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Expect More from The Everything Store

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EXPECT MORE FROM THE EVERYTHING STORE

Ashlyn McCall[†]

Abstract

For years, Amazon, a widely known and popular e-commerce enterprise and online marketplace, has provided consumers with a stress-free, simple approach to online shopping. The company offers customers the option to order products online or on an app and have them delivered directly to their door in no time at all. For years, Amazon has allowed third-party vendors access to its site for marketing and selling products to consumers.

In recent years, instances have arisen where defective products sold on Amazon by third-party vendors have led to the injury of consumers. Often, the third-party vendors are suspicious entities who are challenging to locate and even more difficult to pursue legal recourse against for damages. By arguing that it merely provides a platform for these vendors to market their products to a wider-reaching consumer base, the E-commerce giant argues it is exempt from liability for consumers' injuries since it is not the seller of the product that caused harm.

Recently, a landmark case decided by the Supreme Court of Texas determined that Amazon could not be held liable for a defective product for which it never had or relinquished the title. This Note discusses why Amazon should be considered the "owner" of all products delivered to consumers via Amazon packaging by reviewing persuasive authority from other jurisdictions that found Amazon could be held liable. Additionally, it discusses other potential options for Amazon to pursue to help its customers more clearly identify suspicious vendors before purchasing products that could be defective. This Note ultimately argues that the Supreme Court of Texas set a precedent in the recently decided case of Amazon Incorporated v. McMillan that leaves customers no option for recovery when the third-party vendor is unreachable.

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I. INTRODUCTION

The days of solely relying on retail stores and in-person marketplaces for satisfying consumer demands are long gone. With the ever-increasing capabilities of the internet and the tangible applications it provides, it is no wonder that e-commerce giants, such as Amazon, have experienced record-breaking success.¹ Amazon has developed a reputation for being a simple, relatively painless method of acquiring merchandise, digital streaming content, and much more.² Amazon's website provides users access to an endless array of products.³ However, the primary appeal of this technological company's services seems to be the relative ease and speed at which consumers can order items online and have them delivered right to their doorstep in almost no time at all, sometimes even the day the order was placed. The predictable, quick turnaround from placing an order to finding a package bearing the Amazon logo on consumers' front porches is a testament to Amazon's efficient approach to meeting consumer demands.⁴ But when a widely trusted and utilized company compromises safety for the sake of profit and

1. Shan Li, *Amazon Overtakes Wal-Mart as Biggest Retailer*, LOS ANGELES TIMES: BUSINESS (July 24, 2015, 1:06 PM), <https://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html> [perma.cc/MSQ6-DTD9].

2. Brian Connolly, *Top Amazon Product Categories*, JUNGLE SCOUT (June 10, 2021), <https://www.junglescout.com/blog/amazon-product-categories/> [perma.cc/ZJJ6-86PW].

3. *Id.*

4. Szabolcs Szecsei, *32 Amazing Amazon Statistics Showing Off Its True Power*, CAP. COUNS. (APR. 14, 2022), <https://capitalcounselor.com/amazon-statistics/> [perma.cc/UJ34-U6CU].

efficiency, consumers are likely to suffer the consequences of such lack of oversight.

This problem has increasingly become less of a hypothetical and more of a pressing concern.⁵ There are several recorded instances where harm has occurred, both physical injury and damage to property, in association with the malfunction of a product purchased on Amazon.⁶ One such case is that of the Carpenter family who bought a hoverboard called “ForTech Two Wheels Mini Smart Self Balancing Scooter” from Amazon’s website.⁷ The family left their home with the hoverboard charging on January 19, 2016, only to return to find that the hoverboard had burst into flames during their absence.⁸ Another example of a product defect causing substantial damage involved a man in Wisconsin who purchased a faucet adapter from a third-party seller out of China, which malfunctioned and ultimately resulted in the flooding of his house.⁹ One dangerous case involved a man from Connecticut who purchased a chair that burst into flames.¹⁰ The incident occurred while the Connecticut man lay asleep mere feet from the source of the fire.¹¹ Pointing to a few incidents of defective products does not fully convey the current issue. A search of Amazon’s website using keywords like “fire” or “dangerous” revealed to researchers more than 1,500 reviews of “Amazon Basic” products, with customer reviews pointing to issues of safety and damage to belongings.¹² Though only some of these incidents ended up before a court of law, they all point to a rising issue of products that place consumers’ safety and well-being at risk.¹³

5. Jay Greene, *Burning Laptops and Flooded Homes: Courts Hold Amazon Liable for Faulty Products*, THE WASH. POST: TECH. (Aug. 29, 2020), <https://www.washingtonpost.com/technology/2020/08/29/amazon-product-liability-losses/> [perma.cc/PF68-L69E].

6. *Id.*

7. *Carpenter v. Amazon.com, Inc.*, No. 17-cv-03221-JST, 2017 U.S. Dist. LEXIS 149481, at *2 (N.D. Cal. 2017).

8. *Id.*

9. Greene, *supra* note 5.

10. Blake Ellis & Melanie Hicken, *Dozens of Amazon’s Own Products Have Been Reported as Dangerous – Melting, Exploding or Even Bursting into Flames. Many are Still on the Market*, CNN: BUSINESS (Sept. 10, 2020, 7:55 AM), <https://www.cnn.com/2020/09/10/business/amazonbasics-electronics-fire-safety-invs/index.html> [perma.cc/QGL2-HPJ8].

11. *Id.*

12. Levin Simes Abrams, *What Are Examples of Amazon Product Defects and Injuries?* <https://www.levinsimes.com/practice-areas/drugs-devices-and-products/amazon-product-defect-attorneys/> [https://perma.cc/4UZD-E3RQ].

13. *CPSC Sues Amazon to Force Recall of Hazardous Products Sold on Amazon.com*, U.S. CONSUMER PROD. SAFETY COMM’N (July 14, 2021), <https://www.cpsc.gov/Newsroom/News-Releases/2021/CPSC-Sues-Amazon-to->

Recently, a similar incident occurred in Texas.¹⁴ In March of 2017, Carey Gartner ordered a remote control marketed on Amazon’s website by a third-party vendor.¹⁵ The remote, intended to be a “knock-off” of the widely used Apple TV remote, was listed by a user named “USA shopping 7693” and was based in China.¹⁶

In April of the following year, an incident occurred due to a defect in the product.¹⁷ There is no evidence to suggest Mr. Gartner was aware of this defect at the time of purchase.¹⁸ The battery compartment of this remote was easily removable, exposing a lithium battery inside.¹⁹ The details of this incident involved the purchaser’s nineteen-month-old child quickly opening the compartment and ingesting the battery found inside the remote.²⁰ Despite a frantic rush to the emergency room, where the child received medical attention, the acidic fluid from the battery lodged in her esophagus leaked, resulting in permanent damage to the child’s esophagus.²¹ According to allegations made by the child’s mother, the injuries resulting from the child swallowing the battery have increased the child’s risk for infection and choking.²² After this incident, the child’s mother, Morgan McMillan, contacted Amazon.²³ At that point, Amazon removed the remote control to prevent further sale of the product on its website and suspended Hu Xi Jie, the individual or entity behind the “USA shopping 7693” account.²⁴ After the suspicious vendor was suspended from Amazon, Morgan McMillan filed claims against both Amazon and Hu Xi Jie on behalf of her child to recover from the injuries she sustained from swallowing the battery.²⁵ The decisions reached by courts at different levels in the Texas judicial system and the rationale supporting these decisions are the main focus of this discussion.

This Note will argue that the Texas Supreme Court’s decision to absolve Amazon of liability for defective products marketed on its website,

Force-Recall-of-Hazardous-Products-Sold-on-Amazon-com [perma.cc/L246-UB4P].

