one exception on appeal. Heather Oberdorf purchased a dog collar on Amazon.com.<sup>10</sup> Ms. Oberdorf alleged that the collar failed, causing the dog's leash to retract, striking her in the eye resulting in permanent injury.<sup>11</sup> Amazon defended, saying that they were not the seller but had merely facilitated the transaction for a firm called "The Furry Gang," now nowhere to be found.<sup>12</sup> At the trial level, a federal district court interpreted both Pennsylvania and federal law to side with Amazon, saying that Ms. Oberdorf could not state a claim under product liability law against Amazon because it was not the seller.<sup>13</sup> Further, Amazon was protected by Section 230 of the Communications Decency Act that insulates internet platforms from liability for statements of third-party content providers.<sup>14</sup> Taken together, these conclusions left Ms. Oberdorf utterly without recourse. Paradoxically, the same would not have been true if she had purchased the same leash at PetSmart. Brick-and-mortar merchants are answerable to their customers;<sup>15</sup> Amazon, apparently, is not. In the modern e-commerce environment, this distinction is untenable and, in Amazon's case, misleading. Recognizing this, the Third Circuit reversed.<sup>16</sup> However, the Third Circuit's panel opinion is an outlier. The first seven courts to deal with whether Amazon was a seller

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(applying Illinois law); *see also* *Milo & Gabby LLC v. Amazon.com, Inc.*, 693 F. App'x 879, 885 (Fed. Cir. 2017) (holding that Amazon is not a "seller" under the Copyright Act, 17 U.S.C. § 106).

10. *Oberdorf v. Amazon.com, Inc. (Oberdorf I)*, 295 F. Supp. 3d 496, 498–99 (M.D. Pa. 2017) (applying Pennsylvania law), *rev.'d* *Oberdorf v. Amazon.com, Inc. (Oberdorf II)*, 930 F.3d 136, 153–54 (3rd Cir. 2019), *reh'g granted, opinion vacated*, *Oberdorf v. Amazon.com, Inc.*, 936 F.3d 182, 183 (3d Cir. 2019). Since *Oberdorf*, one trial court has followed the *Oberdorf* reasoning. *See State Farm Fire and Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 973–74 (W.D. Wisc. 2019).

11. *Oberdorf I*, 295 F. Supp. 3d at 497.

12. *Id.* at 497–98.

13. *Id.* at 501.

14. *Id.* at 502–03.

15. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. LAW INST. 1965). Comment c imposes strict liability for any seller of a defective product. *Id.*

16. On appeal, the Third Circuit reversed the *Oberdorf I* opinion, relying heavily on a Pennsylvania Supreme Court decision that held that that whether one is a seller for the purposes of strict liability should consider the following four factors:

- (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 charging for it in his business, i.e., by adjustment of the rental terms."

*Oberdorf II*, 930 F.3d at 144–48. Since *Oberdorf II*, one trial court has followed the *Oberdorf II* reasoning. *See State Farm Fire and Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 973–74 (W.D. Wisc. 2019).

matched the result of the trial court in *Oberdorf*, finding no liability.<sup>17</sup> Indeed, just a week before the Third Circuit decided *Oberdorf*, the Sixth Circuit affirmed a lower court decision holding that Amazon was *not* a seller, because they had insufficient “control” over the transaction.<sup>18</sup> Finally, as noted above, in August 2019, the Third Circuit granted Amazon’s motion to rehear *Oberdorf en banc* and vacated the panel’s opinion.

In our view, the courts do not grasp the magnitude of the problem or the reality of the situation. These decisions create an Amazon exception to tort law. Even the panel opinion in *Oberdorf* understated the extent to which Amazon controls transactions on its platform. Whether Amazon should be considered “in control”—and therefore a “seller”—turns on an examination of both sides of Amazon’s role in the transaction: the relationship with and experience of the buyer; and the heretofore unexamined and underappreciated relationship with and experience of the nominal third-party supplier. To understand the controversy over whether Amazon is a “seller” for product liability purposes, it is important to sketch the relationship between Amazon and the customers who purchase goods on its platform, as well as the relationship between Amazon and those who sell, or purport to sell, through Amazon. Sometimes a purchaser buys an Amazon branded product or a product that Amazon has purchased for resale.<sup>19</sup> In this case, nobody would contend that Amazon is not the seller. However, the majority of unit sales on the Amazon platform arise from a third-party seller (according to the court in *Oberdorf*, there are more than one million third-party sellers on Amazon) who simply use Amazon to consummate the sale.<sup>20</sup> Third-party sellers have the option to ship the product directly to the purchaser, or the seller may send the product to Amazon warehouses and the product is then shipped by Amazon to the purchaser. This is referred to as “Fulfillment by Amazon” (FBA).

