

**Functional Tort Principles for Internet Platforms: Duty,
Relationship, and Control**

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

Over the last seven decades, mainstream U.S. torts jurisprudence shifted dramatically from rigid formal rules—focused on duty and culpability—to more flexible norms and principles of accountability. This shift was part of a general transformation of tort law that can be observed in the case law, the Restatements, and academic scholarship. Recently, however, where internet platforms such as Amazon are involved, courts appear to have reverted to a formalistic approach to limit duty, and hence liability, for personal injuries caused by the sale of defective products using the platform. With a few notable exceptions, courts have focused on the word “seller” in § 402A of the Second Restatement of Torts and have concluded that Amazon is not a “seller” when it facilitates a sale between a customer and a third-party merchant.

This Article is the third in a series of articles that develop a functional, control-based approach to platform liability. It proceeds in five steps. First, we develop the general tort principles that govern liability for transactions in defective consumer products. Second, we show how Amazon, as a platform situated squarely between a third-party seller and the customer, has control over both sides of that transaction. This places Amazon in a position where they should be held accountable as a non-manufacturing seller, where the third-party seller is not amenable to suit. Third, we give an example of how courts have resisted this conclusion, taking shelter in formal concepts of title rather than traditional understandings of culpability and loss allocation. Fourth, we develop a functional approach to platform liability that uses traditional tort principles to evaluate the platform’s role in a transaction and apply those

* David M. Barse Professor of Law, Brooklyn Law School.

** Irwin and Jill Cohen Professor of Law, Brooklyn Law School.

principles to Amazon. Lastly, we consider how these principles should apply to platforms generally.

Article Contents

Introduction	4
I. Accountability for the Sale of Standardized Products	12
A. The Citadel of Privity Crumbles.....	13
B. Seller as a Functional Concept	15
C. Pretzel Privity for Internet Platforms: Manipulating Transaction Structure and Title to Avoid Accountability	17
D. Form over Substance in Texas.....	22
E. Struggling Toward a Control-Based Approach.....	26
II. The Case of Amazon: Control of the Customer/Third- Party Relationship	28
III. Common Law and Markets: The Formal Response.....	35
A. The Transformation of Duty.....	35
B. Title as Label	37
IV. A Functional Approach to Duty.....	39
A. Duty: Vicarious Liability and the Importance of Control.....	42
1. Principles of Vicarious Liability	43
2. Franchisor/Franchisee.....	43
3. <i>Respondeat Superior</i>	45
B. Vicarious Liability and Amazon’s Control of Third- Party Sales	47
1. Placement of Products on Amazon’s Website	47
a. Sponsored Products	48
b. Other Methods for Controlling Placement	48
2. Fulfillment By Amazon: The Right of Substitution Without Consumers’ Knowledge	49
3. The Puzzle of Amazon	51
V. Duty and Immunity as Applied to Platforms	52
A. Control, Relationship, and Duty	53
B. Immunity and Policy	55
C. Duty and Internet Platforms: A Functional Approach.....	57
Conclusion.....	59
Appendix.....	61

Introduction

“Nothing Happens Until Somebody Sells Something”
—Henry Ford

Over the last seven decades, mainstream U.S. torts jurisprudence shifted dramatically from rigid formal rules—focused on duty and culpability—to more flexible norms and principles of accountability.¹ This shift was not limited to personal injury. Rather, it describes a more general transformation of tort law traceable to the inexactly combined visions of Benjamin Cardozo, William Prosser, and Guido Calabresi. This transformation can be observed in the case law, the Restatements, and academic scholarship.² Landmark cases like *MacPherson v. Buick Motor Company*,³ *Palsgraf v. Long Island Railroad Company*,⁴ *Escola v. Coca Cola*,⁵ and *Greenman v. Yuba*,⁶ proceed from a broadly common and deeply realist vision of tort law, reflected in the Second and continued in the Third Restatements of Torts. There, to quote Cardozo, “The *principle* of the distinction is . . . the important thing.”⁷ Substance should control legal determinations rather than form.

¹ See William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) (chronicling the scholarly and legal attack on privity-of-contract defenses raised by manufacturers in products liability litigation and the growing prominence of strict liability in such cases); Patricia Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturer’s Liability for Dangerous Patently Dangerous Products*, 48 NYU L. REV. 1065 (1973) (criticizing the open-and-obvious danger rule in products liability); RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 51 (AM. L. INST. 2012) (detailing the abolition of special liability-immunity rules for landowners in favor of a general negligence standard); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 17 (AM. L. INST. 1998) (noting only a “tiny minority of states retain contributory fault as a total bar” to recovery in products liability because a “strong majority of jurisdictions apply” comparative fault after the adoption of Section 402A of the Second Restatement of Torts in 1964).

² See sources in note 1, *supra*.

³ 111 N.E. 1050 (N.Y. 1916).

⁴ 162 N.E. 99 (N.Y. 1928).

⁵ 150 P.2d 436 (Cal. 1944).

⁶ 377 P.2d 897 (Cal. 1963).

⁷ *MacPherson*, 111 N.E. at 1051 (emphasis added).

Recently, however, where internet platforms such as Amazon are involved, courts appear to have reverted to a formalistic approach to limit duty, and hence liability, for personal injuries caused by the sale of defective products using the platform. With a few notable exceptions, courts have focused on the word “seller” in § 402A of the Second Restatement of Torts and have concluded that Amazon is not a “seller” when it facilitates a sale between a customer and a third-party merchant.⁸ These cases are devoid of any reasoning that would support such a broad immunity for Amazon or other retail internet platforms. Indeed, both the principles behind § 402A, which sought to assure that injured customers

⁸ RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965). In some jurisdictions, Section 402A has been adopted as a statute, but these statutes generally codify the common law. *See, e.g.*, MONT. CODE ANN. § 27-1-719 (West 2023); WIS. CODE ANN. § 895-047 (West 2023). In the following cases, courts refused to impose strict products liability on Amazon for injuries caused by defective products sold by third-party sellers on its marketplace because Amazon was found to have not taken title to the goods. *See, e.g.*, *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018) (applying New York law); *Erie Insurance Co. v. Amazon.com, Inc.*, 925 F.3d 135, 142 (4th Cir. 2019) (applying Maryland law); *Garber v. Amazon.com, Inc.*, 389 F. Supp. 3d 766, 779 (applying Illinois law); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 528 F. Supp. 3d 686, 695 (W.D. Ky. 2021) (applying Kentucky law); *Indiana Farm Bureau Ins. v. Amazon.com, Inc.*, No. CV-1568-JMS, 2021 WL 4147200, at *2 (S.D. Ind. Sept. 13, 2021) (applying Indiana law); *Philadelphia Indemnity Ins. v. Amazon.com, Inc.*, 425 F. Supp. 3d 158, 164 (E.D.N.Y. 2019) (applying New York law); *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 110-11 (Tex. 2021) (applying Texas law); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213, 216 (9th Cir. 2020) (applying Arizona law).

There are two notable exceptions where liability was found: *Oberdorf v. Amazon.com, Inc. (Oberdorf II)*, 930 F.3d 136, 150 (3d Cir. 2019); and *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 618-19 (Ct. App. 2020). Note that in *Oberdorf II*, the Third Circuit, sitting *en banc*, issued an unpublished decision that vacated the panel decision and certified the question of Pennsylvania law to the Pennsylvania Supreme Court. 818 F. App'x 138 (3d. Cir. 2020). The case settled before a decision was rendered. For further discussion of these cases, see text at notes 55 to 66, *infra*.

would have recourse to any party in the chain of distribution,⁹ and the basic tort principles of vicarious liability should lead courts to hold Amazon liable.

This Article is the third in a series of articles that we have written about platform liability for defective products.¹⁰ In the first, we explored why Amazon should be considered a “seller” within the meaning of § 402A. In the second, we discussed how Amazon was using transaction structure to avoid liability in tort or warranty, and thereby reconstituting a form of privity of the type that was rejected by the courts over half a century ago. In this Article, we show that the functional, control-based,

⁹ Restatement (Second) of Torts, § 402A comment f provides:

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

RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (AM. L. INST. 1965). Similarly, § 1 comment (e) of the Restatement (Third) of Torts: Products Liability reinforces this point:

Nonmanufacturing sellers or other distributors of products. The rule stated in this Section provides that all commercial sellers and distributors of products, including nonmanufacturing sellers and distributors such as wholesalers and retailers, are subject to liability for selling products that are defective. Liability attaches even when such non-manufacturing sellers or distributors do not themselves render the products defective and regardless of whether they are in a position to prevent defects from occurring.

RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. e (AM. L. INST. 1998). For an extensive list of cases supporting this proposition, see the Reporters’ Note to comment (e).

¹⁰ Edward J. Janger & Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller Not a Neutral Platform*, 14 BROOK. J. CORP. FIN. & COM. L. 259 (2020) [hereinafter Janger & Twerski, *Heavy Hand*]; Edward J. Janger & Aaron D. Twerski, *Warranty, Product Liability and Transaction Structure: The Problem of Amazon*, 15 BROOK. J. CORP. FIN. & COMM. L. 49, 57-8 (2021) [hereinafter Janger & Twerski, *Transaction Structure*].

approach that we developed in our first article fits squarely within a broader, and similarly functional, approach to accountability. In particular, we consider principles of vicarious liability, and find that, even without reference to § 402A, Amazon would and should be held liable for defective products sold through its platform.

Amazon seeks to avoid such liability by labeling itself a “platform.” In this Article, we focus on the empty formalism of these labels—“platform” and “seller”¹¹—and instead offer a functional approach to internet-platform liability rooted in traditional relationship-focused tort principles of duty and accountability. Some have argued that holding internet platforms like Amazon liable puts them in an impossible position that will chill innovation and deprive consumers of the benefits of marketplaces like Amazon, Etsy, E-Bay, and others.¹² We are dubious. As we discuss below, this is a problem that can and should easily be solved with insurance.¹³ Amazon is well placed to assure that consumers will have recourse. The Amazon sales platform is the world’s largest marketplace for consumer products. It is used by consumers to buy everything from Kleenex to cars.¹⁴ Sometimes Amazon sells things on its own behalf, but Amazon’s customers may also purchase items through Amazon from so-called “third-party sellers.” As we have written previously, sometimes those items explode and cause injury.¹⁵ In many such cases, the nominal third-party

¹¹ See cases cited *supra* note 8.

¹² Eric Goldman, *It’s Impractical to Amazon and Harmful to Consumers*, WALL ST. J. (Feb. 28, 2020, 9:09 AM), <https://www.wsj.com/articles/should-amazon-be-responsible-when-its-vendors-products-turn-out-to-be-unsafe-11582898971> [<https://perma.cc/H3P3-H2K2>].

¹³ See *infra* text accompanying note 101.

¹⁴ Go here if you need Kleenex: *Kleenex*, AMAZON.COM, <https://www.amazon.com/kleenex/s?k=kleenex>____ [<https://perma.cc/SZ4Z-JPU6>]. The Buick showroom on Amazon can be found here: *Buick*, AMAZON.COM, <https://www.amazon.com/adlp/buick> [<https://perma.cc/YPN4-X7WW>].

¹⁵ See Janger & Twerski, *Heavy Hand*, *supra* note 10, at 260; Janger & Twerski, *Transaction Structure*, *supra* note 10, at 49.

seller is insolvent or cannot be found.¹⁶ Not surprisingly, the injured customers have sued Amazon. They look to case law under § 402A of the Restatement (Second) of Torts where, in the non-platform context, courts have uniformly held non-manufacturing sellers either primarily or secondarily liable for injury caused by defective products.¹⁷

Amazon, in defending these cases, however, has advocated a formal interpretation of the words “sell” and “seller” in § 402A. Surprisingly, for the most part, courts have appeared to go along.¹⁸ Looking at the word “seller” in the Restatement as if it were statutory language, these courts have adopted a title-based approach to strict liability.¹⁹ This approach is a significant deviation from the now-traditional tort principles that focus on the substance of commercial relationships to establish accountability rather than formal (and manipulable) transaction structure.²⁰ This deviation has consequences.

¹⁶ See cases cited *supra* note 8.

¹⁷ See *infra* text accompanying notes 71-72; RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. L. 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 Reporters’ Note of Section 1 of the Restatement (Third) of Torts: Products Liability. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. e (AM. L. INST. 1998); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 Reporter’s Note at 12 (AM. L. INST. 1998). 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 (Oct. 31, 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. § 1 Reporters’ Note at 13 (AM. L. INST. 1998). See also JAMES A. HENDERSON, JR., AARON D. TWERSKI & DOUGLAS A. KYSAR, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 66-69 (9th ed. 2021).

¹⁸ See cases cited *supra* note 8.

¹⁹ See *infra* text accompanying note 71, discussing *Amazon v. McMillan*, 625 S.W.3d 101 (Tex. 2021).

²⁰ Most commentators agree that Amazon’s immunity from liability for the sale of defective products sold on its website is not warranted. This Article provides new arguments as to why Amazon should be held responsible. See, e.g., Tanya J. Molnestier, *Amazon as a Seller of Marketplace Goods Under Article 2*, 107 CORNELL L. REV. 705 (2022) (providing in depth analysis as

Merchants who sell directly to their customers must stand behind the goods they sell. Yet internet platforms like Amazon—among the richest corporations in today’s economy—have escaped liability to the detriment of consumers who have suffered serious and often devastating injuries from products sold on their site.²¹

to why Amazon should be held liable under U.C.C. for strict liability even though it did not hold title to third-party goods); Ryan Bullard, *Out-Teching Products Liability, Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J.L. & TECH 181 (2019) (reviewing the policy reasons for holding Amazon liable for third-party defective goods); Robert Sprague, *It’s a Jungle Out There: Public Policy Considerations Arising from a Liability Free Amazon.com.*, 60 SANTA CLARA L. REV. 253 (2020) (same); Janger & Twerski, *Heavy Hand*, *supra* note 10 (same); Kenneth A. Jacobson, *Navigating [The] Amazon: Liability of E-Commerce for Defective Commerce*, 71 DEPAUL L. REV. 87 (2021) (suggesting insurance alternatives to assure that persons injured by products sold by third-party sellers would be compensated); Janger & Twerski, *Transaction Structure*, *supra* note 10 (arguing that Amazon should be held liable under both tort law and the Uniform Commercial Code); Austin Martin, *A Gatekeeper Approach to Product Liability for Amazon*, 89 GEO. WASH. L. REV. 768 (2021) (arguing that Amazon should be strictly liable because they are the gatekeeper for third-party access to the market); Kyle A. Batson, “*The Catch -22*” of Amazon’s Argument to Function as an Auctioneer: *The Implied Warranty of Merchantability*, 54 ST. MARY’S L.J. 545 (2023) (Amazon should be held liable under the UCC because it does not adequately disclose the names of the third-party sellers); Catherine M. Sharkey, *Products Liability in the Digital Age: Online Platforms as “Cheapest Cost Avoiders”*, 73 HASTINGS L.J. 1327 (2022) (arguing that Amazon should be held strictly liable for third-party sale of defective products because it is the “cheapest cost avoider.”); Margaret E. Dillaway, *The New “Web-Stream” of Commerce: Amazon and the Necessity of Strict Liability for Online Marketplaces*, 74 VAND. L. REV. 187 (2021) (suggesting statutory language for state adoption to apply strict liability to Amazon for third-party product defects).