14. See *Gartner v. Amazon.Com, Inc.*, 433 F. Supp. 3d 1034 (S.D. Tex. 2020), *rev’d & remanded*, 2 F.4th 525 (5th Cir. 2021).

15. *Id.* at 1037

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1037.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 1038.

with its international reach, sets a dangerous precedent that courts should not follow in subsequent decisions. This Note will also lay out three proposed courses of action to help Amazon value and protect its consumers from defective products in the future and limit its exposure to liability. First, Amazon should put more safeguards in place, such as a process for screening potential vendors and the safety of their products before granting them access to market products on Amazon's website. Second, Amazon should more clearly indicate which products are manufactured by Amazon and which are actually manufactured by third-party vendors. Although this would not deter many individuals from purchasing said items, it would shift some of the risks to consumers who move forward with buying products from unknown, suspicious vendors. Lastly, Amazon and other e-commerce giants should be encouraged to include a prominent agreement absolving Amazon from liability. Consumers would have to agree to sign off on this provision before purchasing items from third-party vendors on Amazon's website. This approach would identify the outside company as the actual "seller" or "owner" of the purchased product and would better safeguard consumers by encouraging them to personally vet the third-party seller more carefully.

Another important consideration is the policy argument behind why prioritizing the safety of consumers is important. Arguably, Amazon should have a heightened duty to protect its loyal consumers. Individuals who elect to purchase items from Amazon's website rely on an implied promise: that they will receive quality products in an efficient amount of time because Amazon is the one who fulfills their requests for said items. Particularly during the COVID-19 era when many people elected to stay at home as much as possible, Amazon has made itself practically essential to many consumers, with the simplicity and ease with which it allows consumers to purchase items and have the items delivered directly to their doorstep. Amazon should implement safety regulations that protect consumers because of the reputation they now enjoy as being a dependable option for consumers to receive quality products.

In conclusion, Amazon should be considered the "owner" and "seller" of all products delivered to consumers via Amazon packaging. Going one step further, Amazon should be held accountable to adhere to stricter regulations when approving third-party vendors to market products using their Fulfillment by Amazon ("FBA") service or at least broadcast the identities of these vendors more clearly on its website.

II. BACKGROUND

A. *History*

Picturing a world without the convenience and sophistication of an online marketplace like Amazon becomes increasingly difficult as the e-commerce giant finds more audiences to reach and more features that make it practically indispensable.²⁶ Amazon was created by founder Jeff Bezos initially as an online bookstore.²⁷ The company, which originated in 1994 in Seattle, Washington, was named after the Amazon River.²⁸ Bezos drew inspiration to create the largest bookstore in the world from the largest river in the world.²⁹ Even though there were already well-established book retailers in existence, Bezos sought to outdo the competition with the goal of providing the most “convenient” option for consumers.³⁰ What originated as a bookstore quickly grew into an online marketplace for other items, initially starting to branch out by including items such as computer games and music in 1998 and quickly expanding to other products.³¹ Today, the website is often described as a “one-stop-shop” and “The Everything Store” with a product selection that provides everything from books to holiday gifts, groceries, technology, and so much more.³²

Amazon launched Amazon Marketplace in 2000, this allowed third parties to sell items on Amazon’s website with the initial goal of being an outlet for consumers to shop for used, rare, and collectible items.³³ This added feature was the beginning of Amazon opening a

26. See Julie Creswell, *How Amazon Steers Shoppers to Its Own Products*, N.Y. TIMES: BUS. (June 23, 2018), <https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html> [perma.cc/D8UM-PRMA].

27. *The Evolution of Amazon: From Bookstore to Superstore*, CHANNELADVISOR (May 4, 2018), <https://www.channeladvisor.com/blog/industry-trends/from-bookstore-to-superstore-the-evolution-of-amazon-com/> [perma.cc/WD25-DETT].

28. *Id.*

29. *A Brief History of Amazon*, PODEAN: AMAZON 101, AMAZON EXPLAINED, <https://www.podean.com/a-brief-history-of-amazon/> (last visited Oct. 16, 2021) [perma.cc/9QAL-5FYC].

30. *History of Amazon: From Garage Startup to the Largest E-Commerce Marketplace*, CAPITALISM.COM: BUS. (Aug. 19, 2020), <https://www.capitalism.com/history-of-amazon/> [perma.cc/Q6KS-V95Y].

31. Christopher McFadden, *A Very Brief History of Amazon: The Everything Store*, INTERESTING ENG’G: CULTURE (Feb. 17, 2021), <https://interestingengineering.com/a-very-brief-history-of-amazon-the-everything-store> [perma.cc/P4RG-9FQJ].

32. *Id.*

33. *Amazon Marketplace a Winner for Customers, Sellers and Industry; New Service Grows Over 200 Percent in First Four Months*, AMAZON: PRESS RELEASE (Mar. 19, 2001, 8:03 AM), <https://press.aboutamazon.com/news-releases/news-release-details/amazon->

window for third-party vendors to market products on its website.³⁴ The opportunity for outside sellers to conduct business the “Amazon Way” only became more appealing in 2006, when Amazon initiated FBA.³⁵ Essentially, FBA is a straightforward service provided to third-party vendors broken down to the approach of “[s]ellers sell, Amazon ships.”³⁶ In practice, sellers pay a fee to send their products to Amazon, knowing that the multinational company will handle all of the logistics.³⁷ From storage of the product in an Amazon warehouse, to processing orders, handling shipping and returns, and providing customer service if there are any issues with the order or product moving forward, FBA allows third-party vendors the opportunity to do things the “Amazon Way.”³⁸ Today, over two million third-party sellers utilize this service worldwide.³⁹ Amazon’s relatively humble beginnings as an online bookstore that sought to provide a convenient resource for consumers has experienced significant growth in the past twenty-seven years.⁴⁰ Consumers view Amazon as a fast and convenient marketplace, giving them an unlimited number of products to peruse and purchase, widely use, and services to rely on.⁴¹ Since Amazon is such an integral part of the world we live in today,⁴² there is a need for reform in its selection

marketplace-winner-customers-sellers-and-industry [perma.cc/L2NT-VXRH].

34. Annie Palmer, *Amazon Says Sellers are Doing Great on Its Marketplace, as Regulators Turn Up the Heat*, CNBC: TECH (Oct. 19, 2021, 8:08 AM) <https://www.cnbc.com/2021/10/19/amazon-touts-small-business-success-amid-third-party-seller-scrutiny.html#:~:text=Amazon%20launched%20the%20third%20party,of%20Amazon's%20overall%20retail%20sales> [perma.cc/3DPM-V89J].

35. Chris Labatt-Simon, *Leveraging Amazon FBA for Your Online Sales Success*, BIGCOMMERCE, <https://www.bigcommerce.com/blog/amazon-fba/#what-is-amazon-fba> [perma.cc/GJ8V-S9KQ].

36. *Id.*

37. Rachel Burns, *Amazon FBA Fees Explained: Understanding Seller Fulfillment Costs*, SHIPBOB (Nov. 2, 2018), <https://www.shipbob.com/blog/amazon-fba-fees/> [perma.cc/S3KE-H6M5].

38. Labatt-Simon, *supra* note 35.

39. *Amazon FBA: The Essential Guide*, ECOMENGINE, <https://www.ecomengine.com/amazon-fba> (last visited Oct. 17, 2021) [perma.cc/XN6F-NL59].

40. Felix Richter, *Amazon’s Incredible Long-Term Growth*, STATISTA: AMAZON (Feb. 4, 2022), <https://www.statista.com/chart/4298/amazons-long-term-growth/> [perma.cc/NJ8B-KXMZ].