Our discussion examines the relationship between Amazon and its third-party sellers and shows that while Amazon plays different roles in different types of transactions, in almost all of them, it is not a neutral platform or even an honest broker. Instead, Amazon exercises significant control over the transaction, both in terms of how it is fulfilled and who gets the opportunity

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17. See cases cited *supra* note 9.

18. *Fox v. Amazon.com, Inc.*, 926 F.3d 295, 305 (6th Cir. 2019) (finding Amazon exercised insufficient control to be deemed a seller).

19. *Oberdorf I*, 295 F. Supp. 3d at 498.

20. *Oberdorf II*, 930 F.3d at 141 (noting that Amazon processes sales for more than one million third-party vendors). These sales represented 53% of Amazon’s “units sold” for the fourth quarter of 2019. J. Clement, *Percentage of Paid Units Sold by Third-Party Sellers on Amazon Platform as of 4th Quarter in 2019*, STATISTA (Jan. 31, 2020), <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/>. However, less than half Amazon’s sales revenue came from these sales. J. Clement, *Global Net Revenue of Amazon from 2014 to 2019, by Product Group*, STATISTA (Feb. 3, 2020), <https://www.statista.com/statistics/672747/amazons-consolidated-net-revenue-by-segment/>.

to “make the sale.” Buyers rely on Amazon’s name and reputation when purchasing goods on Amazon. We will show, however, that the buyers’ experience is characterized by a significant lack of transparency as Amazon emphasizes or deemphasizes its role to *their* perceived best advantage. We have reviewed the briefs in the principal appellate cases, those siding with Amazon, as well as the Third Circuit’s *Oberdorf* opinion. In none of those cases is there any indication that the courts were given detailed information about the complex and nuanced relationship between Amazon and its third-party sellers. More importantly, the courts did not explore the extent to which Amazon masks that reality from a buyer who uses the platform. In this Article, we wish to explain that reality and put the lie to Amazon’s position that it is a neutral platform. Indeed, what is striking to us is that, in this allegedly two-sided market, the only constant is that Amazon is not what it seems.

To avail oneself of Amazon’s online market, each third-party seller enters into a Business Solutions Agreement (BSA) that governs every aspect of the sellers’ relationship with Amazon and those who purchase the product.<sup>21</sup> For example, at the time of the *Oberdorf* case, the seller was required to maintain “price parity” between the products they sell through other sales channel and those they sell on Amazon online.<sup>22</sup> The seller cedes to Amazon the right in its sole discretion to determine the content, appearance, design, and functionality of any product that Amazon puts online.<sup>23</sup> Amazon curtails the right of third-party vendors to communicate with Amazon site users.<sup>24</sup> They may not do so without Amazon’s permission. Furthermore, Amazon maintains the right to require third-party sellers to obtain, at their expense, insurance to indemnify it for losses arising from the sale of their product.<sup>25</sup> In exchange for its services, Amazon collects a commission of between 7% and 15% of the overall sales price and other fees set forth in the BSA.<sup>26</sup> All payments for sales made on Amazon are made to Amazon, not to the third-party seller.<sup>27</sup>

Despite Amazon’s substantial control over virtually all aspects of the sale, most of the cases have found that Amazon does not qualify as a seller

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21. *Oberdorf II*, 930 F.3d at 141. Amazon’s Business Solutions Agreement can be found on its website. See *Services Business Solutions Agreement*, AMAZON SELLER CENTRAL, [https://sellercentral.amazon.com/gp/help/external/G1791?language=en\\_US](https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US) (last visited Jan. 24, 2020).

22. *Oberdorf II*, 930 F.3d at 141. Indeed, in response to concerns raised by Senator Blumenthal that this practice constituted an antitrust violation, Amazon removed that provision from the BSA. David McCabe, *Amazon to End Price Practice Critics Said Could Violate Antitrust Law*, AXIOS (Mar. 11, 2019), <https://www.axios.com/amazon-price-practice-antitrust-elizabeth-warren-d802ba71-d376-4316-b9dc-cca4540959ac.html>.

23. *Oberdorf (II)*, 930 F.3d at 141.

24. *Id.* at 145.

25. *Id.* at 142.