²¹ As of October 23, 2023, Amazon had a market capitalization of \$1.3 trillion. *Market Capitalization of Amazon*, GOOGLE.COM, <https://www.google.com/search?q=market+capitalization+of+amazon&oq=market+capitalization+of+Amazon&aqs=chrome.0.0i512j0i22i30l6j0i390i650l2.13316j1j7&sourceid=chrome&ie=UTF-8> [https://perma.cc/F5DK-V2UC].

The reasons for the platform exceptionalism created by this doctrinal shift are not transparent from the cases. The shift might proceed from a general suspicion of strict liability that motivates some varieties of “tort reform.”²² It might proceed from a desire not to “kill the golden goose” of innovation represented by Amazon and other internet platforms.²³ One thing is certain, however: it does not proceed from anything inherent in the formal property concept of title, and it is inconsistent with basic principles of tort accountability. Nor is it justified by or through the accepted tort-law rationales used for carving out zones of immunity.²⁴

The problem of platform exceptionalism, created by these Amazon cases, goes beyond Amazon itself. Consumer products are now intermediated by a congeries of internet platforms. The world wide web has replaced the brick-and-mortar shopping mall, the consignment seller, and the department store. It is not clear that the right answer for Amazon will necessarily be appropriate for the Etsys, E-Bays, Walmarts and Barnes and Nobles of the modern retail age. The common law of tort, including the law of products, is generic. It articulates principles of duty and accountability that must be applied in a wide variety of cases.

In this Article we will, therefore, consider the case of Amazon and evaluate it using the traditional tort principles that establish the scope of a seller’s duty. We demonstrate that Amazon’s control of the consumer-product transactions conducted on its platform is pervasive and all encompassing.

²² See, e.g., Patrick F. Hubbard, *The Nature and Impact of the “Tort Reform” Movement Introduction*, 35 HOFSTRA L. REV. 437, 438-39 (2006) (describing the rise, beginning in the 1980s, of the defense bar’s “more permanent institutionalized approach” to advocating damages caps, abolishing the collateral source rule, and joint and several liability, among other things, to limit plaintiff recovery in tort law).

²³ See *infra* Part III.

²⁴ One area of immunity that has been asserted in connection with internet platforms derives from Section 230 of the Communications Decency Act of 1996. Most courts that have addressed the question have found that section inapplicable to consumer sales. See, e.g., *Oberdorf II*, 930 F.3d 136, 150 (3d Cir. 2019). Our focus here is on common-law immunity, rather than statutory.

Under traditional principles of vicarious liability, Amazon should be held accountable for harms caused by defective consumer products sold on the site; this accountability exists regardless of who holds formal title to the goods sold.

We then apply the lessons of Amazon to the problem of platforms more generally. There is an extensive new literature on the two-sided nature of transactions on internet platforms.²⁵ This has led to a fundamental rethinking of antitrust law and economics. The focus is on the central role of the platform in creating a network of commercial relationships. This network effect creates benefits, but also costs, due to the ability of the platform to exercise both transactional control and market power. We are focused here on the costs, but we are not insensitive to the benefits, and therefore the importance of getting it right. We wish to offer a better structure for framing the discussion—traditional tort principles of duty, vicarious liability, and immunity.

Extended chains of accountability and policy-based limits on the scope of duty are nothing new in the law of torts. We focus on control as a common thread that, in the platform context, unites both the functional realism of the Second (and Third) Restatement(s) of Torts and the corrective-justice scholars who turn to Cardozo's reasoning in *MacPherson* and *Palsgraf* to focus on accountable relationships. Our point is that the analysis should focus on indicia of control (on either side of the platform relationship) to determine whether liability should attach. Our goal is to develop a typology of internet sellers and articulate principles to determine when and if other platforms like eBay, Etsy, and Walmart have a duty to their customers with regard to defective products.

This Article proceeds in five steps. First, we develop the general tort principles that govern liability for transactions in defective consumer products. Second, we show how Amazon,

²⁵ See, e.g., Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645 (2006).

as a platform situated squarely between a third-party seller and the customer, has control over both sides of that transaction. This places Amazon in a position where they should be held accountable as a non-manufacturing seller, where the third-party seller is not amenable to suit. Third, we give an example of how courts have resisted this conclusion, taking shelter in formal concepts of title rather than traditional understandings of culpability and loss allocation. Fourth, we develop a functional approach to platform liability that uses traditional tort principles to evaluate the platform's role in a transaction. We then apply those principles to Amazon. Lastly, we consider how these principles should apply to platforms generally. We start from the realism of the Restatement, but our analysis fits comfortably within the more philosophical frame offered by Professors Goldberg and Zipursky. In their classic work, *The Moral of Macpherson*, they situate tort liability within relationships that create accountability.²⁶ We join them here in detailing the nature of the relationship between Amazon and its customers, but we go further and explore the lack of any policy rationale for a “no duty” rule that might limit that liability. In that regard, we explore the limits of our examples and how application of basic tort principles of duty and immunity would allow courts to deal more effectively with the realities of consumer transactions on online platforms.

I. Accountability for the Sale of Standardized Products

The hallmark change in the development of modern product liability law was the crumbling of the “citadel of privity.”²⁷ The doctrine of privity required a contractual

²⁶ John C. Goldberg & Benjamin C. Zipursky, *The Moral of Macpherson*, 146 U. PA. L. REV. 1733, 1815 (1998) [hereinafter Goldberg & Zipursky, *Macpherson*]. See also John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 945 (2010) [hereinafter Goldberg & Zipursky, *Torts*].

²⁷ See William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100 (1960); RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965). Alexandra Lahav has recently taken issue with Prosser's historical account on the torts side with regard to negligence. See Alexandra D. Lahav, *A Revisionist History of Products Liability* 6-12 (Jan. 9, 2023) (unpublished manuscript) (on file with author).

relationship for negligence or warranty liability to attach.²⁸ In tort, in the absence of privity, there was no “relationship” to create a duty of care. Under the law of warranty, in the absence of a direct contractual relationship, the remote purchaser was not a recipient of the warranty, to the extent one might exist.²⁹ The combined effect was to impose on the buyer a duty to inspect, and to create a regime of “*caveat emptor*,” or “buyer beware.”³⁰ Whether this doctrine made sense in a world of face-to-face transactions is debatable. In the modern world, where standardized goods are distributed over a long supply chain, this restriction was untenable.³¹ The behavior leading to tort accountability often occurred during the process of manufacture and might not be chargeable to the immediate seller. In the absence of an enforceable warranty, this left the buyer in a no-man’s land, without recourse.

A. The Citadel of Privity Crumbles

Modern tort law evolved, eliminating the requirement of privity, and resituating tort duties and (to a certain extent) warranty liability on the foreseeability of causing harm.³² Instead of seeing the contractual relationship as the source of the duty, it became merely a special case of foreseeable harm;

The point remains, however, with regard to warranty, and hence the evolution of strict liability for products in tort.

²⁸ Lahav, *supra* note 27, at 3.

²⁹ *Id.* at 8.

³⁰ *Seixas & Seixas v. Woods*, 2 Cai. R. 48, 54 (N.Y. Sup. Ct. 1804).

³¹ See Susan Block-Lieb & Edward J. Janger, *Fit for Its Ordinary Purpose: Implied Warranties and Common Law Duties for Consumer Finance Contracts*, 59 HOUS. L. REV. 551, 554 (2022).

³² RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. §§ 1-2 (AM. L. INST. 1998) (for strict liability in tort); U.C.C. § 2-318 (AM. L. INST. & UNIF. L. COMM’N 1977) (for warranty). The UCC actually offers states three options with regard to who benefits from a warranty. States are free to choose between one option that extends warranties to the purchaser, family members and guests. A second that extends warranties to foreseeable users with regard to personal injury, and a third that extends such warranties for personal injury and other harms to foreseeable users.

while the existence of a contract made harm foreseeable, a direct contractual relationship did not establish the limit of duty. Harm caused by a defectively manufactured product could manifest at any point during the life of the product, whether before or after it reached its ultimate user.³³

Section 402A was a part of this evolution. It responded to the realities of a long post-industrial supply chain and recognized that multiple parties would participate in a sale transaction.³⁴ For example, the sale of a car required the goods to be manufactured, followed by a series of sales—first to a dealer, and only then by the dealer to the ultimate consumer.³⁵ It seemed ludicrous to suggest that there was no relationship between the manufacturer and the ultimate consumer. The manufacturer often controlled the complete transaction, even choosing who would be authorized to sell its products. The word “seller” was used in § 402A to assure that any party in the chain of distribution would be held accountable.³⁶ Liability would run back up the distribution chain to the manufacturer or first solvent party to trust an insolvent or unavailable producer. The term “seller” was used in § 402A to expand

³³ *Macpherson v. Buick* was the first major step in this evolution. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

³⁴ See sources cited *supra* note 9.

³⁵ See RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965) (noting that strict liability to the consumer in products liability applies to “any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the *seller* be engaged solely in the business of selling such products” (emphasis added)).

³⁶ Comment c to § 402A of the Restatement (Second) of Torts provides as follows:

c. On whatever theory, the justification for the strict liability has been said to be that *the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it*; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods

RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. L. INST. 1965) (emphasis added).

liability to capture the complete distribution chain. This expansion was pragmatic and intended to prevent opportunistic use of transaction structure to avoid liability.³⁷ All participants in the chain of distribution had a duty to the ultimate consumer with respect to harm caused by a defective product. The participants in the supply chain were free to allocate this risk amongst themselves, but that was not the consumer's problem.

B. Seller as a Functional Concept

Online platforms like Amazon are a relative newcomer to consumer-product markets. They are a second cousin to the mail-order catalogues, both comprehensive, like Sears and Montgomery Ward, and specialized, like L.L. Bean and Lands' End. They are a first cousin to standalone online merchants that have merged their catalogue or brick-and-mortar

³⁷ Comment b to § 402A elaborates on this point. We set it forth in full here:

b. History. Since the early days of the common law those engaged in the business of selling food intended for human consumption have been held to a high degree of responsibility for their products. . . . In the earlier part of this century this ancient attitude was reflected in a series of decisions in which the courts of a number of states sought to find some method of holding the seller of food liable to the ultimate consumer even though there was no showing of negligence on the part of the seller. . . . In the beginning, these decisions displayed considerable ingenuity in evolving more or less fictitious theories of liability to fit the case. . . . In later years the courts have become more or less agreed upon the theory of a "warranty" from the seller to the consumer, either "running with the goods" by analogy to a covenant running with the land, or made directly to the consumer. Other decisions have indicated that the basis is merely one of strict liability in tort, which is not dependent upon either contract or negligence.

Recent decisions, since 1950, have extended this special rule of strict liability beyond the seller of food for human consumption. . . . [A] number of recent decisions . . . have extended the rule of strict liability to cover the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property. *Id.* cmt. b.

operations onto the Internet. Under classical principles of tort law, these merchants would all be considered tortfeasors when products they sell malfunction and cause injury.³⁸ The principles of strict liability for defective products impose liability on any party in the chain of distribution.³⁹

It is against this backdrop that the cases against Amazon arise. Since the promulgation of the Second Restatement, courts have recognized that the term “seller” is a functional concept. For the last half century, there has been no doubt that any seller, be it a corner grocer, a department store, or even an online merchant, is strictly liable for the products it sells. Courts have treated parties that are integrated into the “sale” as “sellers,” even where they do not take title. The Third Restatement captured this expansion. Section 1 of the Restatement of Products Liability states:

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.⁴⁰

In defining the term “One Who Sells or Otherwise Distributes,” § 20 provides:

(b) . . . Commercial nonsale product distributors *include, but are not limited to, lessors, bailors, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity.*⁴¹

The Reporters’ comment could not be clearer about the section’s intent when it describes what is meant by a “nonmanufacturing seller”:

³⁸ See *infra* Section IV.A.

³⁹ See *supra* note 9.

⁴⁰ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (AM. L. INST. 1998).

⁴¹ *Id.* § 20(b) (emphasis added).

Nonmanufacturing sellers or other distributors of products. The rule stated in this Section provides that all commercial sellers and distributors of products, including nonmanufacturing sellers and distributors such as wholesalers and retailers, are subject to liability for selling products that are defective. Liability attaches even when such nonmanufacturing sellers or distributors do not themselves render the products defective and regardless of whether they are in a position to prevent defects from occurring.⁴²

Abundant case law supports this proposition.⁴³ The inclusion of lessors and bailors within the definition of “one who otherwise distributes” demonstrates that formal “title” is not what the drafters of the Restatement had in mind when they used the word “seller.” Indeed, it would seem to expressly capture Amazon’s role in consumer sale transactions. The focus is on the role played by the defendant in fulfilling the transaction. This illustrates the functional approach envisioned by the Reporters and the courts. Some states have resisted giving non-manufacturing sellers primary liability and have enacted statutes making their liability secondary.⁴⁴ However, there is no doubt that such sellers are liable if the manufacturer is not amenable to suit.⁴⁵

C. Pretzel Privity for Internet Platforms: Manipulating Transaction Structure and Title to Avoid Accountability

For reasons that we fail to understand, the rules articulated above do not appear to apply to Amazon. The Amazon

⁴² RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. e (AM. L. INST. 1998).

⁴³ *Id.* Reporters’ Note (citing cases).

⁴⁴ *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 Reporter’s Note at 13 (AM. L. INST. 1998). *See also* JAMES A. HENDERSON, JR., AARON D. TWERSKI & DOUGLAS A. KYSAR, PRODUCTS LIABILITY: PROBLEMS AND PROCESS, 57-58 (8th ed. 2016).