41. Dan Berthiaume, *The Top Reason Consumers Shop Amazon is...*, CHAIN STORE AGE (Mar. 9, 2021), [https://chainstoreage.com/survey-top-reason-consumers-shop-amazon#:~:text=According%20to%20the%20second%20annual,easy%20returns%20process%20\(43%25\)](https://chainstoreage.com/survey-top-reason-consumers-shop-amazon#:~:text=According%20to%20the%20second%20annual,easy%20returns%20process%20(43%25)) [perma.cc/P8CH-UEX5].

42. Tonya Garcia, *Amazon Prime Member Total Reaches 142 Million in U.S. with More Shoppers Opting in for a Full Year, Data Shows*, MARKETWATCH: RETAIL/WHOLESALE (Jan. 19, 2021, 11:18 AM), <https://www.marketwatch.com/story/amazon-prime-member-total-reaches-142-million-in-u-s-with-more-shoppers-opting-in-for-a-full-year-data>

process for products it chooses to allow to circulate on its website.⁴³ Arguably, a heightened screening process, or a more apparent distinction between products manufactured by Amazon and those produced by outside vendors, would better protect the population from whom Amazon receives such continual support.⁴⁴

B. Rulings from Other Jurisdictions

Although the Supreme Court of Texas found Amazon was not a “seller” according to the term’s meaning in the Civil Practice & Remedies Code § 82.001, there are other cases in which Amazon has been held accountable for products marketed by third-party sellers.⁴⁵ In a Pennsylvania case, *Oberdorf v. Amazon*, Heather Oberdorf purchased a dog collar from a vendor called “The Furry Gang” on Amazon’s website.⁴⁶ A month after her purchase of the collar, while the plaintiff was walking her dog, the D-ring on the collar broke, and the leash recoiled, hitting Ms. Oberdorf in the eye.⁴⁷ The court ultimately deemed that Amazon could be held liable because Pennsylvania law “does not require an actor to hold title to an item in order to be considered a ‘seller’” to be subject to strict liability law.⁴⁸ After answering the question of whether Amazon could be considered a “seller” under § 402A of the Second Restatement of Torts, the United States Court of Appeals for the Third Circuit remanded the case to decide the ultimate question of whether Amazon should be held responsible for the injuries sustained by the claimant.⁴⁹ On remand, the case settled before a court could reevaluate the issue of the online marketplace’s liability for personal injury damages

shows-11611073132 [perma.cc/FQ6Y-WLT7].

43. Mike Schade and Laurie Valeriano, *Wall Street Journal Exposé Demands Amazon Take More Action on Harmful Chemicals*, SAFER CHEMICALS HEALTHY FAMILIES (Aug. 23, 2019), <https://saferchemicals.org/2019/08/23/wall-street-journal-expose-demands-amazon-take-more-action-on-harmful-chemicals/> [perma.cc/7ANP-5MJP].

44. Reuters Staff, *Amazon Tests Screening New Merchants for Fraud Via Video Calls in Pandemic*, REUTERS: TECH. NEWS (Apr. 26, 2020, 7:08 PM), <https://www.reuters.com/article/us-amazon-com-counterfeit/amazon-tests-screening-new-merchants-for-fraud-via-video-calls-in-pandemic-idUSKCN229001> [perma.cc/2TVH-EBJ4].

45. Annie Palmer, *California Court Rules Amazon can be Liable for Defective Goods Sold on its Marketplace*, CNBC: TECH (Aug. 14, 2020, 4:11 PM), <https://www.cnbc.com/2020/08/13/amazon-can-be-held-liable-for-faulty-goods-court-rules.html> [perma.cc/FF99-U7BJ].

46. *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 144–46 (3d Cir. 2019), *reh’g en banc granted*, *opinion vacated*, 936 F.3d 182 (3d Cir. 2019).

47. *Id.*

48. *Id.* at 150.

49. *Id.* at 153–54.

resulting from defective products.⁵⁰ Amazon's willingness to settle the case rather than allowing the issue to be reheard before a court of law could indicate that Amazon recognized a potential to be held accountable for the faulty product. Although Amazon was not officially held responsible for the injuries that resulted from the faulty collar, the Pennsylvania courts showed that this result could occur.⁵¹

Another instance in which a court determined that Amazon could be held responsible for defective products circulated on their website took place in California. The consumer turned claimant, Angela Bolger, purchased a replacement battery on Amazon's website from a seller known as "E-Life."⁵² The third-party vendor who posted the battery on Amazon's website was Lenoge Technology, a manufacturer who used a fictitious name.⁵³ Ultimately, Bolger, the claimant, alleged that the replacement battery's explosion resulted in her experiencing third-degree burns on her arms, legs, feet, clothes, and even damaged the floor of her apartment.⁵⁴ On appeal from a summary judgment in Amazon's favor, the court determined that the company was an "integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products."⁵⁵ While the Texas Supreme Court decided against recognizing Amazon as a "seller" for purposes of strict liability, other courts have reached the opposite conclusion to promote consumer safety.⁵⁶

Looking to the models of other countries can provide further insight into the best ways to promote consumer safety. The European Union ("EU"), for example, has consumer protection rules set in place.⁵⁷ One of these rules provides that the sellers of a product must offer a two-year

50. Stephanie A. Sheridan, Meegan Brooks, & Amanda C. Schwartz, *Recent Losing Streak for Online Marketplaces Signals Developing Liability Trend*, STEPTOE, (Sept. 2, 2021), <https://www.steptoel.com/en/news-publications/recent-losing-streak-for-online-marketplaces-signals-developing-liability-trend.html> [perma.cc/37A2-LTPQ].

51. Brendan Pierson, *Amazon Can be Held Liable for Third-Party Seller Products: U.S. Appeals Court*, REUTERS: RETAIL (July 3, 2019, 12:29 PM), <https://www.reuters.com/article/us-amazon-com-liability/amazon-can-be-held-liable-for-third-party-seller-products-u-s-appeals-court-idUSKCN1TY2HM> [perma.cc/TR6F-CSC3].

52. *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 437 (2020).

53. *Id.*

54. Greene, *supra* note 5.

55. *Bolger*, 53 Cal. App. 5th at 453.

56. *Id.* at 449–50.

57. *Europe Tax and Regulatory Considerations*, AMAZON SELLER CENT., https://sellercentral.amazon.com/gp/help/external/G201468410?language=en_US#:~:text=Under%20EU%20consumer%20protection%20rules,or%20reimburse%20a%20defective%20product (last visited Oct. 17, 2021) [perma.cc/CD8B-HYKY].

Legal Warranty when selling products to consumers in any country that belongs to the EU.⁵⁸

III. AMAZON SHOULD BE CONSIDERED THE SELLER

When the Texas Supreme Court found that Amazon could not be liable for the products liability claims brought by a mother on behalf of her child who ingested a battery, the Court set a precedent that makes it increasingly difficult for consumers to recover for injuries to their person or property if third-party vendors are unknown or unreachable.⁵⁹ The case originated in the United States District Court for the Southern District of Texas when Morgan McMillan brought suit as next friend for her minor child.⁶⁰ McMillan brought five causes of action against the online marketplace, including “(1) strict liability for design defect; (2) strict liability for marketing defect; (3) breach of implied warranty; (4) negligence; and (5) gross negligence.”⁶¹ The plaintiff also sought to bring strict liability claims against Hu Xi Jie for design defects and implied warranty breach.⁶² Despite properly serving Hu Xi Jie through the Texas Secretary of State, the individual or entity failed to appear.⁶³ Since the plaintiff properly actuated service of process on Hu Xi Jie, the burden shifted to Amazon to secure personal jurisdiction over the Chinese individual. Amazon was unable to locate Hu Xi Jie and, as a result, could not acquire personal jurisdiction over the appropriate defendant.⁶⁴ This failure to obtain jurisdiction over the international manufacturer of the defective product left the plaintiff with limited means of potential recovery.⁶⁵ At this point, the feasible means of recovery for the plaintiff was through the entity whose marketplace she went to for the product—Amazon.⁶⁶

Once the court determined it would not likely acquire jurisdiction over Hu Xi Jie, the plaintiff amended her complaints.⁶⁷ The plaintiff added an allegation that Amazon should be held liable for a failure to “place any warning on the Web page where the remote was being

58. *Id.*

59. *See Gartner v. Amazon.com, Inc.*, 433 F. Supp. 3d 1034, 1037 (S.D. Tex. 2020), *rev'd and remanded*, 2 F.4th 525 (5th Cir. 2021).