26. *Id.*

27. *Id.* at 141.

for the purposes of strict liability. These courts have offered a host of reasons in support of this finding. Principally, they have noted that Amazon never takes title to the third-party sellers' product;<sup>28</sup> they do not play an integral role in producing or marketing the product;<sup>29</sup> they are not in a position to exert pressure on the product manufacturer to enhance the safety of the product;<sup>30</sup> and they merely provide a service in which a seller and buyer may get together.<sup>31</sup> We will show that once one looks at both sides of the transaction, both the way in which Amazon controls what sellers see, and the way in which it controls whose and which goods are sold, it is absolutely ludicrous to see them as anything but a "seller" for product liability purposes.

## I. AMAZON CONTROLS SALES OF ALL PRODUCTS ON ITS PLATFORM

In a supermarket or department store, placement on the shelf can determine what the customer sees first, last, or not at all. Sales through Amazon raise the importance of shelf placement from an art form to a science. The Amazon Marketplace sells items through a process of both buyer-pull and seller-push. When a potential buyer wishes to purchase something on Amazon, they search the Amazon website for the product. Even for a generic product, Amazon produces search results that list potential products and sellers in a particular order. These search results are carefully curated in a way that signals various types of information to the buyer. However, this information may not always be what it seems, and not all sellers are treated equally. Consider the following strategies by which Amazon influences what the customer sees.

### A. SPONSORED PRODUCTS

Probably the most important way of getting the buyer's attention is to simply purchase product placement through the mechanism of sponsorship. "Sponsorship" has nothing to do with Amazon endorsing the item due to an opinion or research. The highest bidders in a specific item category receive the "sponsored" label and appear higher on the search list. Sponsorship and its price are determined through a bidding war.<sup>32</sup> In short, the seller pays Amazon to put their product(s) before the customer in a manner that will get

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28. See, e.g., *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 141–42 (4th Cir. 2013) (applying Maryland law).

29. *Carpenter v. Amazon.com, Inc.*, No. 17C 3221, 2019 WL 1259158, at \*7–9 (N.D. Cal. Mar. 19, 2019).

30. *Stiner v. Amazon.com, Inc.* 120 N.E. 3d 885, 891–92 (Ohio Ct. App. 2019).

31. See cases cited *supra* note 9.

32. *Sponsored Products*, AMAZON, [https://advertising.amazon.com/products/sponsored-products?tag=googhydr20&hvadid=344149352091&hvpos=1t4&hvexid=&hvnetw=g&hvrnd=697449398169226403&hvpone=&hvptwo=&hvqmt=b&hvdev=c&hvdvcmdl=&hvlocint=&hvlocphy=9060351&hvtargid=kwd-300258248349&ref=pd\\_sl\\_5r3dcvih9qbsspagld](https://advertising.amazon.com/products/sponsored-products?tag=googhydr20&hvadid=344149352091&hvpos=1t4&hvexid=&hvnetw=g&hvrnd=697449398169226403&hvpone=&hvptwo=&hvqmt=b&hvdev=c&hvdvcmdl=&hvlocint=&hvlocphy=9060351&hvtargid=kwd-300258248349&ref=pd_sl_5r3dcvih9qbsspagld) (last visited Jan. 25, 2020).

the buyer's attention. Furthermore, although the product is labeled "sponsored," no explanation is given to the buyer as to the meaning of the term.<sup>33</sup> The buyer does not know, without significant additional research, that Amazon was paid to give preference to the product.

### B. AMAZON'S CHOICE

Some items are designated as "Amazon's Choice." This label is given to products that have scored very high in all of Amazon's competitive parameters.<sup>34</sup> For the purposes of "Amazon's Choice," however, the most important parameters to consider are sale price, feedback score, and quantity sold. Items that score highly in these three categories can win the "Amazon's Choice" label.<sup>35</sup> Because feedback score is directly related to how a merchant handles returns and customer service, Amazon exercises significant power over these sellers.

### C. BEST SELLER

To award the "Best Seller" label Amazon uses an algorithm that weighs the number of units sold by a seller within its product category against a number of other metrics.<sup>36</sup> However, "Best Seller" status likely correlates with the other categories, as sales are likely to increase with sponsorship and Amazon's endorsement.

### D. AMAZON PRIME

A fourth way in which a product can receive added salience on the 'shelf,' is through designation as "Amazon Prime." Amazon Prime is discussed in more detail below. However, for these purposes, it is another mechanism by which Amazon puts its brand behind certain, but not all, products.<sup>37</sup>

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33. *Id.*

34. Eyal Lanxner, *The Amazon Buy Box: How It Works for Sellers, and Why It's So Important*, in *THE DEFINITIVE GUIDE TO SELLING ON AMAZON* 73, 73–75 (2019) <https://www.bigcommerce.com/blog/win-amazon-buy-box/>.