⁴⁵ *See supra* note 17.

platform hosts billions of dollars of sales each year. Some of the products sold malfunction, injuring consumers. Examples include exploding hoverboards and vape pens, swallowed batteries, and so on. Often, the consumers who were injured by the products purchased through Amazon are left without recourse because the third-party vendor could not be found or was otherwise judgment proof.⁴⁶ We have listed the cases in footnotes 55-57 below.⁴⁷ With only a few exceptions,⁴⁸ the courts have concluded that Amazon should not be held liable because it is only an intermediary or speaker—not a “seller.” One of those exceptions, *Oberdorf v. Amazon, Inc.*, involved a defective dog collar.⁴⁹ The U.S. Court of Appeals for the Third Circuit, sitting *en banc*, vacated the panel opinion and certified the question to the Pennsylvania Supreme Court.⁵⁰ The case settled before the state court ruled.⁵¹ So, there is only one appellate judgment of a major state finding Amazon liable, *Bolger v. Amazon, LLC*.⁵² *Bolger* involved a computer battery that exploded.⁵³ A California Appellate Court allowed the case to survive a motion to dismiss, recognizing Amazon’s central role in the transaction.⁵⁴

We have reviewed the cases making product-liability claims against Amazon and found that they fall into three broad patterns: (1) the majority of cases find that Amazon is not a seller within the meaning of § 402A or implied warranty

⁴⁶ While some states have adopted proposals to grant immunity to non-manufacturing distributors, that immunity was conditioned 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 supra* note 44.

⁴⁷ *See* cases cited *infra* notes 55-57.

⁴⁸ *Oberdorf II*, 930 F.3d 136, 141 (3d Cir. 2019); *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 608 (Ct. App. 2020).

⁴⁹ *Oberdorf II*, 930 F.3d at 142.

⁵⁰ *Oberdorf v. Amazon.com*, 818 F. App’x 138 (3d Cir. 2020).

⁵¹ Lindsay Cook, *Oberdorf v. Amazon Settles, Leaving Question of Amazon’s Strict Liability Under PA Law Unanswered*, VILL. L. REV. (online blog), <https://www.villanovalawreview.com/post/890-oberdorf-v-amazon-settles-leaving-question-of-amazon-s-strict-liability-under-pa-law-unanswered> [<https://perma.cc/F4SC-ZRP4>].

⁵² 267 Cal. Rptr. 3d 601 (Ct. App. 2020).

⁵³ *Id.* at 437.

⁵⁴ *Id.* at 465-66.

because it does not take title;⁵⁵ (2) in cases that involve third-party sellers who do not use fulfillment by Amazon, courts have found a lack of control;⁵⁶ and (3) a small minority of cases which, like *Oberdorf* and *Bolger*, consider the question of

⁵⁵ *Erie Ins Co. v. Amazon.com, Inc.*, 925 F.3d 135, 141 (4th Cir. 2019) (applying Maryland law and finding Amazon did not have title and is not a seller); *Garber v. Amazon.com, Inc.*, 380 F. Supp. 3d 766, 776 (N.D. Ill. 2019) (finding Amazon was not seller of the product and the third-party seller transferred title); *Skaggs v. Amazon.com, Inc.*, 334 So.3d 780, 789 (La. Ct. App. 2021) (finding Amazon never had title to the product); *Wallace v. Tri-State Assembly, LLC*, 157 N.Y.S.3d 438, 441 (App. Div. 2021) (finding Amazon is provider of services and never obtained title to the product); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp 3d 393, 397 (S.D.N.Y. 2018) (finding failure of Amazon to take title to the product places it outside the chain of distribution); *Milo & Gabby, LLC v. Amazon.com, Inc.*, 693 F. App'x 879, 887 (4th Cir. 2017) (finding Amazon was not a seller because it did not have title to the product); *Philadelphia Indemnity Ins. Co. v. Amazon.com, Inc.*, 425 F. Supp 3d 158, 164 (E.D.N.Y. 2019) (applying Arizona law and finding Amazon not liable as seller because it did not hold title and was not in the chain of distribution); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 528 F. Supp. 3d 686 (W.D. Ky. 2021) (dismissing claim of strict liability because the defective hoverboard was not manufactured or sold by Amazon and noting that Amazon did not take title to the hoverboard). We will discuss *Amazon.com, Inc. v. McMillan* below as an exemplar of cases using this reasoning. 625 S.W.3d 101 (Tex. 2021).

⁵⁶ *Stiner v. Amazon.com, Inc.*, 120 N.E.3d 885, 898 (Ohio Ct App. 2019) (third-party seller was in control of the sale, not Amazon); *Allstate New Jersey Ins. Co. v. Amazon.com, Inc.*, No. 17-2738, 2018 WL 3546197, at *11 (D.N.J. July 24, 2018) (Amazon is not a seller within the meaning of the New Jersey Products Liability Act since it did not exert control over the transaction); *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 425-28 (6th Cir. 2019) (finding that the test for seller depends on the control of sale and not on title and that because sale came directly from the third-party seller rather than being fulfilled by Amazon was not sufficient control on the facts of the case); *Great Northern Ins. Co. v. Amazon.com, Inc.*, 524 F. Supp. 3d 852, 857-58 (N.D. Ill. 2021) (finding Amazon is not a seller because it did not have control over the product. This was not a fulfillment-by-Amazon case, so Amazon did not have the product in its inventory.). Alone among these cases, *Fox v. Amazon* makes an express distinction between the level of control exercised in fulfillment-by-Amazon cases and those where fulfillment is handled by the third-party seller. We will explain below, why this turns out to be a distinction without a difference, but we appreciate that the *Fox* court did focus on the proper question by focusing on control.

control and recognize that Amazon *is* a seller.⁵⁷ A few lack sufficient discussion to allow for categorization.⁵⁸

Our concern is not that a few courts have gotten it right, but why so many courts have gotten it wrong. Notwithstanding the logic and history of § 402A briefly recounted above, recent cases involving defective products sold on Internet platforms like Amazon have encouraged courts to read the Restatement like a statute and to use a formal reading of the term “seller” along with pretzeled transaction structure to reconstitute the protection provided by the doctrine of privity.⁵⁹ To hear Amazon describe itself, it is merely a communication device that brokers the sale between the third-party seller and the consumer. As we will discuss below, the commercial reality could not be further from that description. Amazon sits squarely at the center of the transaction. Yet, instead of addressing these realities in light of the tort concept of duty and then exploring the reasons and policy behind any decision to expand or limit its scope, the majority of courts have, at Amazon’s urging, focused on a formal view of the platform structure to simply look the other way.

While it is true that accountability may in some instances derive from ownership, it has been generations since that was its limit. Harm may be foreseeable, and accountable relationships may be formed by other means as well, including loss allocation.⁶⁰ When one views § 402A in the context of its history, one sees that the goals of that section were to de-emphasize the importance of title and to remove the

⁵⁷ *Oberdorf II*, 930 F.3d 136 (3d Cir. 2019); *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601 (Ct. App. 2020). There is at least one lower court opinion in New York that follows the reasoning of *Bolger*. *State Farm Fire & Cas. Co. v. Amazon.com Servs., Inc.*, 137 N.Y.S.3d 884, 889 (Sup. Ct. 2020) (denying Amazon’s motion for summary judgment and finding that Amazon has overwhelming control over the sale and is subject to strict liability under New York law).

⁵⁸ *Indiana Farm Bureau Ins. v. Amazon.com, Inc.*, No. 19-cv-1568, 2021 WL 4147200 (S.D. Ind. Sept. 13, 2021) (finding Amazon is not a seller).

⁵⁹ See cases cited *supra* note 8. One notable exception is *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601 (Ct. App. 2020). That case recounts this history and reaches an appropriate result.

⁶⁰ See *supra* note 8.

requirement of a contract as the source of liability.⁶¹ It was always assumed that the person with whom the buyer dealt, face to face, would be considered a seller. Section 402A assured that they, along with the manufacturer, could be held accountable.⁶²

This point is made clear in the Second Restatement of Torts, and yet clearer in the Third. Status as a seller does not turn on being the person who transfers title, but on being “engaged in the business of selling.” Section 1 of the Third Restatement moves that language into text and broadens it, saying: “One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.”⁶³

Under both the Second and Third Restatement, manufacturers and middlemen (distributors) are to be considered sellers. Further, a court should look at the substance of a transaction and the defendant’s role in it, rather than the form, when determining whether a defendant is a seller. Amazon asserts that it is not a seller but merely a neutral platform that brought the buyer and third-party seller together.⁶⁴ We will show that, whether or not Amazon technically took title to the goods sold, it is most certainly a tortfeasor under classic tort law.⁶⁵ Or, to put it another way,

⁶¹ See *supra* note 27 and discussion that follows.

⁶² These courts abstract the word “seller” out of § 402A and focus on the technical concept of sale, rather than the platform’s role in the transaction. This method of interpreting the Restatements has allowed Amazon to avoid liability where a proper understanding of the tort principles behind § 402A would not. Moreover, this mode of reasoning confuses the common law of torts, obscuring, rather than illuminating the policy questions at issue.

⁶³ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (AM. L. INST. 1998).

⁶⁴ This is the position taken in all of the cases cited *supra* notes 55-58. See also Janger & Twerski, *Heavy Hand*, *supra* note 10.

⁶⁵ There is a second class of cases where courts have taken a related approach. In those cases, a drug manufacturer failed to warn about dangers associated with a drug. After the patent expired, a generic manufacturer

§ 402A of the Second Restatement and §§ 1 and 20 of the Third Restatement make clear that the relevant tort is “selling” a defective product. They further make clear that whether a person is a “seller” turns not on title, but on the functional role in the transaction. We will explain in the next section that the key concept in determining whether someone should be considered a “seller” is “control” over the sale.⁶⁶

D. Form over Substance in Texas

A particularly striking representative example of the majority approach’s pretzeled logic comes from Texas. In

used the same defective warning. The generic manufacturer was able to avoid liability because the Supreme Court has held that as long as the generic manufacturer provides warnings that are exactly the same as those used by the brand manufacturer, the generic manufacturer is not liable for injuries caused by the failure to warn. *Pliva v. Mensing*, 564 U.S. 604, 625-26 (2011). Since the brand-name manufacturer therefore determines the warnings, plaintiffs injured by the generic drug have sought to hold them liable for failing to warn while they were marketing the drug when they knew that a later generic manufacturer would not and could not alter the warning. Even though the brand-name manufacturer would have been liable had it sold the drugs under its own name and would have been obligated to update its own warning, a strong majority of courts have refused to impose liability since the drug that caused the injury was sold by the generic manufacturer. Since the brand-name manufacturer was not the seller it is immune from liability. Once again, under classic tort law, liability should be imposed. The escape to a rigid definition of seller is unwarranted. Twenty states have rejected what has been called “innovator liability” because the brand-name manufacturer was not the seller of the generic drug that caused the plaintiff’s injury. Five states have held the brand-name manufacturer liable for failing to warn about the dangers associated with taking the drug when the warning should have been given when the brand-name manufacturer was selling the drug. For an exhaustive survey of the case law see generally Jenny Ange, *Am I My Competitor’s Keeper? Innovator’s Liability in the Fifty States.*, 21 COLUM. SCI. & TECH. L. REV 1 (2019). We believe that the focus on the failure of the brand-name manufacturer to meet the definition of “seller” is irrelevant. Under classic tort law the failure of the brand-name manufacturer to provide the necessary warning when it was marketing the drug with full knowledge that the generic seller could not alter the warning renders it a tortfeasor. For a thorough discussion of this point of view see *T.H. v. Novartis Pharm. Co.*, 407 P.3d 18, 47 (Cal. 2017).

⁶⁶ Crucially, liability does *not* turn on control over the manufacturing process. See *supra* note 43 and the discussion that follows.

Amazon.com, Inc. v. McMillan,⁶⁷ the plaintiff purchased a television remote control on Amazon from an entity described as “USA Shopping 7693.”⁶⁸ The plaintiff’s nineteen-month-old daughter removed the remote’s battery, swallowed it, and suffered permanent injury to her esophagus.⁶⁹ USA Shopping 7693, the third-party seller, was not amenable to suit in the United States, having only an address in China, so McMillan sued Amazon.

Texas has a statute that incorporates the common law of strict product liability by reference.

(2) “Products liability action” means *any action against a manufacturer or seller* for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is *based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories*.⁷⁰

The statute then goes on to make non-manufacturing sellers liable for product defects when the court does not have jurisdiction over the manufacturer.⁷¹ Statutes insulating non-manufacturing sellers are not uncommon. However, in all cases, their effect is not to absolve the non-manufacturing seller entirely, but instead to make their liability secondary. This ensures that if the manufacturer cannot be reached, either because they are insolvent, or beyond the reach of the court, some solvent party will be liable.⁷²

⁶⁷ 625 S.W.3d 101 (Tex. 2021).

⁶⁸ *Id.* at 105.

⁶⁹ *Id.*

⁷⁰ TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(2) (West 2023) (emphasis added).

⁷¹ *Id.* § 82.003(a)(7)(B). *See also McMillan*, 625 S.W.3d at 105.

⁷² *See supra* note 17.

The *McMillan* court focused on whether Amazon was a “seller,” both for the purposes of (i) common-law strict products liability and (ii) holding Amazon liable as a non-manufacturing seller. For each issue, the court turned to the definition of a “seller” within the Texas statute. The statutory definition goes even further than the language of § 20 of the Third Restatement set forth above:

- (1) “Seller” means a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.⁷³

By any understanding of the language quoted above, Amazon would appear to be a person who placed a product “in the stream of commerce for use or consumption.”⁷⁴

The case was initially brought in federal court before the Fifth Circuit, which characterized the question as whether Amazon “placed” a product in the stream of commerce or merely “facilitated” that stream.⁷⁵ It certified the question to the Texas Supreme Court as follows:

Under Texas products-liability law, is Amazon a “seller” of third-party products sold on Amazon’s website when Amazon does not hold title to the product but controls the process of the transaction

⁷³ TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(3) (West 2023).