60. *Id.* at 1036.

61. *Id.* at 1038.

62. *Id.*

63. *Id.*

64. *See id.* at 1040.

65. *Id.* at 1040.

66. *Id.*

67. *Id.* at 1038.

sold.”⁶⁸ Ultimately, the district court determined that Amazon could be recognized as a “seller” of the remote for strict liability purposes, relying on an exception to Texas law.⁶⁹ Generally, a nonmanufacturing seller cannot be found liable for harm caused by a product unless an exception applies.⁷⁰ One such exception designates that a nonmanufacturing seller can be found liable if the manufacturer of the product “is not subject to the jurisdiction of the court.”⁷¹ Both the Restatement (Second) of Torts § 402A and Tex. Civ. Prac. & Rem. Code § 82.001(2) contain broad definitions of what qualifies as a “seller.” The Restatement (Second) of Torts § 402A provides that strict product liability “applies to any person engaged in the business of selling a product for consumption,”⁷² which applies to individuals serving many different roles in the transactional process. On the other hand, the Tex. Civ. Prac. & Rem. Code § 82.001(2), states that “introducing the product in the stream of commerce is enough.”⁷³ Based on the exception and these two definitions, the court determined that Amazon could be recognized as the remote seller, because it participated in the transaction as a service provider, placing the product into the “stream of commerce.”⁷⁴ Amazon’s motion for summary judgment was partially granted in relation to the amended complaint.⁷⁵ The basis for this decision was the understanding that Amazon was not required to monitor information third-party vendors provided or failed to provide on its website.⁷⁶ Under the Communications Decency Act, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁷⁷ This determination prevented the plaintiff from recovering any damages from Amazon based on its alleged failure to regulate its website.⁷⁸ However, all other claims successfully survived Amazon’s motion for summary judgment.⁷⁹

On appeal, the Fifth Circuit Court of Appeals directly relayed a certified question to the Supreme Court because it determined no Supreme

68. *Id.* at 1045.

69. *Id.* at 1044.

70. TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a) (West).

71. *Id.* § 82.003(a)(7)(b).

72. *Gartner*, 433 F. Supp. 3d at 1040.

73. *Id.* at 1041.

74. *Id.* at 1043.

75. *Id.* at 1045.

76. *Id.*

77. 47 U.S.C. § 230(c)(1).

78. *Gartner*, 433 F. Supp. 3d at 1045.

79. *Id.* at 1044.

Court precedent could help the Fifth Circuit arrive at a decision.⁸⁰ The question presented before the highest court of authority in the State of Texas asked “under Texas Product-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 and delivery through Amazon’s Fulfillment by Amazon program?”⁸¹

When the issue reached the Supreme Court of Texas, the Court reviewed the question of law *de novo*.⁸² The Court narrowed its analysis by framing the question in terms of the particular issue at hand, only answering the question in terms of a transaction involving third-party sales on Amazon.com through FBA.⁸³ Ultimately, the Texas Supreme Court held that Amazon could not be held liable for the defective product because “when a product-related injury arises from a transaction involving a sale, sellers are those who have relinquished title to the allegedly defective product at some point in the chain of distribution.”⁸⁴ The Court decided that, as a rule, a person could be held liable despite not transferring title in a strict liability case when there is a non-sale commercial transaction.⁸⁵

The Supreme Court of Texas determined that to find Amazon a “seller” under Texas law, the company would have had to have made the “ultimate sale” of the defective product, or it would have had to relinquish title at some point in the distribution chain.⁸⁶ Ultimately, the Court determined that “Amazon [was] not a seller even though it controlled the process of the transaction and the delivery of the product.”⁸⁷ In this case, the Court relied on its ability to exclude Amazon from the umbrella of who qualifies as a seller for purposes of Civil Practice and Remedies

80. *McMillan v. Amazon.com*, 983 F.3d 194, 202 (5th Cir. 2020).

81. *Id.* at 203.

82. *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 106 (Tex. 2021).

83. *Id.* FBA is a service offered to third-party vendors that allows them to send their products to Amazon, then package and ship the sold items to consumers. The company goes so far as to promise it will provide customer service for these products manufactured by third-party vendors. (sell.amazon.com/fulfillment-by-amazon) [perma.cc/9DLB-MWBU].

84. *Id.* at 111.

85. *Id.* Non-sale commercial transactions can involve “barter, exchanges, counter-purchases, and compensation deals.” Philip Yale Simons, “Non-Sale” Transactions and The Antidumping Laws of the United States, 35 THE BUSINESS LAWYER, No. 4, 1611 (July 1980), <https://www.jstor.org/stable/40686170> [perma.cc/AM3U-SQQB]. Another example of a Non-sale activity involves the solicitation of potential customers. *Rearden LLC v. Rearden Com., Inc.*, 683 F.3d 1190, 1205 (9th Cir. 2012).

86. *Amazon.com, Inc.*, 625 S.W.3d at 112.

87. *Id.*

Code § 82.001.⁸⁸ In looking to persuasive authority from decisions reached by other jurisdictions, there is an argument to be made that Amazon was integrally involved throughout the entire transactional process of the defective product, from promoting, to purchasing, and eventually in distributing the remote to McMillan and her family. Because delivery of the remote would not have been achieved without Amazon's role in providing the marketplace and supplying the product from the manufacturer to the consumer, the company was sufficiently involved enough to be held liable for injuries sustained from the child swallowing batteries from a defective product.⁸⁹

A. How the Court Should Have Ruled

After reviewing the discrepancies in the arguments from courts of different jurisdictions, the Supreme Court of Texas should have found that Amazon could be considered a “seller” for purposes of strict product liability.⁹⁰ The primary basis for this argument is the extent to which Amazon inserted itself as an intermediary between the manufacturer and the buyer.⁹¹ Looking to the court's rationale in *Bolger v. Amazon.com, LLC* as persuasive authority, the Texas Supreme Court should have looked at how Amazon directly placed itself between the plaintiff and the third-party vendor throughout the transaction.⁹² Whether the Court determined Amazon to have been a “seller” of the defective remote controller, the online marketplace undoubtedly played a pivotal role in the product's being delivered on the doorstep of the plaintiff.⁹³ As in this case, where the third-party vendor is an unknown, unreachable defendant, Amazon, as the entity seeking to bring these two parties together to profit from their transaction, should not escape liability in such cases where the plaintiff has no other means of recovery.⁹⁴

As a case decided on strict liability principles, the Court arguably should have focused on the reasons behind the development of strict liability. The doctrine “derives from judicially perceived public policy

88. TEX. CIV. PRAC. & REM. CODE ANN. § 82.001 (West).

89. See Katie Schoolov, *Amazon is Now Shipping Cargo for Outside Customers in its Latest Move to Compete with FedEx*, CNBC: TECH (Sept. 4, 2021, 9:00 AM), <https://www.cnbc.com/2021/09/04/how-amazon-is-shipping-for-third-parties-to-compete-with-fedex-and-ups.html> [perma.cc/M5K8-TP8H].

90. CIV. PRAC. & REM. § 82.001 (West).

91. *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 149 (3d Cir.), *reh'g en banc granted, opinion vacated*, 936 F.3d 182 (3d Cir. 2019).

92. *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 438 (2020).