35. Dennis Green, *Here's What It Means When An Item Is Marked 'Amazon's Choice'*, *BUS. INSIDER* (Aug. 4, 2018, 3:26 PM), <https://www.businessinsider.com/what-is-amazons-choice-2018-5>.

36. Amazon describes the "best seller" designation. *Amazon Best Sellers Rank*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=525376> (last visited Jan. 25, 2020). See also Tara Johnson, *What You Should Know About Amazon Best Sellers Rank (BSR)*, *TINUITI* (Jan. 9, 2019), <https://www.cpcstrategy.com/blog/2019/01/amazon-best-sellers-rank/>.

37. See *infra* Section II.B.

### E. KEY WORD BIDS

A final way of controlling ‘shelf space’ is through “keyword bids.”<sup>38</sup> Sellers bid for specific keywords, and if they win them, then those keywords will return searches with their items. For example, if a toothbrush distributor wins the keywords “dental” and “hygiene,” searches with those words would return results with that product near the top. This is another way for Amazon to increase its revenue by favoring one seller over another.

## II. AMAZON CONTROLS, MANAGES, AND HOLDS MUCH OF THE INVENTORY SOLD ON ITS SITE

Independent of the way products appear on the Amazon website, Amazon also takes an active role in either fulfilling (selling) products or ensuring that the sale of those products by others does not undercut the Amazon brand. Sellers who wish to sell through Amazon must meet certain criteria established by Amazon.

### A. THIRD-PARTY SELLERS

Third-party sellers sell through Amazon’s website but retain title to their products. Amazon takes a percentage cut from every product sold. Third-party products go through an approval process by Amazon under which each category label has different standards that items need to meet.<sup>39</sup>

### B. FULFILLMENT BY AMAZON—AMAZON PRIME

“Fulfillment by Amazon” (FBA) is an agreement between merchants and Amazon to handle all the packaging and shipping of those products. Products that use FBA are automatically designated as “Amazon Prime” and are guaranteed for two-day delivery by Amazon.<sup>40</sup> FBA products are labeled by Amazon and usually shipped in Amazon boxes. For products that are FBA, Amazon handles all returns and customer service requests.<sup>41</sup> FBA stands out for the amount of control Amazon takes over the product. Once an item is sent to one of Amazon’s fulfillment centers, the seller never touches again.

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38. Amazon refers to this as the “cost per click,” which operates at the keyword level. *Cost-per-Click Bids*, AMAZON, <https://advertising.amazon.com/help#GTX8JYBTJX5EUCZW> (last visited Mar. 21, 2020). See also Rustin Nethercott, *What Sellers Need to Know About Amazon Keyword Bidding*, TEIKAMETRICS (Mar. 12, 2019) <https://learn.teikametrics.com/blog/amazon-keyword-bidding/>.

39. *Start Selling Online*, AMAZON SERVICES, [https://services.amazon.com/services/soa-approval-category.htm/ref=asus\\_soa\\_ben\\_indcat](https://services.amazon.com/services/soa-approval-category.htm/ref=asus_soa_ben_indcat) (last visited Jan. 25, 2020).

40. *Help Grow Your Business with Fulfillment by Amazon*, AMAZON SERVICES, [https://services.amazon.com/fulfillment-by-amazon/benefits.htm/?ld=SEUSSOAGOOG-sitelink-fba&tag=googhydr20&hvadid=293567583085&hvpos=1t1&hvexid=&hvnetw=g&hvrnd=13360383028569486442&hvpon=&hvptwo=&hvqmt=b&hvdev=c&ref=pd\\_sl\\_1uekdrge8\\_e&hvtargid=kwd-321456900689](https://services.amazon.com/fulfillment-by-amazon/benefits.htm/?ld=SEUSSOAGOOG-sitelink-fba&tag=googhydr20&hvadid=293567583085&hvpos=1t1&hvexid=&hvnetw=g&hvrnd=13360383028569486442&hvpon=&hvptwo=&hvqmt=b&hvdev=c&ref=pd_sl_1uekdrge8_e&hvtargid=kwd-321456900689) (last visited Jan. 25, 2020).

41. *Id.* (“FBA leverages the Amazon customer service network stretching around the globe, managing customer inquiries, refunds, and returns for your FBA orders.”).