⁷⁴ *Id.*

⁷⁵ *McMillan v. Amazon.com, Inc.*, 983 F.3d 194 (5th Cir. 2020). The Fifth Circuit interpreted the import of the question as follows:

When Amazon allows third parties to sell products on its website, is Amazon “placing” products into the stream of commerce or merely “facilitating” the stream? If the former, then Amazon is a “seller” under Texas products-liability law and potentially liable for injuries caused by unsafe products sold on its website. But if Amazon only *facilitates* the stream when it hosts third-party vendors on its platform, then it is not a seller, meaning injured consumers cannot sue for alleged product defects. *Id.* at 196.

and delivery through Amazon’s Fulfillment by Amazon program?⁷⁶

Notwithstanding the functional definition of the term “seller” in the Texas statute and a similarly functional definition in the Restatement, the court focused neither on “control” nor on underlying principles of tort liability, but instead on whether Amazon had ever taken title to the goods. The concept of title appears nowhere in the Texas statute.⁷⁷ Indeed, the dissent at the Texas Supreme Court observed:

The Court notes today that in each of our decisions, the party that qualified as a seller held title to the product when the transaction occurred. . . . Although that may be true, we never relied on, or even mentioned, that fact in any of our decisions. Instead, we relied only on the fact that the party was responsible for physically supplying, delivering, introducing, or releasing the product into the stream of commerce.⁷⁸

In sum, the court in *McMillan* tortures both the statutory text, the text of the Restatement, and general tort principles to absolve Amazon of liability. This textual approach to the Restatement is particularly problematic when used by courts to interpret the Restatement. Restatements are not statutes. Restatements seek to synthesize and articulate the common law.⁷⁹ The law itself is embodied in the cases. It is therefore ironic that the text of § 402A has been used to override the

⁷⁶ *McMillan*, 983 F.3d at 203 (emphasis added).

⁷⁷ See TEX. CIV. PRAC. & REM. CODE ANN. § 82.001 (West 2023).

⁷⁸ *McMillan*, 625 S.W.3d at 116 (Boyd, J., dissenting) (emphasis added).

⁷⁹ For the American Law Institute’s description of what a Restatement is, see *Frequently Asked Questions*, AM. L. INST., <https://www.ali.org/publications/frequently-asked-questions/#differ> [<https://perma.cc/Q85M-VGH5>].

underlying purpose of that Section, both as written and as updated in the Third Restatement.

The underlying principle of the Restatement and the general move to strict product liability in tort was to assure that the consumer would have recourse for injury caused by a defective product.⁸⁰ In the first instance, the party responsible for putting the defective product into the stream of commerce (i.e., the manufacturer) should be liable. But, that failing, any party in the chain of distribution would also be held liable, on the theory that they chose to do business with their own seller. They were free to bargain for indemnification and should not be able to hide behind the fact that they did business with a judgment-proof, disreputable, or otherwise unavailable seller.⁸¹ “Title,” like “privity” before it, merely obscures the realities of the relationship between and among Amazon, the third-party seller, and the customer. Here, the fact that there was a statute does not matter. The Texas statute expressly did not displace the common law of product liability, except to make non-manufacturing sellers’ liability secondary.⁸²

Where Amazon arranges a sale from a third-party seller, it is obvious that the seller should be liable. But, as we shall discuss below, given Amazon’s pervasive role in the transaction, Amazon should be held liable as well.

E. Struggling Toward a Control-Based Approach

While the majority of courts have followed the title-based approach used in *McMillan*. Several courts have grappled with the concept of control and have, to varying degrees, explored Amazon’s role in the transaction. We discuss those cases here and find that they point in the right direction but fail to fully

⁸⁰ One of us was the co-Reporter of the Restatement (Third) of Torts: Products Liability. That author avers that the language defining “seller” was written to be all inclusive. Admittedly, the Amazon Marketplace was not yet on the radar in 1998, but the author is genuinely surprised by the narrow reading given to that language by the courts.

⁸¹ This is the logic behind the comments to the Restatement cited above. See *supra* text accompanying notes 36-37.

⁸² See *supra* note 70.

develop the implications of the control approach where Amazon and other Internet platforms are involved.

Of the cases holding Amazon liable for defective products sold by third-party sellers on its website, only *Bolger v. Amazon* had a comprehensive discussion of the control that Amazon exercises over the transaction and coupled that discussion with a thorough discussion of the policies behind the adoption of strict tort liability.⁸³ In *Fox v. Amazon*, the court found that there was no strict liability claim against Amazon, but since Amazon undertook to warn about the dangers associated with a hoverboard battery, there may have been a failure to warn claim.⁸⁴

Meanwhile, the *Oberdorf* case focuses on the four-factor test that Pennsylvania court utilize to decide whether Amazon meets the definition of seller. There, the four-part test was “functional” in the way we use the term and addressed the reason for applying strict liability. The New York lower court case is sparse in its discussion of the control issue that is the focus of this Article. Only *Oberdorf* is a case where the third-party seller did not use fulfilment-by-Amazon case. In *Bolger* the sale was fulfilled by Amazon.

As in *Bolger*, the Wisconsin federal district court in *State Farm Fire & Casualty v. Amazon.com, Inc.* focused its discussion on the fact that Amazon fulfilled the transaction of the product at issue.⁸⁵ *State Farm* involved a faulty faucet adaptor that later caused flooding. While the court discussed control, noting Amazon’s control over the relationship between the customer and the third-party seller, it focused mainly on the traditional policies that support strict liability, such as who is the least cost avoider, and who is the best risk

⁸³ 267 Cal. Rptr. 3d 601 (Ct. App. 2020).

⁸⁴ *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 425-28 (6th Cir. 2019) (finding that the test for seller depends on the control of sale and not on title and that because sale came directly from the third-party seller rather than being fulfilled by Amazon was not sufficient control on the facts of the case).

⁸⁵ 390 F. Supp. 3d 964 (W.D. Wis. 2019).

spreader in the transaction. As between Amazon and the consumer, the policies favored the consumer.

While we are encouraged by these cases, they fall short in two important respects. First, because they do not fully capture the extent of Amazon's control, they are not as convincing as they might be. We set these factors out in detail in Part II. But specifically, even in non-fulfillment cases, the courts do not appreciate that Amazon should be considered a seller. Given the overwhelming control that Amazon exerts over every sale, we see no reason to limit Amazon's liability to cases where Amazon inventoried the product. Second, the courts in these cases do not appreciate the power of a functional control-based approach to distinguish amongst internet platforms. We discuss these shortfalls in detail below.

II. The Case of Amazon: Control of the Customer/Third-Party Relationship

In this Part, we consider Amazon, its arguments against liability generally, and the specific arguments made in *McMillan* (our paradigm of the current majority approach). We show that while Amazon never formally takes title, its business model rests on its exercise of almost complete control of the transaction between a third-party seller and their buyer. We then show that the title-based approach taken by the Texas courts in *Amazon v. McMillan* and other cases fundamentally ignores the reality of the relationship between Amazon and its customers.

Amazon sells products on its website in two different modes.⁸⁶ In the first mode, Amazon is the direct seller. It purchases products from manufacturers or other distributors and sells them to consumers. Sometimes, it even sells products under its own name. In this mode, Amazon is no different from any retail seller. Liability of a retailer for selling defective

⁸⁶ Although several courts have discussed this issue at length, they have failed to fully explore many aspects of the Amazon operation that support tort liability.

products is well established.⁸⁷ This mode constitutes approximately forty percent of its sales.⁸⁸ The second mode is two-sided. Third-party vendors utilize the Amazon website to sell their goods, while customers use Amazon to locate those vendors and purchase their wares. Third-party vendors are further divided into two categories. Vendors who fulfill orders themselves, and vendors who use Amazon Fulfillment Services to accomplish the sale. In both scenarios, and in every case cited in this Article, Amazon contends that it is not a “seller” of the products posted on its website from third-party vendors but is simply a platform that allows those third-party vendors to connect with consumers.⁸⁹ Sales from third-party vendors constitute sixty percent of Amazon sales and a substantial portion of their business revenue.⁹⁰ Experts estimate that there are approximately six million third-party sellers on Amazon.com. Amazon earned \$121 billion from third-party sellers in 2021.⁹¹ The average third-party seller now gives Amazon a thirty-four percent cut of every transaction.⁹²

Amazon exercises firm control over both sides of the transaction. While third-party sales are a huge part of Amazon’s business model, and a significant source of revenue, Amazon seeks to minimize its role in these transactions, describing itself only as a facilitator of the transaction between the third-party seller and their customer. From the third parties’ perspective, access to the site and to the consumer is controlled by Amazon. Further, from the customers’

⁸⁷ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 20 cmt. a (AM. L. INST. 1998).

⁸⁸ Daniela Coppola, *Amazon Third-Party Seller Share 2007-2023*, STATISTA (Dec. 11, 2023), <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform> [<https://perma.cc/B9QT-E2BC>].

⁸⁹ See cases cited *supra* note 8.

⁹⁰ Moira Wegel, *What You Don’t Know About Amazon*, N.Y. TIMES (April 21, 2022), <https://www.nytimes.com/2022/04/21/opinion/amazon-product-liability.html> [<https://perma.cc/E9SC-QD8J>]. See also Daniela Coppola, *supra* note 88.

⁹¹ See Coppola, *supra* note 88.

⁹² See Wegel, *supra* note 90.

perspective, the entire experience is controlled by Amazon, and the relationship exists between the customer and Amazon, rather than the third-party seller.

Once a consumer has identified a product to buy, Amazon handles virtually all aspects of that transaction, including even which third-party seller will be credited with a particular sale:

(1) Amazon in its sole discretion determines and approves the content, appearance, design and described functionality of any product that it puts on its online platform;⁹³

(2) Amazon determines the ability of third-party vendors to communicate with Amazon customers without its permission;⁹⁴

(3) Payments for all sales made on Amazon are made to Amazon, not to the third-party seller;⁹⁵

(4) Amazon provides all customers who purchase on its website, including purchases from third-party vendors, an “A-to-Z Guarantee”⁹⁶ that covers defective products. If the customer is not satisfied with the product, Amazon will refund the product cost, the original shipping cost, and the return shipping cost.⁹⁷ Amazon does not tell the customer that if they are injured by the product and the third-party seller cannot be found or is insolvent, Amazon will *not* stand behind the defective product and compensate for the harms caused by it. Indeed, Amazon creates the impression

⁹³ *Oberdorf II*, 930 F.3d 136, 141 (3d Cir. 2019).

⁹⁴ *Id.* at 145.

⁹⁵ *Id.* at 141.

⁹⁶ *A-to-Z Guarantee - Amazon Customer Service*, AMAZON.COM, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GQ37ZCNECJKTIFYQV> [<https://perma.cc/MD6D-8PPL>].

⁹⁷ *About Our Returns Policies*, AMAZON.COM, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GKM69DUUYKQWKWX7> [<https://perma.cc/QW3U-2NJ9>].

that it will do so, through its “A-to-Z Claims Process,”⁹⁸ which ostensibly includes claims for property damage and personal injury,⁹⁹ but which Amazon actually appears to disclaim.¹⁰⁰

(5) Amazon requires any U.S. seller who sells more than \$10,000 worth of products in a given month to obtain liability of \$1,000,000 per occurrence.¹⁰¹ However, as we

⁹⁸ *A-to-Z Claims Process Terms and Conditions*, AMAZON.COM, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GTUXEP9L4KCBFSLU> [<https://perma.cc/5XF7-C4JY>].

⁹⁹ *A-to-Z Claims Process for Property Damage and Personal Injury*, AMAZON.COM, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GS3GYAU8JGDBGWH2> [<https://perma.cc/JW9T-6TAD>].

¹⁰⁰ *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 608 (Ct. App. 2020). Notwithstanding the A-Z guaranty, Amazon seeks to disclaim all warranties, express or implied beyond their written warranty. See *Conditions of Use*, AMAZON.COM, https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM_ [<https://perma.cc/BHD3-VD7Y>]. To the extent that this would constitute a disclaimer of personal injury liability, it would be prima facie invalid. U.C.C. § 2-719 (AM. L. INST. & UNIF. L. COMM’N 1977). Further, to the extent that the warranty and its disclaimer are inconsistent, this runs afoul of U.C.C. § 2-316(1) (AM. L. INST. & UNIF. L. COMM’N 1977) (“Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction is unreasonable.”).

¹⁰¹ Paragraph 9 of Amazon’s Business Solutions Agreement provides:

Insurance. If the gross proceeds from Your Transactions exceed the applicable Insurance Threshold during each month over any period of three (3) consecutive months, or otherwise if requested by us, then within thirty (30) days thereafter, you will maintain at your expense throughout the remainder of the Term for each applicable Elected Country commercial general, umbrella or excess liability insurance with the Insurance Limits per occurrence and in aggregate covering liabilities caused by or occurring in conjunction with the operation of your business, including products, products/completed operations and bodily injury, with policy(ies)

discuss later, since Amazon itself disclaims liability and courts go along, this indemnification does little good for consumers.¹⁰²

(6) When a single product is offered by multiple sellers, Amazon determines which seller will get the first chance to sell the product as a “Featured Offer.”¹⁰³ The Featured Offer is placed in the so-called “Buy Box” — the text box with the seller’s name listed below the “buy now” button in fine print. Other sellers’ names then

naming Amazon and its assignees as additional insureds. At our request, you will provide to us certificates of insurance for the coverage to the following address: c/o Amazon, P.O. Box 81226, Seattle, WA 98108-1226, Attention: Risk Management.

There are two defined terms: Insurance Threshold and Insurance Limits:

“*Insurance Limits*” means the applicable one of the following:

- One Million Canadian Dollars (\$1,000,000) (if the Elected Country is Canada),
- One Hundred Million Japanese Yen (¥100,000,000) (if the Elected Country is Japan),
- Ten Million Mexican Pesos (\$10,000,000) (if the Elected Country is Mexico),
- One Million U.S. Dollars (\$1,000,000) (if the Elected Country is the United States).

“*Insurance Threshold*” means the applicable one of the following:

- Ten Thousand Canadian Dollars (\$10,000) (if the Elected Country is Canada),
- One Million Japanese Yen (¥1,000,000) (if the Elected Country is Japan),
- One Hundred Thousand Mexican Pesos (\$100,000) (if the Elected Country is Mexico),
- Ten Thousand U.S. Dollars (\$10,000) (if the Elected Country is the United States).

Amazon Services Business Solutions Agreement, AMAZON.COM, https://sellercentral.amazon.com/help/hub/reference/external/G1791?local_e=en-US [<https://perma.cc/5DL5-28ST>] [hereinafter *Business Solutions Agreement*].

¹⁰² See *infra* text accompanying note 113.