93. *Id.*

94. Pierson, *supra* note 51.

considerations, i.e., enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among the defendants.”⁹⁵ Although policy arguments are not the only consideration in deciding the merits of a case, as the Third Circuit in *Oberdorf* noted, being a marketplace operator was a factor weighing against Amazon, and the “imposition of strict liability upon operator would serve as an incentive to safety, as [a] factor weighing in favor of finding that operator was a seller.”⁹⁶ Although there are other arguments to consider in determining whether Amazon can be held liable as the seller of a defective product, noting the purpose behind why strict products liability claims are available to aggrieved parties is an important consideration to frame a subsequent discussion.

In examining the extent to which Amazon inserts itself in transactions between the third-party vendor and the consumer, “Amazon not only accepts orders and arranges for product shipments, but it also exerts substantial market control over product sales by restricting product pricing, customer service, and communications with customers.”⁹⁷ FBA allows third-party vendors to send their products to an Amazon warehouse to be stored there until a customer purchases the product.⁹⁸ Once the item is purchased from Amazon.com, the product manufactured by a third party is retrieved by Amazon workers from the storage warehouse where it was stored, and then is shipped and delivered to the customer by FBA.⁹⁹ Interestingly, the FBA service allows products to be stored by Amazon in one of its warehouse locations before consumers even purchase the product.¹⁰⁰ This level of involvement signifies that Amazon is integrally a part of the transaction and interaction between the product manufacturer and the consumer from start to finish.

Another way of looking at the problem of whether Amazon should be held strictly liable for damages to consumers is by making an analogy to transactions involving a car salesman.¹⁰¹ When individuals venture to a car dealership seeking to purchase a new or used automobile, they rely

95. *Bolger*, 53 Cal. App. 5th at 449.

96. *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 144–46 (3d Cir. 2019) (internal citations omitted), *reh’g en banc granted*, *opinion vacated*, 936 F.3d 182 (3d Cir. 2019).

97. *Id.* at 149.

98. Seamus Breslin, *How Does Amazon FBA Work in 2022? (Fullfillment by Amazon)*, REPRICER EXPRESS, <https://www.repricerexpress.com/how-does-amazon-fba-work/> [perma.cc/FGW2-3ZB9].

99. *Id.*

100. *Id.*

101. *Buying a New or Used Car*, KEN PAXTON: ATTORNEY GENERAL OF TEXAS, <https://www.texasattorneygeneral.gov/consumer-protection/automotive-scams/buying-new-or-used-car> (last visited Feb. 28, 2022) [perma.cc/V8VY-3758].

on the assurances of the car salesman rather than the manufacturer of the vehicle itself.¹⁰² When the car purchaser drives off the lot, even if they tested the car out themselves, the purchaser starts the vehicle and proceeds to drive it onto a trafficked road relying on the car salesman's implied promise that this vehicle will perform the way it was designed.¹⁰³ In *Long v. Yingling*, the court recognized the duty an automobile salesman possesses to consumers and the general public not to sell a defective car or a car which he should have known was defective.¹⁰⁴ To hold a seller liable for a defective product in tort theory requires proof of four elements:

(1) the seller was engaged in the business of selling the product that caused the harm; (2) the product was sold in a defective condition unreasonably dangerous to the consumer or user; (3) the product was one which the seller expected to and did reach the plaintiff consumer or user without any substantial change from the condition in which it was sold; and (4) the defect was a direct and proximate cause of the plaintiff's injuries.¹⁰⁵

In the case of a car salesman, although the seller of the vehicle did not manufacture the automobile, the salesman may still be held liable for injuries sustained by the purchaser if the above factors are satisfied.¹⁰⁶ In the same way, although Amazon does not manufacture the majority of products marketed on its website, consumers rely on the assurance that products listed and manufactured by third-party companies have the support and consent of Amazon to be delivered to consumers using Amazon's services.¹⁰⁷ Accordingly, Amazon operates in much the same way as an automobile salesman, vouching for the quality of products made available to consumers in the same way a car salesman guarantees that the cars on his lot will function the way they were designed.¹⁰⁸

IV. PROPOSED PLANS MOVING FORWARD

In reviewing the discrepancy between decisions reached by courts from other jurisdictions and the verdict issued by the Texas Supreme

102. *Id.*

103. *Id.*

104. *Long v. Yingling*, 700 A.2d 508, 515 (Pa. Super. Ct. 1997).

105. Restatement (Second) of Torts § 402A (1965).

106. *Long*, 700 A.2d at 515.

107. Daniela Coppola, *Amazon Third-Party Seller Share 2007-2021*, STATISTA: E-COMMERCE (Nov. 10, 2021), <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/> [perma.cc/NX5L-K565].

108. *Buying a New or Used Car*, *supra* note 101.

Court, it is important to discuss a plan of action for reconciling this division.¹⁰⁹ Additionally, implementing new policies and procedures to screen third-party vendors and promote supplies of safe products could aid e-Commerce giants, such as Amazon, to continue putting “the customer at the center of everything they do.”¹¹⁰

A. Regulations

One potential approach the “Everything Store” should consider to reduce damage caused by defective products is to put safeguards in place that require Amazon to be more selective in the vendors it allows to advertise products on its website.¹¹¹ Amazon could also consider thoroughly vetting products for safety compliance before problems arise. According to the website Amazon Seller Central, vendors who list products on Amazon’s website “must comply with all federal, state, and local laws, as well as [Amazon’s] policies applicable to those products and product listings, including this policy.”¹¹² The policy also designates that the testing of the product must be completed and documented by a third-party testing laboratory.¹¹³ The requirements are even stricter for products marketed for children, which must be tested by a Consumer Products Safety Regulation-accepted testing laboratory specifically authorized to perform testing of this type.¹¹⁴ Although Amazon has proactively made an effort to safeguard consumers by requiring that someone test the safety of products before they are marketed on its website, requiring documentation does not ensure that the protocol detailed in the policies was adhered to by the third-party vendors.¹¹⁵

By acting as an intermediary between the third-party vendor and the consumer, Amazon is in a unique position to “use its power as a gatekeeper between an upstream supplier and the consumer to exert

109. Reuters Staff, *supra* note 44.

110. Amazon CEO Jeff Bezos Highlights the Customer-Centric Retail Strategy, POWER REVIEWS, <https://www.powerreviews.com/blog/amazon-customer-centric-strategy/> [perma.cc/W42B-658H].

111. Bloomberg News, *Walmart Becomes More Selective About Who Sells on Its Marketplace*, DIGITAL COMMERCE 360 (Apr. 10, 2018), <https://www.digitalcommerce360.com/2018/04/10/walmart-becomes-more-selective-about-who-sells-on-its-marketplace/> [perma.cc/7CA2-5N5Z].

112. Consumer Product Safety Commission (CPSC) Regulated Products, AMAZON SELLER CENTRAL, <https://sellercentral.amazon.com/gp/help/external/KHQEFBM7834V6AV> (last visited Feb. 28, 2022) [perma.cc/CX9F-XB68].