Amazon handles every other part of the transaction with the consumer. Amazon will provide inventory information to merchants who use FBA indicating when stock is low, as if the merchant were only a supplier.<sup>42</sup> While Amazon may not take title to the product, they bear the risk of loss when the product is in its inventory.<sup>43</sup> Indeed, as discussed later, Amazon reserves the right to substitute goods provided by one seller to customers who have ordered from another. The customer will never know because the goods themselves may never be identified to a particular seller.<sup>44</sup> Aside from the formal transfer of title, all of the apparent attributes of ownership have been transferred to Amazon.<sup>45</sup>

In sum, for a broad swath of products purchased through the platform, Amazon itself controls access to the site, the manner in which the items are displayed, and receives compensation at every stage. In fact, except for the formality of title, the level of integration in Amazon's supply chain is comparable to that of a standard brick-and-mortar seller.

### C. AMAZON'S "BUY BOX" OBSCURES THE SELLER'S IDENTITY?

For a buyer, the identity of the nominal seller is often unclear. Indeed, through its manipulation of the so-called "Buy Box," Amazon does everything it can to maximize that confusion. A buyer may go to the Amazon website and search on a particular product, say a food processor, then click on it with the intention to buy it. So far, the buyer has interacted with two

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42. *Id.* ("Keep your best-selling inventory in stock with personalized restock recommendations.").

43. *Business Service Agreement Section F-4 Storage*, AMAZON SELLER CENTRAL, [https://sellercentral.amazon.com/gp/help/external/1791?language=de\\_DE&ref=efph\\_1791\\_cont\\_5\\_21](https://sellercentral.amazon.com/gp/help/external/1791?language=de_DE&ref=efph_1791_cont_5_21) (last visited Jan. 25, 2020). *See also, Getting Started with Fulfilment by Amazon (FBA)*, AMAZON SELLER CENTRAL, [https://sellercentral.amazon.com/gp/help/G53921?language=en\\_US&ref=xx\\_G53921\\_cont\\_1791](https://sellercentral.amazon.com/gp/help/G53921?language=en_US&ref=xx_G53921_cont_1791) (last visited Mar. 13, 2020). *See FBA Inventory*, AMAZON SELLER CENTRAL, [https://sellercentral.amazon.com/gp/help/help.html?itemID=201074410&language=en\\_US&ref=xx\\_201074410\\_cont\\_G53921](https://sellercentral.amazon.com/gp/help/help.html?itemID=201074410&language=en_US&ref=xx_201074410_cont_G53921) (last visited Mar. 13, 2020), for information about inventory management.

44. *See infra* Section II.D.

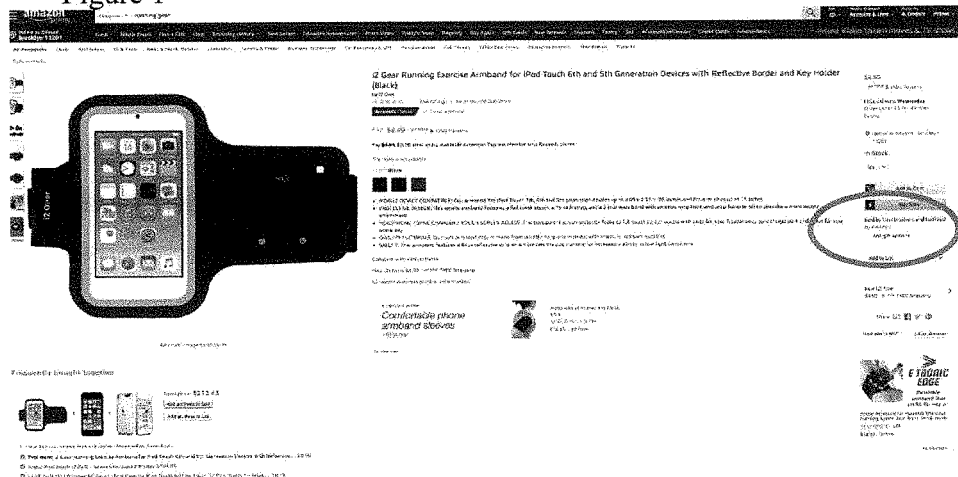
45. There is another way for third-party merchants to get a prime label for their products. Seller-fulfilled Prime (SFP) is a way for third-party merchants who are FBM (fulfilled by merchants) to qualify for Prime. Third-party FBM distributors must apply for SFP, and then must complete a month long trying out period before being given a prime label. If during that month, the seller fulfills orders within the Prime parameters over around 90% of the time, they can win a Prime label. This means they are more likely to win the buy box, and more likely to appear higher on search pages. It also means returns are handled by the seller, but customer service requests are handled by Amazon. This system is an example of Amazon pushing its brand name and brand appeal on merchants that do not want Amazon handling their items. Prime is critically important to win percentage shares of the buy box, and Amazon's system is specifically tailored to heavily favor merchants who integrate their product into Amazon's web. As seen throughout this article, the less of your product you actually handle as a merchant, the more likely you are to sell on Amazon. *See Sell Products with the Prime Badge Directly from Your Warehouse*, AMAZON, <https://sell.amazon.com/programs/seller-fulfilled-prime.html> (last visited Apr. 2, 2020).