¹⁰³ *Featured Offer*, AMAZON.COM, https://sellercentral.amazon.sg/gp/help/external/help.html?itemID=37911&ref=efph_37911_cont_home [<https://perma.cc/S5XT-55KB>].

appear lower down on the page as “More Sellers on Amazon.”¹⁰⁴ As discussed below, because Amazon has the right to substitute, the goods delivered may not even have been supplied by the named seller.¹⁰⁵

(7) When the consumer decides to purchase a product, the name of the nominal seller can only be found in tiny print below the “Buy Box,” while Amazon or Prime is splashed across the webpage multiple times.¹⁰⁶

(8) A key aspect of the Amazon operation is the agreement between merchants and Amazon to handle all the packaging and shipping of the merchants’ products—Fulfillment by Amazon (or “FBA”). Merchants who use FBA are labeled as “Prime.”¹⁰⁷ Further, FBA products are labeled by Amazon and usually shipped in Amazon boxes. Once an item is sent to one of the Amazon fulfillment centers, the seller never touches it again.¹⁰⁸

(9) Amazon offers customers a whole range of benefits if they become “Prime members.”¹⁰⁹ Currently, there are 200 million Prime members. Benefits include guaranteed free two-day delivery or one- or same-day delivery depending on the location of the buyer. Amazon offers a wide range of other benefits such as free videos, movies, sports events, etc. to Prime

¹⁰⁴ See, e.g., *LAMY Safari Ballpoint Pen - Model 217*, AMAZON.COM, <https://www.amazon.com/LAMY-Safari-Ballpoint-Pen-Model/dp/B001341O5M> [<https://perma.cc/BRX6-YBPS>].

¹⁰⁵ See *infra* Section IV.B.2.

¹⁰⁶ See Appendix, Fig. 4c; Janger & Twerski, *Transaction Structure*, *supra* note 10, at 56-57.

¹⁰⁷ *Amazon FBA: Fulfillment Services for Your Ecommerce Business*, AMAZON.COM, <https://sell.amazon.com/fulfillment-by-amazon> [<https://perma.cc/YH8W-RMEL>].

¹⁰⁸ *Business Solutions Agreement*, *supra* note 101.

¹⁰⁹ *Prime*, AMAZON.COM, <https://www.amazon.com/amazonprime> [<https://perma.cc/TED7-RDC9>].

members. It thus maintains daily contact with members and encourages use of its website.¹¹⁰

In sum, Amazon is deeply integrated into the transaction between a third-party seller and the consumer purchaser. Indeed, we would go further. Amazon has gone to great lengths to put itself at the *center* of the relationship between the consumer and the seller. It controls communication between the third-party seller and the customer.¹¹¹ Amazon may refer the customer back to the third-party seller, but generally only at Amazon's discretion.¹¹²

This may create a catch-22 for the purchaser under which they have no permitted communication with the third-party seller, no acknowledged relationship with Amazon, and no recourse against a solvent party. This problem is not solved by Amazon's requirement that its third-party sellers carry insurance, as Amazon is the beneficiary of that insurance, and if neither the third-party seller nor Amazon are amenable to suit, the insurance does not benefit the tort-claimant.¹¹³ Worse, the state of consumer limbo has been worsened by common-law courts that treat the principal player in the transaction as if they are not engaged in selling products.

As the discussion above demonstrates, common-law courts have shown a disturbing willingness to overlook the functional and pragmatic principles embedded in U.S. tort doctrine in favor of doctrinal labels, such as seller and title. In the next Part we show that this resort to transaction structure in the face of innovation is not historically unusual. It remains, however, misguided.

¹¹⁰ *Prime Membership Benefits*, AMAZON.COM, <https://www.amazon.com/b/?node=23945845011> [<https://perma.cc/M99P-YJV4>].

¹¹¹ *Contact a Third-Party Seller*, AMAZON.COM, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GLC8ZMBWMBTR6QZZ> [<https://perma.cc/52BD-DLQA>].

¹¹² *Id.*

¹¹³ *See supra* note 100 and accompanying text.

III. Common Law and Markets: The Formal Response

This resistance to holding internet platforms liable under ordinary tort principles could proceed from a generic hostility to tort liability.¹¹⁴ The expansion of tort liability that followed the emergence of strict product liability in tort and § 402A gave rise to a well-funded “tort reform” movement.¹¹⁵ That movement has spearheaded statutory limits on tort liability and has also given rise to judicial sensitivity to any perceived extensions.¹¹⁶

It seems more likely, however, that these cases proceed from a recognition and concern that internet platforms like Amazon provide a new and useful function in society. Amazon and other internet platforms have revolutionized the way in which consumer goods are sold. From eBay to Etsy to Walmart, these platforms serve as intermediaries to bring online sellers together with online buyers. It is understandable that judges, with nothing but the common law of tort to guide them, might be nervous about disrupting the development of such a useful technology.

A. *The Transformation of Duty*

Such judicial reticence about interfering with economic and technological development is not an unusual reflex within the common law. The most obvious example was the reformulation of tort and contract law that happened in the late 19th and early 20th century, as both fields adopted a *laissez-faire* approach to

¹¹⁴ Dillaway, *supra* note 20, at 192 (noting early judicial reticence to impose strict liability on 19th century U.S. manufacturers based on concerns of stifling economic growth).

¹¹⁵ See, e.g., Hubbard, *supra* note 22, at 438-39 (describing the rise, beginning in the 1980s, of the defense bar’s “more permanent institutionalized approach” to advocating damages caps, abolishing the collateral source rule, and joint and several liability, among other things, to limit plaintiff recovery in tort law).

¹¹⁶ *Id.* at 457-83 (describing the goals of “reform”); *id.* at 483-587 (describing the influence of tort “reform”).

regulating market transactions. The tort story is familiar to scholars and law students. Morton Horwitz tells the story in his once controversial, but now canonical history, *The Transformation of American Law*.¹¹⁷ He argues, on the liability side, that fault-based negligence liability and limits on causation displaced the more cause-based strict liability of the English common law.¹¹⁸ In the law of contracts, the so-called “classical theory” of contract emerged to limit promissory liability to enforcement of bargained-for exchange.¹¹⁹ Both of these doctrinal developments can be understood as jurisprudential moves that facilitated the development of new forms of commerce. Horwitz characterizes the development of negligence liability itself as “subsidization” of business and links it to the *laissez-faire* solicitude for business that facilitated the industrial revolution—often at the expense of industrial workers and the purchasers of products.¹²⁰

It should be noted that Robert Rabin has challenged Horwitz’s historical account, arguing that the transformation was really one where one set of formal rules—no-duty rules—was displaced by a second set of formal rules in the form of the fault principle.¹²¹ The point here is not to debate the merits of

¹¹⁷ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (Harv. U. Press 1977).

¹¹⁸ Compare *Brown v. Kendall*, 60 Mass. 292 (1850), with *Fletcher v. Rylands*, 159 Eng. Rep. 737 (1865). See also HORWITZ, *supra* note 117, at 89-91.

¹¹⁹ GRANT GILMORE, *THE DEATH OF CONTRACT* 23-26 (2d ed. 1995).

¹²⁰ HORWITZ, *supra* note 117, at 99.

¹²¹ Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 926 (1981). Rabin points out:

The main flaw in the traditional account of the rise of negligence is the narrow focus on cases like *Brown v. Kendall*, usually involving interpersonal harms among strangers, which, in turn, relied upon a limited range of historical precedent - essentially, cases arising under the trespassory forms of action. Unfortunately, focusing on the immediate lineage of the fault principle diverted attention from a vast area of common law history that is of central concern to the development of liability for unintended harm.

Id. at 945. As he puts it: “From a functional perspective, the focus on a dominant tension between strict liability and fault seems misplaced. To the contrary, I will argue that fault liability emerged out of a world-view

laissez-faire jurisprudence, nor do we wish to argue that common-law courts should not be asked to respond to evolutions and transformations in the marketplace. Rather, we merely wish to point out that, there, as here, the judicial response to the Industrial Revolution was to use formal concepts, such as privity of contract and consideration, to limit tort liability.

One can view the current formal focus on “title” instead of functional relationships as an example of such a judicial strategy. This does not undercut our observation that it is a distinction without a difference.

B. Title as Label

The legal realist Felix Cohen made this point with snark, describing the concept of title as “transcendental nonsense.”¹²² We do not go so far, other than to say that title is a conclusion rather than an argument. Worse yet, it is not a “tort” concept; it is a “property” concept. Title may matter in tort analysis, but

dominated largely by no-liability thinking.” *Id.* at 928. See also John C. Goldberg & Benjamin C. Zipursky, *Convergence and Contrast in Tort Scholarship: An Essay in Honor of Robert Rabin*, 61 DEPAUL L. REV. 467 (2012).

¹²² See Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820 (1935). The extended snark is as follows:

In every field of law we should find peculiar concepts which are not defined either in terms of empirical fact or in terms of ethics but which are used to answer empirical and ethical questions alike, and thus bar the way to intelligent investigation of social fact and social policy. *Corporate entity, property rights, fair value, and due process* are such concepts. So too are *title, contract, conspiracy, malice, proximate cause*, and all the rest of the magic “solving words” of traditional jurisprudence. Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Moliere’s physician’s discovery that opium puts men to sleep because it contains a dormitive principle.

Id. (emphasis in original).

its relationship to tort doctrine must be established, meaning the distinction between owner and non-owner must matter in the tort context for which is offered. For example, ownership may matter because it gives the owner power to act: I can ride my own bicycle, but to ride somebody else's might be trespass to chattels or conversion. Similarly, ownership may imply agency: If my cow tramples your crops, I may be held liable. But the same would be true if I was leasing or caring for somebody else's cattle and they escaped. Title in and of itself means nothing.

Moreover, title and ownership are slippery concepts; lawyers have been manipulating title to affect liability for centuries. Indeed, there is an entire body of law—fraudulent conveyance—devoted to avoiding transfers of title that are done with the purpose of avoiding creditors.¹²³ Legal trusts were originally conceived as a mechanism for avoiding transfer taxes.¹²⁴ And commercial finance lawyers frequently structure transactions as leases or sales for accounting purposes, or to manipulate the treatment of certain property in bankruptcy.¹²⁵

To illustrate the manipulability of the concept of title, one need only look to the distinction between a lease and a sale financed with a secured loan. The same economic transaction can be created under either label with title landing on either side of the transaction.¹²⁶ In the context of commercial

¹²³ *Twyne's case* (1601), 3 Co. Rep. 80b, 76 ER 809. *See also* UNIFORM VOIDABLE TRANSACTIONS ACT § 4(a)(1) (NAT'L CONF. COMM'RS ON UNIF. STATE LS. 2014); 11 U.S.C. § 548.

¹²⁴ Statute of Uses, 27 Hen. c. 10 (1536) (available at: https://en.wikipedia.org/wiki/List_of_Acts_of_the_Parliament_of_England_and_Wales#/media/File:Statute_of_Uses_1536.pdf) [https://perma.cc/6JDC-RPMV].

¹²⁵ Edward J. Janger, *The Death of Secured Lending*, 25 CARDOZO L. REV. 1759, 1762 (2003) (“My concern in this article is state law attempts to shift the line between secured lending and structured finance by manipulating, or indeed eliminating, the line between ‘security interests’ and ‘sales.’”).

¹²⁶ A simple example is a person who wishes to purchase a car. They need to finance \$20,000 of the \$25,000 purchase price. They could buy the car and borrow from the seller who would retain a security interest in the car. The down-payment would be \$5,000, and the monthly payments at 4.5% interest would be approximately \$600 over 36 months. Alternatively, they could lease it from the seller, for \$5,000 down-payment and 36 months of rent at

transactions, parties frequently structure their deals in order to apply a label with legal consequence. The lease/sale distinction is just one example. The Uniform Commercial Code and the Restatement (Second) of Contracts take an approach that resolutely elevates substance over form.¹²⁷

The realist response to the malleability of formal concepts like title was to adopt a “functional” approach.¹²⁸ Instead of affixing a label, ask the question that you are asking. Here, the question is, “what burden of liability should internet platforms have with regard to transactions that they facilitate?” The question is one worth asking, but it is not one that is answered by affixing the label “owner” with regards to the goods sold.

IV. A Functional Approach to Duty

The question, as framed above, is: when should an internet platform have a duty to its customers with respect to defective products sold on its platform? In this Part, we will show that a “functional” approach to the term “seller” will allow courts to distinguish amongst internet platforms in a sensible way, and that it dovetails not just with § 402A, but also with classic tort concepts of duty. Other entities sell goods over the Internet: eBay, Etsy, Walmart, L.L. Bean, and Lands’ End. But not all

\$600, with an option to purchase the car at the end of the lease for a nominal amount. The cash streams produced by these two transactions are the same. The seller is financing the purchase for 36 months, and the end result is the same—the purchaser owns the car. However, under the lease, the title remains in the seller/lessor for 36 months, while under the sale, title transfers immediately to the purchaser. Under both transactions, the purchaser/lessee is in possession at all times. Nobody would suggest that the formal state of title should affect the allocation of liability. If the driver is negligent, the driver should be liable. If the car’s brakes fail, the car dealer or manufacturer would be liable. The form of the transaction should not matter.

¹²⁷ See U.C.C. § 1-201(35) (AM. L. INST. & UNIF. L. COMM’N 1977), (definition of a security interest); *id.* § 1-203 (definition of a lease as distinguished from a security interest); *id.* § 2-204 (contract formation by any means reasonable under the circumstances).

¹²⁸ Cohen, *supra* note 122.

internet sellers are the same. Some sell goods in their own name (L.L. Bean or Lands' End). Some sell goods on behalf of others (Etsy, eBay). Others combine these functions (Amazon, Walmart). Title may correlate with the platform's role in the transaction, but for the reasons discussed in Section III.B, it may not.

The law of torts has a well-developed body of doctrine that addresses the concept of duty. The starting points are a relatively general duty to take reasonable precautions against foreseeable harm, subject to the limitation of proximate cause.¹²⁹ Indeed, there is an extensive jurisprudence debating whether duty requires a relationship with an identifiable plaintiff, or whether its scope is limited merely by “policy and convenience.” This debate between Chief Judge Cardozo's majority and Judge Andrews' dissent in *Palsgraf* is reflected in modern jurisprudence in the conversation between “corrective justice” scholars and realists who trace their approach to William Prosser.

But there are also a series of “no duty” rules or privileges that carve out certain parties or transactions from this more general duty.¹³⁰ Section 7 of the Third Restatement explains the logic behind such no-duty rules:

- (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.

¹²⁹ See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (AM. L. INST. 2010) (noting general duty of reasonable care in negligence doctrine); see also *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916); *Palsgraf v. L.I.R.R.*, 162 N.E. 99, 104 (N.Y. 1928); *Petitions of Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968) (denying negligence recovery to grain companies for damages incurred from their inability to unload silos because such injury was not foreseeable from a bridge collapse).

¹³⁰ See, e.g., RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §§ 38-44 (AM. L. INST. 2012) (exploring various affirmative duties negligence doctrine imposes based on an actor's relationship and conduct relative to injured parties).

(b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.¹³¹

While Section 7 applies to negligence duties, courts have also applied these principles in drug and product cases to impose strict liability.¹³² The point is that the duty inquiry as outlined in Section 7 requires the court to ask what “principle or policy” justifies limiting or denying liability.¹³³ Title is not a policy.