113. *Id.*

114. *Id.*

115. See Amazon.com, Inc., Annual Report (Form 10-K) 8, 11 (Feb. 4, 2022).

pressure on those upstream suppliers (here, third-party sellers) to enhance safety.”¹¹⁶ Unfortunately, trusting that vendors have independently taken the necessary precautions to assess the safety of their products does not guarantee a thorough test was conducted.¹¹⁷ In 2019, individuals operating on behalf of CBS News purchased four products sold on Amazon’s website by third-party sellers and had the products tested at an accredited lab to see if they would pass inspection.¹¹⁸ All four children’s toys failed safety tests.¹¹⁹ When CBS attempted to reach out to the companies who had signed off on these toys being properly tested, CBS was informed by one of the companies that “its product meets ‘safety standards’ and passed U.S. safety tests from a lab in China, but it did not test for all of the defects” identified by the lab enlisted by CBS.¹²⁰ During a deposition in anticipation of the *Bolger* trial, an individual associated with Amazon stated:

When a third-party seller signs up to sell on the platform, they have to agree to the [BSA], which contains very clear language that says they have to sell products that meet all the compliance requirements for the jurisdictions that they’re going to be selling the product in. Once products are being sold, we have a robust and active process to monitor for any customer complaints that come in.¹²¹

Although the representative of Amazon indicated that the company’s monitoring process is an “ongoing” process and that it keeps track of potential issues “every single day for every single product” on the website, there might be an incentive to get ahead of the issue before it presents itself.¹²² Rather than taking a reactionary approach to safety concerns as they arise, Amazon could avoid the risk of future product liability lawsuits by playing a more active role in vetting products listed on its website.¹²³ While Amazon does have a provision about “Other Businesses” in its conditions of use which specifies that if consumers

116. *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 454 (2020), *review denied* (Nov. 18, 2020).

117. See *Amazon.com, Inc.*, *supra* note 115.

118. *Some Toys Sold Online Don’t Meet U.S. Safety Standards: “Our Children Should Not be the Testing Grounds,”* CBS NEWS, (Dec. 19, 2019, 9:57 AM), <https://www.cbsnews.com/news/online-shopping-toys-sold-on-amazon-may-not-meet-us-safety-standards/> [perma.cc/QNJ3-3T4E].

119. *Id.*

120. *Id.*

121. *Bolger*, 53 Cal. App. 5th at 433.

122. *Id.*

123. *About Product Safety at Amazon*, AMAZON: HELP & CUSTOMER SERVICE, sellercentral.amazon.com/gp/help/external/GUH6FA4XSJ2LZFLY?ref=efph_GUH6FA4XSJ2LZFLY_cont_521&language=en-US (last visited Feb. 28, 2022) [perma.cc/5V6C-45NL].

“purchase any of the products or services offered by these businesses or individuals, you are purchasing directly from those third parties, not from Amazon.”¹²⁴ However, this provision is not highly effective because it is buried in a means of communication that consumers often ignore.¹²⁵

B. *More Clear Identification of Third Parties*

Another suggestion, seemingly simple but could prove effective, would be for Amazon to clearly indicate which products are manufactured by Amazon versus third-party vendors. Amazon is the only connection between the vendor and access to the United States for many third-party vendors.¹²⁶ Without Amazon, the international vendor would not be able to feasibly market and supply products to consumers in America.¹²⁷ Currently, the only signal to consumers that Amazon does not manufacture the listed item is a “sold by” designation included with the other product information while first viewing a product and then again at checkout.¹²⁸ Even if courts moving forward conclude that Amazon cannot be the “seller” for product liability purposes, Amazon should try to get out in front of consumer complaints to try and prevent them. One way Amazon can get in front of disgruntled consumers continuing to bring lawsuits would be to include a simple terms of agreement pop-up that the consumer would sign off on before the transaction could take place. This suggestion provides clarity in making certain that Amazon itself cannot be identified as the seller of the item.¹²⁹ Instead, the entity that manufactured and is selling the product is the third-party vendor and, for legal purposes, should be held accountable as the products’ seller. Accordingly, Amazon, as a mere forum of commerce, would not be held accountable for guaranteeing the safety of the product.¹³⁰

124. *Conditions of Use*, AMAZON: HELP & CUSTOMER SERVICE, <https://www.amazon.com/gp/help/customer/display.html?no-deld=GLSBYFE9MGKKQXXM> (last visited Feb. 28, 2022) [perma.cc/T7JP-SNRG].

125. *See id.*

126. *See* John Hermann, *The Great Amazon Flip-a-Thon*, N.Y. TIMES: STYLE (Oct. 28, 2021), <https://www.nytimes.com/2021/03/17/style/amazon-brand-flippers.html> [perma.cc/X4BE-CS4Q].

127. *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 972 (W.D. Wis. 2019).

128. Ben J Edwards, *How to Tell If You’re Buying from a Third-Party Seller on Amazon*, HOW-TO GEEK (Nov. 3, 2008, 08:00 AM), <https://www.howtogeek.com/695896/how-to-tell-if-youre-buying-from-a-third-party-seller-on-amazon/> [perma.cc/FX5J-VZFF].

129. *Id.*

130. James Bikoff, *Supporting Liability for Online Marketplaces that Allow Third-Party Sellers to Offer Defective and or Counterfeit Products*, SMITH GAMBRELL RUSSELL (May 24, 2021), <https://www.jdsupra.com/legalnews/supporting-liability-for-online-3180683/>

V. POLICY ARGUMENT

Amazon's success as a company is contingent on the continual support of customers who genuinely believe they benefit from participating in virtual commercial transactions on Amazon's website.¹³¹ Amazon should find ways to implement the proposed changes into its company's framework because of the benefits the company has enjoyed from having a loyal following of shoppers who rely on Amazon to supply them with essential goods and services.¹³²

A. Implied Promise

People have become accustomed to seeing an Amazon delivery vehicle drive down their street with the same frequency as a UPS delivery van, a FedEx vehicle, or even the mailman.¹³³ When an item listed by a third-party seller is purchased off of Amazon.com, the package arrives on the buyer's doorstep with the Amazon logo displayed.¹³⁴ Jeff Bezos, the founder and Executive Chairman of Amazon himself, has been quoted saying that "brand names are more important online than they are in the physical world," indicating that he understands the power and significance associated with the brand he has created in Amazon.¹³⁵ Although in a perfect world, all consumers would be thorough in analyzing the risks of purchasing products from the internet and would test products themselves for safety upon purchase, there will always be a natural tendency to rely on the assertions of a well-known and respected brand name, such as Amazon.¹³⁶ One case based in Texas, *Galindo v. Precision American Corporation*, addresses the need to look at conclusions based on the seller's conduct:

[<https://perma.cc/4ZS2-693N>].

131. See generally Grace Baldwin, *The Strategies Behind Amazon's Success*, PRICE POINTS: TECHNOLOGY (Mar. 9, 2020), <https://www.omniaretail.com/blog/the-strategies-behind-amazons-success> [perma.cc/75JN-6HQH].

132. See *Customer Loyalty of Amazon*, <http://hig.diva-portal.org/smash/get/diva2:561578/FULLTEXT01.pdf> [perma.cc/55CR-HND9].

133. See Szecsei, *supra* note 4.

134. See *Interactive: Unpack Your Label*, <https://www.aboutamazon.com/news/interactive-unpack-your-label>, (last visited Feb. 28, 2022) [perma.cc/5DM6-Y5BJ].

135. Bill Murphy Jr., *'Follow the Money' and Other Lessons from Jeff Bezos*, INC., (Aug. 6, 2013), <https://www.inc.com/bill-murphy-jr/follow-the-money-lessons-from-jeff-bezos.html> [perma.cc/VV9C-5DYQ].