known parties: Amazon and the manufacturer. When the buyer clicks on the product, Amazon takes them to a screen which includes additional product details, and in the top right-hand corner, two buttons: “buy now” and “add to cart.” This location on the screen is referred to in Amazon parlance as the “Buy Box.” Near these buttons, there is additional information. It is likely to say one of three things: (1) sold by XXX and shipped by XXX; (2) Sold by XXX and fulfilled by Amazon; or (3) sold and shipped by Amazon. This is the only indication the buyer gets of who is nominally selling the product. The buyer may never even notice it.

However, the identity of the seller may have real consequences in light of the case law discussed above. Only in the third category, sold and shipped by Amazon, would Amazon concede liability for the sale of a defective product that causes personal injury or property damage. In the first two categories, Amazon claims to be only a conduit. The consumer would, however, have to be a Philadelphia lawyer to understand the difference in the legal regime caused by three seemingly identical transactions. Amazon does nothing to alert their customers that it washes its hands of liability in the first two categories.

Indeed, if anything, Amazon does everything it can to make matters worse. If one looks at the image in Figure 1 below, the page banner says boldly “Amazon Prime.” The words “Amazon”, or “Prime” appear a total of thirteen times on the page. The name of the seller, “Cost Brothers,” appears once. It is hard to find.

Figure 1<sup>46</sup>



46. *i2 Gear Running Exercise Armband Screenshot*, AMAZON, <https://www.amazon.com/i2-Gear-Exercise-Generation-Reflective/dp/B0145QIQZU/> (last visited Mar. 21, 2020). While the seller of the actual product here is Cost Brothers, the name is only listed once on the product's webpage in an inconspicuous manner. *Id.*

#### D. SUBSTITUTION

To make matters even worse, when a sale is fulfilled by Amazon for a nominal seller, it is not even clear whose goods are actually being sold. In its agreement with sellers, it reserves the right to substitute products with those provided by other sellers.<sup>47</sup> By default, Amazon stores inventory on a product-by-product basis, not a seller-by-seller basis. Therefore, when, for example, Amazon sells a food processor, the nominal seller may be Williams Sonoma, Cost Brothers, or Amazon. In reality, unless the seller opts out, all of the food processors are stored together in a common bin identified by product code, not by seller. A buyer who purchases from "Williams Sonoma" may receive a food processor that was actually supplied to Amazon by "Cuisinart" or somebody else, possibly "Cost Brothers."

In short, Amazon decides who will appear in the "Buy Box" and whose inventory will be sold. All of this is largely out of the control of third-party sellers or the awareness of the consumer. Amazon hinges its legal arguments above, on the fact that it is simply arranging a deal between a third-party buyer and a third-party seller. This may be accurate for a subset of Amazon's transactions, but for many, if not most, the only relevant parties are the buyer, the manufacturer, and Amazon.

### III. THE "BUY BOX"—CONTROL OF THE FINAL SALE

In addition to obscuring the identity of a buyer's nominal seller, a further aspect of Amazon's control of the sale is how it manipulates who ends up in the "Buy Box." When a buyer goes to Amazon and searches a product, it generally will list the product but not the seller. When the buyer clicks through, only then does an identified merchant appear (Figure 1). Amazon controls who that merchant will be.