¹³¹ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (AM. L. INST. 2010).

¹³² *Quiroz v. Alcoa, Inc.*, 416 P.3d 824 (Ariz. 2018).

¹³³ We have been emphasizing the regulatory structure of tort law, which is of general applicability. In this regard Amazon’s attempt to create an end run around accountability is striking. This approach by internet platforms to evade regulation is not limited to Amazon, and can have truly horrifying consequences. For example, a company called Blackbird uses an internet platform to allow private jet owners to give “lifts” to travelers who “need a ride.” See Christina Liao, *This App is like Uber for Private Jets - Here’s How It Works*, TRAVEL + LEISURE (Apr. 20, 2022), <https://www.travelandleisure.com/airlines-airports/flewber-private-jet-app> [<https://perma.cc/8QCV-HXLC>]. Such an arrangement creates a host of potential problems in the highly regulated airline sector. For example, commercial pilots are subject to different licensing requirements than private pilots. Further the consequences of hiring an insufficiently trained pilot could be devastating. Indeed, when Blackbird reached out the Federal Aviation Administration to seek confirmation that they were not a common carrier, the FAA had no trouble whatsoever, in concluding that they, and their pilots, were “holding” themselves “out” to customers. A letter from the Chief Counsel for the FAA relied on a DC Circuit case, *Flyte Now Inc. v. Federal Aviation Administration*, stating, “the FAA uses ‘holding out’ as that concept is defined through common law . . . and applies it in a functionalist, and pragmatic matter.” They were not swayed by Blackbird’s argument that it did not choose the pilots, supervise them, or otherwise insert itself in the relationship. Indeed, that made it worse. 808 F.3d 882, 892 (D.C. Cir. 2015).

A. Duty: Vicarious Liability and the Importance of Control

Given the common-law tort principles discussed above, the court's conclusion in *Amazon v. McMillan*, that the identity of the parties who formally transfer title determines liability, is particularly striking. Even without getting into the complexities of who is a seller, a cursory review of the nine factors described in Part II above, along with application of ordinary tort principles of vicarious liability should have led the court to impose strict liability on a party in Amazon's position.

The case law absolving Amazon of liability does not consider several vital aspects of Amazon's relationship with both the third-party seller and the customer. Plaintiffs have, perhaps, simply failed to bring these factors to the attention of the courts. We shall first set forth the theory for imposing vicarious liability against Amazon in the absence of title and then demonstrate how the information which courts have not to date considered compels a finding in favor of liability.

Amazon's control of third-party sellers, described *supra* in Part II, would render them liable under principles of vicarious liability and *respondeat superior*—independent of any ideas about ownership or formal status as a seller. Amazon's functional control of the transaction is so complete that this conclusion is inescapable. To date, courts have been given inadequate information as to how Amazon controls virtually every aspect of every sale on its platform, even when the third-party seller ships directly to the consumer. The failure of plaintiffs to fully explain the degree of Amazon's control has allowed the majority of courts to focus on title instead. And, even in the few cases that have held Amazon liable, the courts have focused on the control that arises when the sales are Fulfilled by Amazon (FBA).¹³⁴ Products shipped directly from

¹³⁴ *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 616 (Ct. App. 2020). The case on its facts involved an FBA sale. The court's emphasis on that fact limits the holding to a case where the product was in Amazon's inventory. In *Fox* (applying Tennessee law) the court said: "[W]e hold that the TPLA's definition of 'seller' means any individual regularly engaged in exercising sufficient control over a product in connection with its sale, lease

the third-party seller to the consumer have been assumed not to meet the control threshold for the imposition of vicarious liability.¹³⁵ We shall show that in both FBA and direct third-party shipping. It is true that who stores and ships the goods is a factor to be considered. But even with these sellers, Amazon controls virtually all aspects of the transaction with the consumer.

1. Principles of Vicarious Liability

Control is the deciding factor for imposing vicarious liability in several areas of tort law, such as franchisor/franchisee liability and *respondeat superior*. We analogize to these areas of the law to support the minority of court's position that control is of significance in imposing liability against Amazon. The courts have not created this criterion out of whole cloth. It has deep roots in tort history. And courts have correctly intuited its application to situations that are analogous to Amazon's transactions. Here, we consider those examples.

2. Franchisor/Franchisee

The issue of the liability of a franchisor for the torts of a franchisee has been the subject of considerable litigation and academic commentary.¹³⁶ Whether the franchisor is

or bailment, for livelihood or gain.” The court held for Amazon because the plaintiff was not able establish that the sale was made by FBA. *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 425 (6th Cir. 2019); *see also* *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 973 (W.D. Wis. 2019) (applying Wisconsin law and emphasizing that FBA was important to its holding against Amazon). We argue that even in non-FBA cases Amazon controls the sale because it controls favorable placement. *See* discussion *infra* Section IV.B.

¹³⁵ *See* case cited *supra* note 134. All of the cases cited in the preceding footnote are FBA cases, except *Fox*, for which it is the determinative point.

¹³⁶ *See, e.g.*, Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417 (2005); Michael R. Flynn, Note, *The Law of Franchisor Vicarious Liability*:

McDonalds, Starbucks, or 7-Eleven, the cases generally arise when someone is injured due to the negligence of the franchisee on its premises.¹³⁷ Notwithstanding the fact that the franchisee is required to follow directives of the franchisor for everything from dress code to the recipe for food preparation, the majority of cases have not held franchisors liable for the negligence of the franchisee.¹³⁸

The fact that the franchisor imposes control over the uniformity and the standardization of products and services is not enough. The franchisor must control the “day-to-day” operations of the franchisee. Most plaintiffs have been unable to overcome this hurdle. Though the requirements that the franchisors impose on the franchisees are often extensive, they did not rise to the level of daily control of the activity and sales made by the franchisee.

Some courts, however, have been unwilling to find that day-to-day control is necessary to support a finding of vicarious liability. These cases set forth in great detail the obligations imposed by the franchisor over the franchisee and conclude that the issue of the sufficiency of the control is for the jury to

A Critique, COLUM. BUS. L. REV. 89 (1993); Randall K. Hanson, *The Franchising Dilemma Continues: Update on Franchisor Liability for Wrongful Acts of Local Franchisee*, 20 CAMPBELL L. REV. 91 (1997). See also Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099 (2002) (arguing trademark licensors and franchisors should be held liable for the torts of their licensees and franchisees).

¹³⁷ Courts have also analyzed whether off-premises tortious conduct by franchisee employees warrants imposing vicarious liability. See, e.g., *Domino’s Pizza, LLC v. Wiederhold*, 248 So. 3d 212, 222 (Fla. Dist. Ct. App. 2018); *Parker v. Domino’s Pizza, Inc.*, 629 So. 2d 1026, 1027 (Fla. Dist. Ct. App. 1993).

¹³⁸ See, e.g., *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 341 (Wis. 2004) (holding franchisor liable “only if the franchisor has control . . . over the daily operation of the specific aspect of the franchisee’s business that is alleged to have caused the harm”); *Little v. Howard Johnson Co.*, 455 N.W.2d 390, 393-94 (Mich. App. 1990) (holding franchisor not liable because it did not control the daily operations of franchisee); *Currier v. Newport Lodge No. 1236, Loyal Ord. of Moose*, 589 F. Supp. 3d 210, 234-35 (D.N.H. Mar. 9, 2022) (same); *O’Sullivan v. 7-Eleven, Inc.*, No. 154536/14, 2016 WL 2919324, at *3 (N.Y. Sup. Ct. Mar. 29, 2016) (same); *Schlotzsky’s, Inc. v. Hyde*, 538 S.E.2d 561, 563 (Ga. Ct. App. 2000) (same).

decide on a case-by-case basis.¹³⁹ We will show below that, even applying the higher threshold describe above, Amazon’s control of the transaction clears the bar required in these cases.

3. *Respondeat Superior*

The most pervasive use of control as the determinant of vicarious liability is found in the case law dealing with the liability of an employer for the torts committed by an employee. Here too, form and substance are at war. An employer may label a worker a contractor for any number of reasons, including tax, accounting, and benefits. Some may have bearing on tort liability, while others may not. Needless to say, it should be the realities of the relationship not the formal label that determine whether an employer should be held strictly liable for the torts of someone acting on their behalf. Again, whether the worker is an employee or independent contractor—for whom the employer bears no vicarious liability—depends, for the most part, on the degree of control over the conduct of the employee.¹⁴⁰

¹³⁹ *Parker*, 629 So. 2d at 1028-29 (holding that franchise agreement’s 24 provisions stipulating franchisor’s control over franchisee raised genuine dispute of material fact for factfinder); *Miller v. McDonald’s Corp.*, 945 P.2d 1107, 1110 (Or. Ct. App. 1997) (noting the application of the “right to control test for vicarious liability” in franchisor-franchisee tort litigation).

¹⁴⁰ *See, e.g.*, *Herndon v. Torres*, 249 F. Supp. 3d 878 (N.D. Ohio 2017), *aff’d*, 791 F. App’x 547, 552-54 (6th Cir. 2019) (affirming trucker driver was independent contractor because he—not his employer—controlled the jobs he took, routes he drove, and hours he worked, among other things); *Cayer v. Cox Rhode Island Telecom, LLC*, 85 A.3d 1140, 1143-44 (R.I. 2014) (holding technician was independent contractor because of employment agreement disavowed employer-employee relationship and employer had “limited power to control the manner in which [technician] performed his installation duties”); *City of Houston v. Ranjel*, 407 S.W.3d 880, 890-91 (Tex. App. 2013) (holding worker’s status as employee or independent contractor based on employer’s control, which is demonstrable in two ways: (1) contractual assignment or (2) evidence of actual control over how work is performed); *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1189-90 (9th Cir. 2002) (describing Arizona law’s eight-factor test for

Restatement (Third) of Agency Section 7.07 sets forth the general rule:

- (1) An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.
- (2) An employee acts with the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control¹⁴¹

Comment f explains that:

Numerous factual indicia are relevant to whether an agent is an employee. These include: the extent of control that the agent and the principal have agreed the principal may exercise over details of the work. . . . Also relevant is the extent of control that the principal has exercised in practice over the details of the agent's work.

In some employment relationships, an employer's right of control may be attenuated. For example, senior corporate officers, like captains of ships, may exercise great discretion in operating the enterprises entrusted to them, just as skilled professions exercise discretion in performing their work. Nonetheless, all employers retain a right of control, however infrequently exercised.¹⁴²

In other words, labeling an agent a contractor or an employee matters, but it does not determine whether strict vicarious liability will be imposed on a principal for the torts of its agents. Vicarious liability, as a form of strict liability in tort law, has implications for training incentives and for allocating the

determining if a worker is an employee or independent contractor, with the "fundamental criterion" being "the extent of control the principal exercises or may exercise over the agent").

¹⁴¹ RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. L. INST. 2006).

¹⁴² *Id.* cmt. f.

burden of insurance. For example, a plaintiff need not prove that a principal was negligent in its supervision of the agent. Nor must a plaintiff worry whether, say, an Uber driver has adequate automobile liability insurance. The independent contractor label puts both of these questions into play through the inquiry into control.¹⁴³ The real question is not the label but the degree of control. And control is a matter of substance, not form or label. This point applies equally to consumer sales transactions.

B. Vicarious Liability and Amazon's Control of Third-Party Sales

We set forth the myriad ways in which Amazon controls both sides of the relationship between third-party sellers and consumers *supra* in Part II.¹⁴⁴ Several courts have held that these suffice to impose liability on Amazon as a seller, but the majority have disagreed. Nonetheless, whether Amazon is technically a seller or not, the principles of vicarious liability discussed above would suggest that Amazon should be held liable for the defective products it sells on its website because it controls each and every sale in the most profound manner. But, even beyond the relationship with the third-party seller, Amazon controls the relationship between the consumer and the transaction as well.

1. Placement of Products on Amazon's Website

In brick-and-mortar retail stores, sellers compete for shelf space and for shelf location. The retailer decides which products to include and where on the shelf a product will be displayed. Likewise, preferential placement is crucial to Amazon's business. Favorable placement on the Amazon webpage influences what the consumer will see when searching

¹⁴³ It is important to recognize that there may be other bases for franchisor liability, such as the reasonable expectations of the consumer. Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1114 (2002).

¹⁴⁴ See *supra* text accompanying notes 93-110.

for a product. Amazon allocates “shelf space” by determining the placement on its web pages in a manner that maximizes profit for Amazon. It does so in several ways.

a. Sponsored Products

Products labeled by Amazon as “Sponsored” are the recipient of a higher placement on the search list.¹⁴⁵ That designation has nothing to do with Amazon endorsing the item due to its opinion as to the quality of the product. Instead, product sellers bid for favorable placement in a “bidding war.”¹⁴⁶ Very simply, the seller pays Amazon to put their product before the consumer in a manner that will get the buyer’s attention. Thus, every Amazon sale is controlled by Amazon based on nothing more than Amazon’s sale of preferential placement. Not only does Amazon control third-party sellers in this manner, but consumers are not told that the “Sponsored” designation came about because Amazon was paid to give a seller preferential listing. In this way, Amazon controls both the seller and consumer. It puts its finger on the scale as to placement and in turn leads the buyer to believe that the placement is inherently meritorious.

b. Other Methods for Controlling Placement

Another way of controlling preferential placement of a product is through “Key Word Bids.” Sellers bid for specific key words, and if they win, then those keywords will return searches with their items.¹⁴⁷ Once again, Amazon sells a designation from which it profits. It also designates some

¹⁴⁵ *Sponsored Products*, AMAZON.COM, <https://advertising.amazon.com/solutions/products/sponsored-products> [<https://perma.cc/J4GP-5SGR>].

¹⁴⁶ Megan Graham, *Amazon Is Turning Advertising into Its Next Huge Business - Here’s How*, CNBC (Jul. 17, 2019, 11:17 AM), <https://www.cnbc.com/2019/07/17/how-amazon-advertising-works.html> [<https://perma.cc/Z4YQ-C7KT>].

¹⁴⁷ David Hassler, *Amazon Bidding - What Advertisers Need to Know*, TEIKAMETRICS (July 8, 2021), <https://www.teikametrics.com/blog/amazon-keyword-bidding> [<https://perma.cc/Y5GX-6JG6>].

products “Amazon Choice.”¹⁴⁸ To win this designation, it considers sales price, feedback score, and quantity sold. This designation is discretionary and gives Amazon significant control over the seller. Finally, Amazon awards some products with the “Best Seller” label.¹⁴⁹ Amazon utilizes an algorithm that weighs the number of units sold by a seller within its product category against a number of other metrics.¹⁵⁰ It is likely that the “Best Seller” designation correlates with the other categories, as sales are likely to increase with sponsorship and Amazon’s endorsement. The algorithm is known only to Amazon.