136. See Shawn Westlund, *Delivering on a Promise of Safety*, DETROIT FREE PRESS (Oct. 5, 2020), <https://www.freep.com/story/sponsor-story/amazon-prime/2020/10/05/delivering-promise-safety/3593784001/> [perma.cc/32D8-SJSV].

whether the seller's conduct would justify a conclusion that (1) he has undertaken a special responsibility for product safety; (2) the public has a right to expect that he will stand behind the product; and (3) as between the consumer and the seller, it is equitable to impose upon the seller the loss caused by the product and the burden of spreading that loss as a cost of doing business.¹³⁷

Arguably, Amazon comfortably fits all three of these criteria. In assessing the first, that Amazon has taken on the responsibility of its products, Amazon seeks to incentivize third-party sellers to comply with safety guidelines to "increase [their] chances of succeeding as a seller on Amazon" and to help them "avoid practices that could lead to blocked listings."¹³⁸ The focus of this approach seems to prioritize assisting third-party sellers to maintain their ability to continue circulating products on Amazon versus warning or addressing the need to comply in order to first and foremost protect consumers. Amazon does require that products falling under certain categories go through an approval process, such as jewelry, movies, and postage stamps, but the approval of these items does not seem to necessarily pertain to safety.¹³⁹ For the most part, Amazon's product safety regulation seems to be more responsive than proactive.¹⁴⁰ According to its website, Amazon has a team dedicated to product safety that "investigates and acts on reported safety complaints and incidents."¹⁴¹ This Product Safety Team monitors products on its website and will remove the product from Amazon.com in concerning cases.¹⁴² This "wait and see" technique for regulating products that are already made available to the general public requires consumers to be the ones who test and report back on product safety, without their knowledge that they are serving in this "guinea pig" role. In the case of "dangerous items," such as batteries, Amazon informs sellers that they may be required to provide Amazon with a safety data sheet or exemption sheet.¹⁴³ These documents provide detailed safety

137. Galindo v. Precision Am. Corp., 754 F.2d 1212, 1221 (5th Cir. 1985).

138. *Product Safety and Compliance*, AMAZON SELLER CENTRAL, https://sellercentral.amazon.com/gp/help/external/GUH6FA4XSJ2LZFLY?language=en_US&ref=efph_GUH6FA4XSJ2LZFLY_cont_521, (last visited Feb. 28, 2022) [perma.cc/BBJ4-2BTR].

139. Omar Deryan, *How to Get Approval for Restricted Products on Amazon: The Ultimate Guide*, OJ DIGITAL SOLUTIONS, <https://ojdigitalsolutions.com/how-to-get-approval-for-restricted-products-on-amazon/> [https://perma.cc/XN9D-KRG3].

140. *Product Safety and Compliance*, *supra* note 138.

141. *Product Safety and Recalls*, AMAZON: HELP & CUSTOMER SERVICE, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GLD7VXFKV4AWU78X> [https://perma.cc/N3GV-7MUU].

142. *Id.*

143. *Product Safety and Compliance*, *supra* note 138.

information related to “the physical and chemical properties, physical and health hazards, routes of exposure, precautions for safe handling and use, emergency and first aid procedures, and control measures of a product.”¹⁴⁴ If an item is going to require such a detailed list of how to safely handle and use it, waiting until after a listing is posted on such a widespread marketplace seems to contradict Amazon’s promise that “customer safety is of paramount importance to Amazon.”¹⁴⁵ If safety truly were the focus and goal of Amazon, it would ensure products comply with safety regulations before these items were listed on its website.

Second, the public has justifiably built up this expectation that Amazon will back all of its products, not just the ones manufactured by Amazon itself. The CEO of Amazon’s worldwide consumer business, has stated that the company is expected to overtake shipping competitors in being the largest U.S. package delivery service.¹⁴⁶ In 2020, over four billion Amazon packages were delivered in the United States alone.¹⁴⁷ Amazon’s capacity to deliver packages to consumers has greatly increased since it launched Amazon Logistics in late 2014.¹⁴⁸ Amazon can now rival and match the parcel volume capabilities of its delivery rivals, such as USPS, UPS, and FedEx.¹⁴⁹ Accordingly, consumers are seeing the Amazon logo on their front doorstep as often as, if not more than, the logos of other delivery services. What distinguishes Amazon from delivery competitors, however, is that while the U.S. Postal Service and FedEx merely deliver packages purchased on external websites, the products delivered by Amazon are also purchased on Amazon. Thus, when individuals receive packages from Amazon, they recognize them as Amazon

144. *Safety Data Sheet*, Amazon Seller Central, <https://sellercentral.amazon.co.uk/gp/help/external/5G6BBSA6FZQP9CP> [perma.cc/SD5H-J5GE].

145. *Product Safety and Compliance*, *supra* note 138.

146. Annie Palmer, *Amazon Poised to Pass UPS and FedEx to Become Largest U.S. Delivery Service by Early 2022, Exec Says*, CNBC: TECH (Nov. 29, 2021, 10:07 AM), <https://www.cnbc.com/2021/11/29/amazon-on-track-to-be-largest-us-delivery-service-by-2022-exec-says.html> [perma.cc/PEJ3-NAG5].

147. E. Mazareanu, *Packages Delivered by Amazon Logistics in the U.S. 2018-2020*, STATISTA: LOGISTICS (Oct. 1, 2021), <https://www.statista.com/statistics/1178979/amazon-logistics-package-volume-united-states/> [perma.cc/8LDM-AZQN].

148. Andria Cheng, *Amazon Ships 2.5 Billion Packages A Year, With Billions More Coming, In a Major Threat to UPS and FedEx*, FORBES (Dec. 12, 2019, 6:36 PM), <https://www.forbes.com/sites/andriacheng/2019/12/12/how-serious-is-amazons-threat-to-ups-fedex-study-finds-it-could-soon-beat-them-in-us-package-delivery-volume/?sh=706f83ad68f4> [perma.cc/FH23-MT62].

149. Max Garland, *Amazon Logistics Now Ships More US Parcels Than FedEx: Pitney Bowes*, SUPPLY CHAIN DIVE: DIVE BRIEF (Oct. 19, 2021), <https://www.supplychaindive.com/news/amazon-logistics-volume-fedex-ups-postal-service-pitney-bowes/608409/> [perma.cc/J6EC-CE3Z].

products and rely on Amazon's vouchers that the products are quality. Therefore, because Amazon does not limit its role to just being a delivery service, consumers understandably expect that Amazon vets and supports all the products that appear on its website.

Third, imposing the burden of responsibility for the losses sustained due to defective products on Amazon is an equitable remedy to provide the wronged party, the consumer, relief.¹⁵⁰ Recently, Amazon has amended its "A-to-Z Guarantee" to pay consumers for claims under \$1,000 for injuries and damages sustained as a result of defective products and agrees to even pay claims for higher amounts if the seller is unavailable.¹⁵¹ While Amazon seemingly appears to concede that equitable principles would require it to provide aggrieved parties some means of relief, this remedy is limited in nature. It requires consumers to forego bringing their claims to a court of law while Amazon reviews them.¹⁵² Although a step in the right direction for providing relief for injured consumers, this act on Amazon's part seems to be in response to the United States Consumer Product Safety Commission ("CPSC") filing a complaint against Amazon.com.¹⁵³ This agency also brought complaints to force Amazon to accept responsibility for faulty products listed on Amazon.com that posed a risk of serious harm to purchasers.¹⁵⁴ The agency's complaint charged that Amazon is legally responsible for recalling the listed items.¹⁵⁵ In the past few years, Amazon has faced an

150. Sean P. Wajert & Shook, Hardy & Bacon LLP, *Product Liability Claims, Defenses, and Remedies*, THOMSON REUTERS PRAC. L., [https://1.next.westlaw.com/Document/11c63117eef2811e28578f7ccc38dcbee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad7403700000183aa45d2288bd261e2%3Fppcid%3Da5c16215d1e646439aa8e09970ada218%26Nav%3DKNOWHOW%26fragmentIdentifier%3D11c63117eef2811e28578f7ccc38dcbee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=18ceaab361431d13b7171e22607d508&list=KNOWHOW&rank=1&sessionScopId=8f980d3cd51d915e6726529be8c711220a0232a6d063b9453c3660ef1199c03e&ppcid=a5c16215d1e646439aa8e09970ada218&originationContext=Search%20Result&transitionType=SearchItem&contextData=\(sc.Search\)&navId=DAD58A220B93942DEF6D963D5381169](https://1.next.westlaw.com/Document/11c63117eef2811e28578f7ccc38dcbee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad7403700000183aa45d2288bd261e2%3Fppcid%3Da5c16215d1e646439aa8e09970ada218%26Nav%3DKNOWHOW%26fragmentIdentifier%3D11c63117eef2811e28578f7ccc38dcbee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=18ceaab361431d13b7171e22607d508&list=KNOWHOW&rank=1&sessionScopId=8f980d3cd51d915e6726529be8c711220a0232a6d063b9453c3660ef1199c03e&ppcid=a5c16215d1e646439aa8e09970ada218&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&navId=DAD58A220B93942DEF6D963D5381169) (last visited Oct. 5, 2022) [<https://perma.cc/DE6N-AKVC>].