Because many distributors on Amazon sell the same products, including Amazon itself, many sellers share the same product page. As a result, only one can be the top product displayed, or in other words, the product that is actually being purchased when clicking on "add to cart." Sellers must win percentage shares of the "Buy Box" for their particular product in order to be the item customers are purchasing when they click "add to cart."<sup>48</sup> The most

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47. *Business Service Agreement*, under *F-5 Fulfillment*, AMAZON SELLER CENTRAL, [https://sellercentral.amazon.com/gp/help/external/G1791?language=en\\_US](https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US) (last visited Jan. 25, 2020) ("We may ship Units together with products purchased from other merchants, including any of our Affiliates. We also may ship Units separately that are included in a single Fulfillment Request."). While a seller may opt out of "commingling," to do so requires them to incur additional labelling and may result in increased shipping times and reduced search rankings. See also Izabella Kaminska, *Amazon (sub)Prime - Part II*, FIN. TIMES (Apr. 3, 2019, 6:30 AM), <https://ftalphaville.ft.com/2019/04/03/1554287401000/Amazon—sub-prime—Part-II/> ("[W]hile sellers can opt out of commingling, historically it has been expedient for them to opt in due to how the process reduces labelling costs and shipping times for sellers, while also improving search rankings.").

48. Lanxner, *supra* note 34, at 75.

important parameters Amazon uses to determine who gets the “Buy Box” are fulfillment time (how long it takes for a company to deliver their products) and listed price.<sup>49</sup> Since price is such an important factor in winning the “Buy Box,” a distributor who sells a product cheaply is likely to win a large portion of the “Buy Box” share. Also, since Amazon would like to fulfill as many orders as possible, sellers who have stored large quantities of the particular product with Amazon may get a larger share of the “Buy Box.”<sup>50</sup> Those metrics are item specific, which means even if a seller on Amazon has high ratings and low prices for other products, it will not affect the seller’s “Buy Box” share for a separate product. Every product is evaluated against the same product sold by other merchants.<sup>51</sup> Most significantly, however, the exact algorithm is proprietary—a trade secret.

The “Buy Box” system means that at different times throughout the day, the same product page will be supplying an item from two separate distributors. A Colgate toothbrush bought at 10 a.m. might come from “Toothbrush Emporium,” while a Colgate toothbrush bought at 6 p.m. the same day, from the same product page, might come from “Ye Olde Toothbrush Shop.” That is because both distributors have a percentage share of the “Buy Box,” and that share determines when their product appears in the “Buy Box.”<sup>52</sup>

The “Buy Box” system also heavily favors merchants who use FBA. FBA automatically assigns the product a “Prime” label, which in turn influences the “Buy Box” selection process.<sup>53</sup> The result is a system that pushes merchants towards FBA to win a larger percentage share of the “Buy Box”—a decision that is entirely controlled by Amazon and hidden from the customer. As noted earlier, Amazon has a policy that states if a product has the same manufacturer bar code as another distributor, they are allowed to use other sellers’ product to fulfill an order and vice versa. The result is that a customer who sees “sold by x” on Amazon when buying a product might actually get that product “supplied by y” without knowing it.<sup>54</sup>

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49. See *supra* text accompanying notes 45 and 47.

50. SAM SOMMER, *HACK THE BUY BOX: FROM ALIBABA TO AMAZON FBA & BEYOND* loc. 60 (2016) (ebook). (“So the vendor who has the most inventory (the parent who is readily available) wins.”).

51. See *id.*

52. Lanxner, *supra* note 34, at 75.

53. See *Help Grow Your Business with Fulfillment by Amazon*, *supra* note 40.

54. *Using the Manufacturer Barcode to Track Inventory*, AMAZON SELLER CENTRAL, [https://sellercentral.amazon.com/gp/help/external/200141480?language=enUS&ref=mpbc\\_200243180\\_cont\\_200141480](https://sellercentral.amazon.com/gp/help/external/200141480?language=enUS&ref=mpbc_200243180_cont_200141480) (last visited Jan. 25, 2020). Whether or not this is problematic may vary with the type of product. Sometimes the seller matters. Also, this system relies almost entirely on Amazon’s own ability to control what its suppliers give them. Indeed, there were recent reports of counterfeit sales of the “Blue Book” on Amazon, and the editors advised legal writing professors to purchase only “authentic” copies that the Blue Book publishes themselves or reputable brick-and-mortar bookstores. David Ziff (@disziff), TWITTER (Aug. 7, 2019, 12:58 PM), <https://twitter.com/djsziff/status/1159192059208589312?s=20>.