In short, whether by direct payment (sponsorship) or by use of an algorithm, Amazon controls the placement of every product from third-party sellers. The level of control exceeds the “day to day” control which governs franchisor liability and the control which governs employer-employee liability. Through its placement decisions, Amazon controls every sale. But there is more.

2. Fulfillment By Amazon: The Right of Substitution Without Consumers’ Knowledge

“Fulfillment by Amazon” (FBA) is an agreement between merchants and Amazon to handle all the packaging and shipping of those products.¹⁵¹ Third-party sellers that use FBA are designated as “Amazon Prime” so long as they guarantee two-day delivery, enter into a “professional seller’s agreement,” and satisfy certain performance metrics (mostly properly managing orders and maintaining inventory levels).¹⁵²

¹⁴⁸ Ashley Kochans, *What is Amazon’s Choice Badge?*, SELLERLABS (Nov. 24, 2020), <https://www.sellerlabs.com/blog/amazon-choice> [<https://perma.cc/E69C-562W>].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Business Solutions Agreement*, *supra* note 101.

¹⁵² *How to Get the Prime Badge for Your Products When Selling on Amazon*, SMARTSCOUT, <https://www.smartscout.com/amazon-selling-guides/how-to->

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. FBA stands out given the extent of the control Amazon takes over the product. Once an item is sent to one of Amazon’s fulfillment centers, the seller never touches it again.¹⁵³ 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.¹⁵⁴ While Amazon may not take title to the product, Amazon bears the risk of loss when the product is in its inventory.

To put the control by Amazon in yet sharper focus, when Amazon fulfills an order, the product provided by Amazon on behalf of the third-party seller may not even be the item delivered to Amazon by that seller. The reality is that Amazon stores products in its inventory on a product-by-product, not seller-by-seller, basis.¹⁵⁵ For example, multiple sellers may send

get-the-prime-badge-for-your-products-when-selling-on-amazon [https://perma.cc/H7VC-DXUP]. Amazon also allows sellers who do not use Fulfillment by Amazon if they can maintain compliance with the required metrics. *Sell Products with Prime Branding Directly from Your Warehouse*, AMAZON.COM, <https://sell.amazon.com/programs/seller-fulfilled-prime> [https://perma.cc/682D-HWZR].

¹⁵³ See *Business Solutions Agreement*, *supra* note 101.

¹⁵⁴ *Inventory Management 101: Essentials for Ecommerce Businesses*, AMAZON.COM, <https://sell.amazon.com/learn/inventory-management> [https://perma.cc/6YRS-AHXC].

¹⁵⁵ *Business Solutions Agreement*, *supra* note 101, Section F-4 (“We will not be required to physically mark or segregate Units from other inventory units (e.g., products with the same Amazon standard identification number) owned by us, our Affiliates or third parties in the applicable fulfillment center(s). If we elect to commingle Units with such other inventory units, both parties agree that our records will be sufficient to identify which products are Units.”). See also *Amazon Inventory Management Causes Authentic Vendors to Sell Fakes*, REDPOINTS, <https://www.redpoints.com/blog/amazon-commingled-inventory-management> [https://perma.cc/9AXH-UHSY].

A seller may opt out of “commingling” by changing their barcode setting, but doing so can come at a cost. *Id.*; see also Izabella Kaminska, *Amazon (sub)Prime - Part II*, FIN. TIMES (Apr. 3, 2019, 6:30 AM),

expensive Parker pens to Amazon for sale under the Prime designation. However, when filling the order Amazon will simply take a pen from the “Parker” bin and in so doing, substitute a pen from a different seller who has also placed Parker pens in the Amazon inventory. As a result, consumers who thought they were buying pens from one source may actually get it from a different seller.

Consumers are never told about this right to substitution. On any given day or time, the name of the seller of the Parker pen that appears in the “Buy Box” is totally dependent on Amazon’s discretion. That Amazon has agreed with third-party sellers to allow for substitution does not alter the fact that the buyer is getting the pen from a different source from the one that they chose. If the pen actually shipped from Amazon turns out to be a “knock off” and leaks ink over the consumer’s suit, the consumer may blame the assumed seller, or worse yet, may be faced with the argument that the pen that caused the leakage did not come from the seller whose name appeared in the “Buy Box.”

3. The Puzzle of Amazon

When confronted with the tort principles of vicarious liability discussed in Section IV.A and the realities of Amazon’s relationship to the transaction, cases like *McMillan* present a puzzle: How should courts approach the question of

<https://ftalphaville.ft.com/2019/04/03/1554287401000/Amazon--sub-prime--Part-II/> [<https://perma.cc/B66Q-EY55>]. (“[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.”). To help remedy this problem, Amazon has instituted an invitation-only program called “Project Zero” that identifies each piece of merchandise with a unique barcode. *See Amazon Project Zero*, AMAZON.COM, <https://brandservices.amazon.com/projectzero> [<https://perma.cc/A29N-C3GX>].

product liability for internet platforms? That question is explored in the next part.

V. Duty and Immunity as Applied to Platforms

In our discussion thus far, we have argued that Amazon has a tort duty to its customers. It is not enough to say, however, that because of its pervasive control of the transaction Amazon should have the duties of a product seller. The role of duty in the law of torts has been the subject of judicial and scholarly debate for almost a century.¹⁵⁶ Whether (1) duty should be presumed subject to clearly articulated public policy

¹⁵⁶ The debate between Justices Benjamin Cardozo and William Andrews in *Palsgraf* as to the appropriate role of duty continues today. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §§ 7, 37 (AM. L. INST. 2010) (describing common-law general duty an actor has to use reasonable care when its conduct creates a risk of physical harm to others, and the general lack of such a duty in the absence of a corresponding risk arising from the actor's conduct); see also Jonathan W. Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 732 (2008) (chronicling the California Supreme Court's influence in expanding tort liability since the mid-20th century and defending the Third Restatement's "default duty of reasonable care with regard to causing physical harm"); Jonathan W. Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 794 (2005) (arguing adoption of Section 7's general duty of care would improve the rule of law by allowing courts to avoid redundant foreseeability considerations often meant for juries on issues of breach and causation); Aaron D. Twerski, *The Cleaver, the Violin, and the Scalpel: Duty and the Restatement (Third) of Torts*, 60 HASTINGS L.J. 1, 1-2 (2008) (contrasting exceptions to the general duty in tort law, such as no or limited liability for economic loss or intentional trespassers, which are insensitive to facts, with negligence, where courts generally defer to juries on factual disputes over breach or causation).

However, some legal scholars have opposed the Third Restatement's general position on common-law duty in tort. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 333 (2006) (criticizing the Third Restatement for its "dogmatic insistence on collapsing questions of duty into a blunderbuss policy inquiry as to the propriety of permitting juries to impose liability").

exceptions,¹⁵⁷ or (2) whether it is the responsibility of plaintiffs to bring defendant's conduct within the orbit of duty,¹⁵⁸ or (3) whether it should be decided based on multiple factors, as is the case in California,¹⁵⁹ analyzing the question of duty cannot be avoided.

A. Control, Relationship, and Duty

Understanding the relationship between online sellers and their customers is key to deciding the duty issue. The jurisprudential works of Professors John C. Goldberg and Ben Zipursky are relevant here. In deciding whether the law of torts should recognize a duty to victims, they focus first and foremost on the relationships between the parties.¹⁶⁰ In a series of articles and books, they develop their thesis at great length and take issue with the position of the Restatement (Third) of Torts. Section 7(a) would seem to suggest that a general duty of due care is owed to the entire world, and only limited in § 7(b) by categorical “no duty” rules. It is not our intention now to take sides on that debate. We agree with Goldberg and Zipursky that tort liability emerges from relationships, and that we must look at online sellers through that prism.

¹⁵⁷ See *Thompson v. Kaczinski*, 774 N.W.2d 829, 834-35 (Iowa 2009) (holding tort law imposes a general duty of reasonable care on actors, subject to “exceptional cases” based on clearly articulated public policy that no duty exists as a matter of law); *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568, 574 (Wis. 2009) (reiterating support for Justice Andrews’ dissent in *Palsgraf* for a general duty of reasonable care subject to rare exceptions).

¹⁵⁸ See *Quiroz v. Alcoa, Inc.*, 416 P.3d 824, 827 (Ariz. 2018) (holding plaintiff bears the burden of establishing defendant owed it a duty of care, which is based on common-law special relationships or state law).

¹⁵⁹ See *T.H. v. Novartis Pharms. Corp.*, 407 P.3d 18, 28 (Cal. 2017) (holding brand-name drug manufacturers may owe consumers a duty to warn based on a “constellation of factors,” including “foreseeability, the certainty of the injury, and the closeness of the connection between the plaintiff and the defendant”); see also *Rowland v. Christian*, 443 P.2d 561, 564 (1968).

¹⁶⁰ Goldberg & Zipursky, *Macpherson*, *supra* note 26, at 1744. See also Goldberg & Zipursky, *Torts*, *supra* note 26, at 945.

When looking at Amazon, it is important to see the relationships that it creates with its customers and, concomitantly, its destruction of the relationship between the consumer and the third-party seller. As noted earlier, Amazon engages directly with customers:

- (1) All sales are made through Amazon.
- (2) All payments are made to Amazon.
- (3) Amazon introduces the customer to the third-party seller by placing the product in a preferred spot on its website as it sees fit.
- (4) Amazon acts like a classic retailer in representing to the customer its view of the quality of the product.
- (5) Where multiple third-party sellers are available for the same product, Amazon picks and chooses which will be handed the sale.
- (6) Amazon even ships the product from commingled inventory for Prime sales through Fulfillment by Amazon, and does so directly to the consumer in Amazon boxes.
- (7) Amazon controls how the consumer learns the seller's identity and does so quietly.
- (8) By guaranteeing satisfaction and an open return policy, Amazon communicates to the consumer that Amazon is in charge of the transaction.
- (9) By substituting like products from sellers other than the one chosen by the customer, Amazon falsely represents to the consumer that the product they receive is known to be from the seller from whom they placed their order.

In sum, not only has Amazon created an extensive and robust relationship with the customer, but it has also taken steps to place itself at the *center* of any relationship that might develop between the third-party seller and the customer. It does this by handling refunds and determining whether to handle complaints itself, or channel them back to the seller. This is all consistent with a desire to maintain customer satisfaction. However, the point is that Amazon is the steward of the relationship between the customer and the seller.

We are confident that this relationship would satisfy Goldberg and Zipursky as more than sufficient to generate a duty in tort.¹⁶¹ Indeed, we are confident that even those scholars who believe that tort duties need not be governed exclusively by relationships would agree that relationships are a significant factor in determining whether the law should recognize a duty.

B. Immunity and Policy

Are there policy issues that might lead a court to immunize Amazon from liability through the creation of an immunity or “no duty” rule? We think that there are, and they are worth discussing. Indeed, we think that this is the motivation behind the resort to “title” in the case law. But the better approach is to consider whether the special position of internet platforms justifies immunizing them from liability. No-duty rules can insulate defendants from horrible harms that they may cause. One example is social-host immunity, which, in some states, insulates a host from liability for serious harms caused by drunk drivers, while on the other hand preserving the institution of the backyard barbecue.¹⁶² If the productive or social activity is important enough, it may be appropriate to insulate it. This,

¹⁶¹ It is to distinguish the product liability context from cases like employment, where tort liability is imposed on an employer when the tort arises from a “course of conduct subject to the employer’s control.” RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. L. INST. 2006). The sale is the tort, even though it is not the “specific aspect of the franchisee’s business that is alleged to have caused the harm.” *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 341 (Wis. 2004). As we have noted above, when 402A extended liability to all sellers in the chain of distribution, it did so expressly without regard to whether the seller had control of manufacture. *See supra* text accompanying note 8.

¹⁶² *See Coulter v Swearingen*, 447 N.E.2d 561, 562-63 (Ill. App. Ct. 1983) (“Our courts have adhered to this position and make no distinction as to whether the intoxicated individual is a corporate defendant, a strong and able-bodied man, or a minor.”); *Juliano v. Simpson*, 962 N.E.2d 175, 177 (Mass. 2012); Edward L. Raymond, Jr., Annotation, *Social Host’s Liability for Injuries Incurred by Third Parties as a Result of Intoxicated Guest’s Negligence*, 62 A.L.R.4th 16 (1988).

however, is a question that should be addressed directly, not through linguistic manipulation.

Such an inquiry would involve asking the following questions to start:

- How important is it that Amazon has opened business opportunities to numerous third-party sellers?
- Would the imposition of tort liability serve as a deterrent for entrance into the worldwide marketplace?
- Would the third-party seller have to prove that it has product liability insurance as a prerequisite to securing a place on the Amazon platform?
- Will Amazon self-insure?
- Given the thousands of products sold and the myriad third-party sellers operating on its website, how would holding Amazon liable affect the cost of goods across product lines?
- Could Amazon accurately determine the cost depending on the nature of the product or would insurance be a simple add-on for all goods sold on the Amazon website?
- How frequent are personal-injury harms?
- How many customers have suffered serious harms and, because of the inability to discover the identity of the seller and their solvency, have been left bearing a loss with no responsible defendant to sue?

These are the questions that would be addressed in a forthright duty/no-duty analysis. Whether the internet platform takes title answers none of them.

Addressing these questions forthrightly for Amazon is crucial. For example, if Amazon has a tort duty, the same may be true for Walmart, eBay, and Etsy. Most commentators and courts decide the duty question in a nuanced analysis. It is true that for the most part there are broad limited or no-duty rules for particular transaction types. But product-liability law has

fact-specific duty rules.¹⁶³ In deciding the aforementioned questions, courts will have to work their way through them, and a jurisprudence that confronts these questions is far superior to the nonsensical decisions that predicate liability on whether the online seller has formal title to the product.¹⁶⁴

We believe that Amazon's control over the placement of the products on its website and its relationship with customers through Prime membership is so overwhelming that a duty exists. But, even if this is not the case, the teenager who suffered crippling injuries from a defective hoverboard or the child who was maimed for life after swallowing a dangerous battery deserves a better answer than the courts have given heretofore.