151. Amazon Staff, *A-to-Z Guarantee to Cover Property Damage and Personal Injury*, AMAZON: HOW AMAZON WORKS (Aug. 9, 2021), <https://www.aboutamazon.com/news/how-amazon-works/new-a-to-z-guarantee-better-protects-amazon-customers-and-sellers> [perma.cc/9SH4-BGRR].

152. Hannah Rhodes, *What to Know About Amazon's New A-to-z Claims Process*, MASSPIRG (Sept. 1, 2021), <https://masspirg.org/blogs/blog/usf/what-know-about-amazon-s-new-z-claims-process> [<https://perma.cc/U9Z2-HWJ4>].

153. *CPSC Sues Amazons*, *supra* note 13.

154. *Id.*

155. *Id.*

increase in complaints and lawsuits for defective products peddled on its website.¹⁵⁶ Amazon implemented changes to the A-to-Z guarantee at a time that suggests the changes were meant to limit Amazon's exposure moving forward.¹⁵⁷ Although Amazon has taken positive steps to compensate consumers who have experienced damage to personal property or suffered injury as a result of the use of products purchased on Amazon, compensation to maintain an equitable balance after an injury occurs is not as beneficial as taking appropriate steps to prevent defective products from ever reaching purchasers. The only recourse available to consumers should not be Amazon's self-review of whether or not a claim is valid.¹⁵⁸ Amazon's decision to expand its A-to-Z guarantee to provide compensation for injured consumers shows that it is aware of the legal risk it has opened itself up to by allowing third-party sellers to market products on Amazon.com. This approach appears designed to coerce consumers to settle for the quick, guaranteed recovery rather than pursue adequate compensation and justice in the courts of law. Amazon's change in policy in response to the complaint filed against it and recent court decisions suggest Amazon's awareness that consumers can seek recovery against Amazon for products liability and that equitable principles lean in the aggrieved party's favor when they have no other defendant to recover from.¹⁵⁹

VI. COUNTERARGUMENT

As a company that strives to be motivated by "customer obsession as opposed to competitor obsession," Amazon would likely argue it has already implemented significant measures to ensure and promote the safety of its consumers.¹⁶⁰ The main effort that Amazon would likely point to in arguing that, as an entity, it has intentionally implemented

156. Michael Waters, *Amazon Briefing: Why Amazon's Product Liability Risk is Growing*, MODERN RETAIL: THE AMAZON EFFECT (July 22, 2021), <https://www.modernretail.co/platforms/amazon-briefing-why-amazons-product-liability-risk-is-growing/> [https://perma.cc/G4FT-T3WP].

157. Alison Frankel, *Amazon Zigs and Zags in Latest Strategy to Avoid Product Liability Claims*, REUTERS: ON THE CASE (Sept. 24, 2020, 3:22 PM), <https://www.reuters.com/article/us-otc-amazon/amazon-zigs-and-zags-in-latest-strategy-to-avoid-product-liability-claims-idUSKCN26F3FY> [https://perma.cc/U99N-U7Y5].

158. *Id.*

159. *Id.*

160. Marla Tabaka, *Amazon's 4 Keys to Success, According to Jeff Bezos*, INC.: GROW, <https://www.inc.com/marla-tabaka/jeff-bezos-says-these-4-principles-are-key-to-amazons-success-they-can-work-for-you-too.html> (last visited Feb. 28, 2022) [https://perma.cc/ST8K-JVKJ].

policies with consumer safety in mind would be that of the A-to-Z Guarantee.¹⁶¹ Amazon created this customer service policy with third-party vendors in mind.¹⁶² In providing this “guarantee” for customers that they will receive quality items in a timely manner, Amazon provides an avenue for submitting a complaint if the customer cannot get in touch with the third-party vendor directly.¹⁶³ Although this policy is called a “guarantee,” the A-to-Z Guarantee does not promise that consumers who receive a damaged or defective product will be given a refund.¹⁶⁴ Rather, this outlet merely provides the consumer the opportunity to have their eligibility for a refund considered.¹⁶⁵ Ultimately, the argument that Amazon has intentionally sought to provide a means of compensation for consumers should not absolve them from liability because they are substantially involved in the transactional process between consumers and third-party vendors who are allowed to list products on their website.¹⁶⁶ If the A-to-Z Guarantee is the only line of defense for aggrieved consumers then they will be forced to accept Amazon’s determination of just compensation, and will likely be coerced to settle rather than face Amazon’s well-funded corporate lawyers in the courts.

VII. CONCLUSION

Amazon is an impressive company that constantly provides beneficial services to consumers who choose to utilize the features available through its online marketplace, a subscription to its Amazon Prime services, and other features available to users.¹⁶⁷ However, moving forward, Texas courts should not allow Amazon to continue enjoying immunity from being held responsible for injuries sustained by individuals harmed by items that arrive directly to their doorstep inside a box labeled with Amazon’s signature logo.¹⁶⁸ Texas courts should find Amazon

161. *A-to-z Guarantee*, AMAZON: HELP & CUSTOMER SERVICE, [https://www.amazon.com/gp/help/customer/display.html%3FnodeId%3DGGQ37ZCNEC\]KTFYQV](https://www.amazon.com/gp/help/customer/display.html%3FnodeId%3DGGQ37ZCNEC]KTFYQV) (last visited Feb. 28, 2022) [<https://perma.cc/58WD-GEWX>].

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Markeyus Franks, *Amazon Products and Services: The Ultimate List*, PLENTY OF GADGETS, (Aug. 15, 2020), <https://plentyofgadgets.com/amazon-products-and-services/> [perma.cc/34F9-94Z7].

168. Kirk McDaniel, *Amazon Not Liable for Defective Third-Party Products, Texas High Court Rules*, COURTHOUSE NEWS SERVICE (June 25, 2021), <https://www.courthousenews.com/amazon-not-liable-for-defective-third-party-products-texas-high-court-rules/> [perma.cc/9X6N-ADEB].

to be the “owner” and therefore “seller” of all products advertised on its website because it so directly benefits from reaching consumers in this way.¹⁶⁹ Since third-party vendors manufacture 60% of the products marketed on Amazon’s website, there is support for the argument that Amazon directly benefits from allowing these outside sellers to use its website to sell their products.¹⁷⁰ Conversely, suppose Texas courts were to follow the precedent now set in deeming Amazon not a seller of products manufactured by third-party vendors.¹⁷¹ In that case, the company should be more selective in screening the third-party vendors they allow to sell products on their website or how they approach disclosing who is manufacturing the products delivered to consumers. Ultimately, Amazon should be held accountable for the products circulated on its website that are manufactured by suspicious third-party vendors to better protect consumers and provide them the appropriate recourse to pursue justice and adequate compensation.

169. *Id.*

170. Pamela N. Danziger, *Amazon’s Third-Party Marketplace Is Its Cash Cow, Not AWS*, FORBES, (Feb. 5, 2021, 9:55AM), <https://www.forbes.com/sites/pamdanziger/2021/02/05/amazons-third-party-marketplace-is-its-cash-cow-not-aws/?sh=cfc814221c03> [perma.cc/L9YC-W5CM].

171. *McMillan v. Amazon.com, Inc.*, 2 F.4th 525 (5th Cir. 2021).