### A. SELLING WITHOUT TORT LIABILITY: THE PROLIFERATION OF DANGEROUS PRODUCTS

One would expect that immunizing Amazon from tort liability might lead to a proliferation of dangerous products. Making third-party sellers effectively immune from product liability suits either where they are not identifiable or have no assets to pay for legitimate claims could be expected to make matters worse. But one need not speculate about this eventuality. The *Wall Street Journal* (*WSJ*), in a recent article, documented that the problem is pervasive. Their investigation found over 4,000 items for sale on Amazon.com that had been declared “unsafe by federal agencies, deceptively labeled or banned by federal regulators.”<sup>55</sup>

Although Amazon claims consumer protection from unsafe products is a priority, the *WSJ* tested the effectiveness of Amazon’s safety practices by hiring a federally certified testing company to examine certain items bought on Amazon during a three-month period.<sup>56</sup> They found the following:

- Forty-three listings for oral benzocaine, a pain reliver, lacked the advised Food and Drug Administration (FDA) labels warning against use on children under two-years-old;
- 116 products were falsely listed as “FDA-approved” including four toys—the agency does not approve toys—and ninety-eight eyelash-growth serums that never undertook the drug-approval process to be marketed as approved;
- Eighty listings matched the description of infant sleeping wedges the FDA has warned can cause suffocation and Amazon has said it banned;
- Fifty-two listings were marketed as supplements with brand names the FDA and the Department of Justice have identified as containing illegally imported prescription drugs; and
- 1,412 electronics listings falsely claimed to be Underwriter Laboratories certified—indicating they met voluntary industry safety standards—or did not provide enough information to verify the claim.<sup>57</sup>

The *WSJ* also noted, “[D]ozens of products that the [*WSJ*] identified as dangerous or mislabeled had the Amazon’s Choice designation, which many consumers take to be Amazon’s endorsement.”<sup>58</sup> One would have to search the Amazon website to discover that the “Amazon Choice” label “reflects a

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55. 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, 8:56 AM), <https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990>.

56. *Id.* (“To test the effectiveness of Amazon’s safety practices, the Journal analyzed listings on Amazon between May and early August, and hired a federally certified testing company to examine certain items bought on Amazon.”).

57. *Id.*

58. *Id.* (“Dozens of products the Journal identified as dangerous or mislabeled had the Amazon’s Choice designation, which many consumers take to be Amazon’s endorsement.”).

combination of ratings, price and shipping time.”<sup>59</sup> Nothing short of a complete reading of the *WSJ*’s findings will suffice to understand the scope of the problem. It is not surprising that the *WSJ* concludes that “America’s tech giants have lost control of their massive platforms—or decline to control them.”<sup>60</sup>

## CONCLUSION

Amazon’s contention that it is a neutral platform that simply facilitates sales between sellers and buyers is a myth. Amazon exercises control over each sale through a host of mechanisms that maximize its profit and determine who will buy what from whom. First, by selling priority space to the highest bidder, it controls the likelihood that the product will be seen by a potential buyer. Second, by selling key words to the highest bidder, it increases the chance that a buyer will be directed to the product that Amazon prefers. Third, by allowing substitution of products from different third-party sellers who have placed their products in Amazon’s inventory, it effectively makes a sale that differs from the one described in the “Buy Box.” The product may be the same, but the product may not have been supplied to Amazon by the seller identified in the “Buy Box.” Fourth, by confusing the various forms of sales on Amazon, the consumer does not know for which sales Amazon is disclaiming liability.

At this point, it is inescapable that Amazon is truly the seller of products purchased on its website. Its contractual arrangement with the third-party seller allowing substitution does not change the fact that it is selling something different to the buyer than what was represented in the “Buy Box.” The buyer does not have a clue that Amazon only bears liability for products it owns and sells. The “Buy Box” does not tell the buyer that it has no responsibility for third-party sellers for sales that are fulfilled by Amazon. Even if the “Buy Box” were to do so, they should not be permitted to avoid liability as a seller. Amazon’s behind-the-scenes manipulation of product placement on its website through sale of preferred space and its sale of products contrary to the designation in the “Buy Box” gives it extraordinary control of the product sale.

The adoption of strict liability for non-manufacturing sellers throughout the country was designed to create “incentives for them to deal only with reputable, financially responsible manufacturers and distributors, thereby helping to protect the interests of users and consumers.”<sup>61</sup> The only entity that can provide that protection is Amazon. If the cost to consumers is the loss of

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59. *Id.* (“The company’s website says Amazon’s Choice reflects a combination of ratings, pricing and shipping time.”).

60. *Id.* (“Amazon’s struggle to police its site adds to the mounting evidence that America’s tech giants have lost control of their massive platforms—or decline to control them.”).

61. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. a (AM. LAW. INST. 1998).

cheap, inferior, and dangerous products that cause serious personal injury, we submit that it is not too high a price to pay.