C. Duty and Internet Platforms: A Functional Approach

Amazon is far from the only entity that intermediates consumer sales on the Internet. In this regard, there is a loose typology: (1) direct sellers; (2) flea markets (here, true platforms); and (3) chimeras.¹⁶⁵ As we mentioned in Part IV, some entities sell their own products directly on the Internet: Lands' End, Barnes and Noble, and Amazon itself when it is acting as a direct seller fit into this category. Others appear to make it clear that they are merely facilitating an arms-length transaction between two parties. Auctions on eBay would appear on their face to fall into this category. Etsy might, as well. The metaphor here is that the customer is aware that they are walking into the stall of an independent merchant. Others, Walmart, for example, appear to follow Amazon in playing

¹⁶³ See, e.g., RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 (AM. L. INST. 1998) (liability of sellers for component parts); *id.* § 10 (liability of sellers for post-sale duty to warn).

¹⁶⁴ Amazon.com, Inc. v. McMillan, 625 S.W.3d 101 (Tex. 2021).

¹⁶⁵ In Greek mythology, a chimera was a hybrid creature composed of different animal parts. *Chimera*, DICTIONARY.COM, <https://www.merriam-webster.com/dictionary/chimera> [<https://perma.cc/V7KM-WM6N>].

both the role of direct seller, fulfillment manager, and marketer.

In the attached Appendix, we include several screenshots exemplifying these three types. The first screenshot is from L.L. Bean, which seems to sell only its own goods on its site. The second and third screenshots are from eBay and Etsy. As far as we can determine, eBay and Etsy never sell goods directly to consumers. The fourth and fifth screenshots are from Walmart. Walmart, like Amazon, is a chimera. Sometimes it falls into one category, sometimes the other. We show pages for two different microwave ovens. One is sold directly by Walmart. The other by a third-party. Finally, we show a page from Amazon with the identity of the third-party seller in a red box. Without the box we added, the information would be hard to find, and might be easily missed. With these chimeras, there is much about the way this information is presented that would likely confuse a consumer.

Under current law, there is little confusion about the treatment of internet merchants in the first category (direct sellers). They must stand behind the goods they sell both in warranty and in tort. The difficult question arises in distinguishing the second two categories (true platforms) from the third (chimeras). In our view the answer is functional and relies on a choice of metaphor. To what extent does the platform serve “functionally” as a single storefront selling goods on its own shelves? To what extent is it operating a flea market or bazaar with concessionaires operating, each in their own stall? To what extent does the consumer go to the platform to buy Kleenex, and to what extent does it go to the platform to develop a relationship with the seller of Kleenex?

This functional inquiry, we posit, requires one to ask whether the platform has sufficient control over the sale transaction that it should be held accountable. The answer will determine whether strict product liability should be applied to the platform. As we have discussed, the consistent criterion for vicarious liability is the degree of control exercised over the transaction. When evaluating internet platforms like Amazon, it is essential to consider both sides of the two-sided

relationship. Title only looks at the relationship between the platform and the seller. It does not examine the relationship between the platform and the consumer. In reality, the platform can exercise control over the third-party seller. It can control the relationship between the third-party seller and the customer, and it can control its own relationship with the customer.

While we are not drawing conclusions with regard to particular online merchants other than Amazon, the point is that the devil is in the details; and the key detail is control.¹⁶⁶ Principles of accountability, not formal labels, should determine the answer to the control question. The question of control requires a careful examination of the full scope of the relationship: the extent to which the platform control (1) the information given to the consumer; (2) the transaction, and (3) the seller's access to the consumer. The one thing that is clear is that the formalities of ownership and title have little to do with answering this question.

Conclusion

As we read the opinions, the courts have not understood the functional importance of “control” as creating an accountable relationship in tort. These courts and commentators have not been completely blind to the realities of Amazon's central role in consumer transactions conducted on its website. But, when looking at internet platforms, courts have lacked a holistic understanding of the tort principles that determine whether a party has a duty. Our point is that the inquiry must be functional. What role is the platform serving in the transaction: The platform might in some cases embrace its role as a seller, but where it does not, the courts must look

¹⁶⁶ The FAA example provided *supra* note 133, gives emphasis to our key point: Transaction structure and labels should not be used as tools to escape a regulatory structure. In the case of the FAA, this mean regulating pilots and their airplanes. In the case of product liability, the regime is imposed by the common law of torts.

behind the trappings of the transaction to see who is in control of the relationship—and hence who should be held accountable.

Appendix

Fig. 1 – L.L. Bean

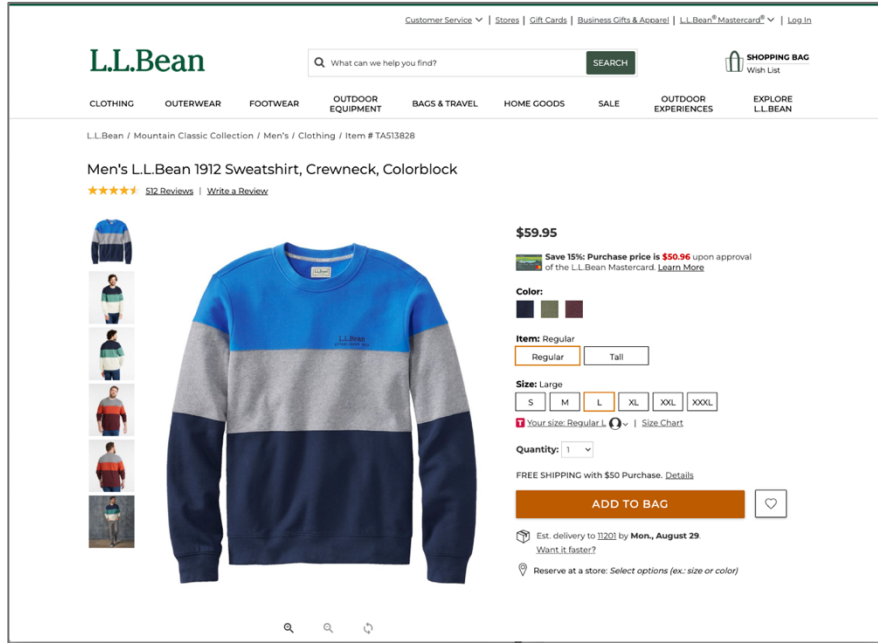


Fig. 2 – eBay

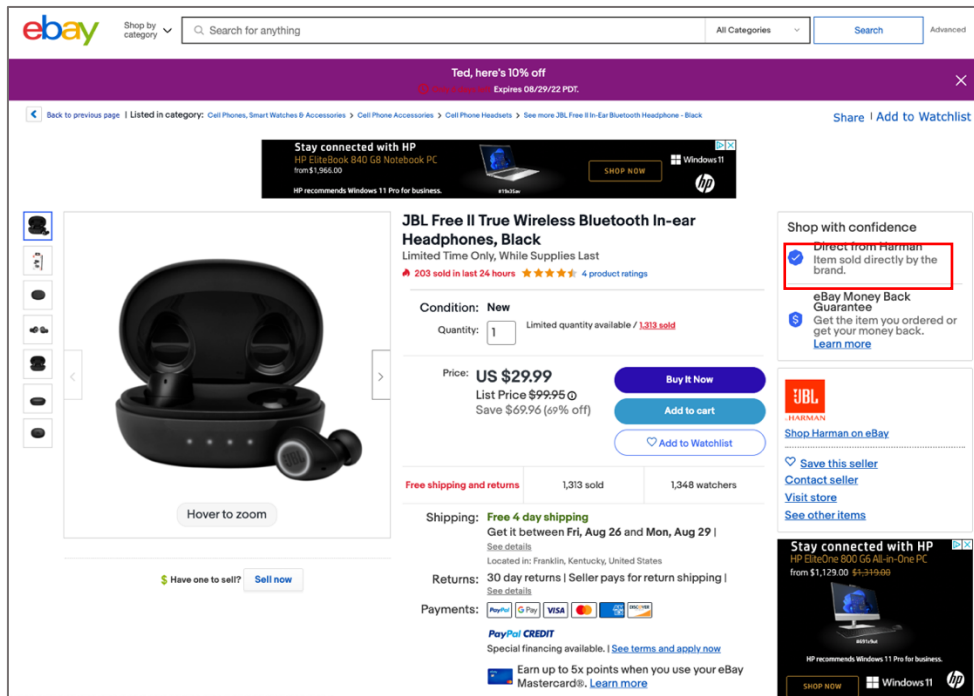


Fig. 3 – Etsy

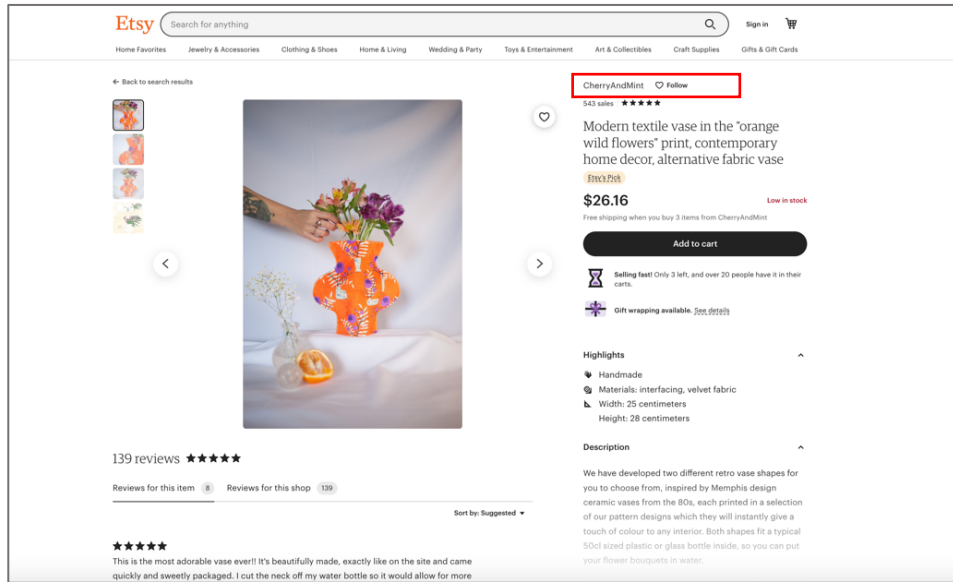


Fig. 4a – Walmart

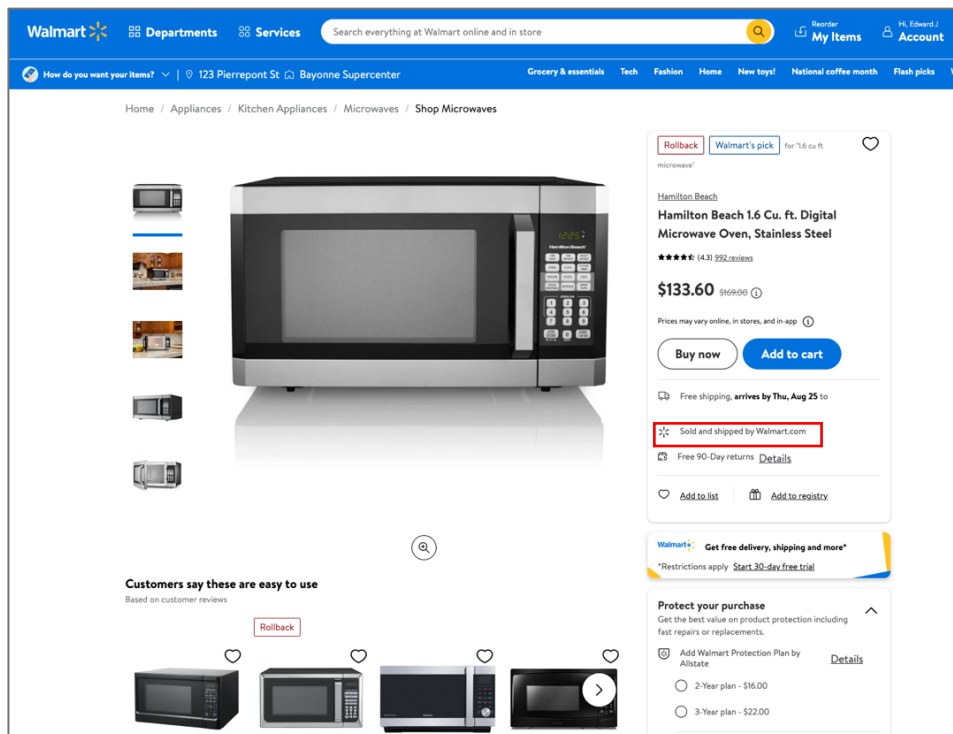


Fig. 4b – Walmart

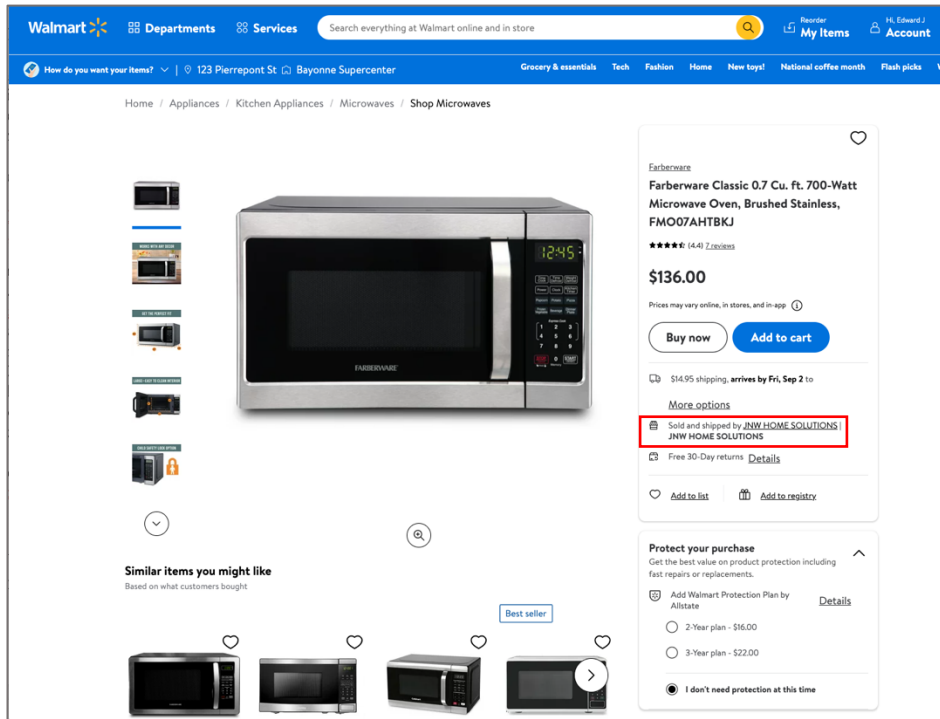


Fig. 5 – Amazon

