JUST ANOTHER LINK IN THE SUPPLY CHAIN: A CASE FOR THE NON-SELLER CLASSIFICATION OF AMAZON

INTRODUCTION

Over the years, e-commerce has become a prominent part of the commercial landscape of the United States and the world.[1] While brick-and-mortar retailers like Walmart once reigned supreme, now online giants like Amazon dominate the market.[2] In the past year alone, Amazon yielded a net income of $92 million.[3] Amazon now accounts for 49.1% of the overall retail market share.[4] Amazon continues to grow its platform with great success, and now participates in a "Fulfillment by Amazon" program in which Amazon hosts the products of third-party sellers on its site.[5] These products are listed and intermingled amongst Amazon's own products.[6] The "Fulfillment by Amazon" products are identified by including the third-party seller's information on the listing.[7] Product descriptions and prices are set by the third-party seller; Amazon simply takes the order, ships the product, and remits a payment to the third-party seller after taking its own fees.[8] The "Fulfillment by Amazon" program has proved mutually economically beneficial for third-party sellers and Amazon.[9]

However, Amazon's success and platform growth does not come without consequences. An expanded platform which now includes third-party sellers poses unique problems when it comes to products liability law. In this highly commercial era, there is always a certain risk of defective products entering the marketplace.[10] The Restatement expresses that absolute liability for a defective product should fall squarely on the "seller" of that defective product.[11] However, it states that the definition of "seller" is flexible and dependent on several factors rooted in state tort law.[12] Thus, a problem emerges: is Amazon considered a "seller" of these third-party products? And if so, is Amazon, rather than the third-party merchant, strictly liable for any damages caused by such defective products?

Courts have developed several tests and factors for determining "seller" status of a business entity to supplement the standards set forth in the Restatement.[13] Each of these tests considers the interests of companies, consumers, and the economy generally.[14] However, the interpretation and valuation of these factors has often been a point of contention across cases. Furthermore, different courts have afforded different weights to each factor, leading to a lack of clarity as to which factors and tests should take precedent. For the most part, these factors all broaden the definition of "seller" as found in the Restatement, but to different extents.[15]

This Comment argues that Amazon ought not to be classified as a "seller" for purposes of strict products liability law through its "Fulfillment by Amazon" program. Part I of this Comment serves to demonstrate the legal and factual bases for the development of strict liability law, along with two key tests for evaluating "seller" classification: the marketplace-based test and the consumer-based test. Part II demonstrates that Amazon would not qualify as a "seller" under either of these tests. Part III explores the public policy implications of the "seller" classification and extrapolates on the future of strict products liability law as a whole.

I. JUDICIAL DEVELOPMENT OF STRICT LIABILITY TESTS

A. Judicial Background of Strict Liability

The formally-known concept of strict liability emerged for the first time in *Escola v. Coca-Cola Bottling Co.,* in which the court departed from the traditional negligence framework previously used to assess product defects.[16] Although some still believe the negligence framework should be used and that strict products liability law is unnecessary and pernicious to the legal system,[17] *Escola* set a precedent that would define much of state law on the strict liability concept.[18] Based on injuries caused by exploding bottles of Coca-Cola bottles, the

concurrence in *Escola* developed the basis of strict liability which hinged heavily on public policy and the changing needs of consumers.[19]

Consumer needs have remained a judicial priority as strict liability has evolved. Starting first with food product safety and later moving into commercial products like vehicles, toys, and tools,[20] laws have been developed as a means of prioritizing consumer safety in an age where consumers must rely on large retailers to obtain products.[21] The Restatement has utilized this policy basis to enumerate standards as to who exactly may be liable and in what situations.[22]

B. Broad Standards for Strict Liability

Section 402A of the Restatement (Second) of Torts was developed to set clearer standards as to the exact application of strict products liability law.[23] The Restatement has imposed "absolute liability" on "sellers" of products that have the potential to reach the general public and potentially cause harm if defective.[24] The Restatement goes on to describe situations in which a "seller" may be liable: if they are engaged in the business of selling a product, and if that product reaches the consumer in substantially the same condition as when it left the seller's hands.[25] A seller will be liable if a product which they release into the marketplace is "unreasonably dangerous" and likely to cause harm to a consumer.[26] While products cannot always be entirely safe, the "unreasonable" standard provides a guideline for liability without being unduly harsh and burdensome on commerce.[27]

While the Restatement has attempted to define the meaning of "seller," the drafters intentionally left the concept open to interpretation, potentially due to an understanding that the marketplace would shift and change over time.[28] A definition too strict would defeat many of the public policy purposes behind strict products liability as whole. As such, common law has endeavored to fill in many of the gaps deliberately left open in the Restatement. Common law

interpretations consider impacts on the consumer, on companies, and on the economy and marketplace as a whole. Generally, two schools of thought emerge as to the tests for determining "seller" classification: tests focused on the marketplace and economic factors, and tests which primarily consider impacts on the consumer and their safety.

C. The Marketplace-Based Test

The marketplace-based test considers factors used across various cases that place emphasis on how "seller" classification would affect the commercial market and economic development. These factors center on the ever-changing retail market and the role of different merchants and entities within the supply chain.[29] One of the hallmarks of this test is how it interprets the status of merchants like lessors and bailors, which share some similarities with traditional "sellers," yet are not entirely alike.[30] This test serves to analogize these "non-traditional" merchants to more typical "sellers" of the traditional supply chain.[31] Such an analogy is used in order to prove whether an entity's role in commerce is sufficient such that they too can be considered a "seller."

As time has gone on, the supply chain has complexified to include wholesalers, retailers, lessors, bailors, manufacturers, repairers, and various other third-parties.[32] Understanding the interaction between these various groups is key to understanding which groups can be classified as "sellers." In *Francioni*, the court began to distinguish the traditional "seller" role from non-traditional parties in the supply chain like lessors.[33] There, a truck driver brought a claim for strict liability against a truck lessor for his injuries sustained in an accident while driving the leased truck.[34] The driver claimed the truck was defective in nature and believed the lessor to be the responsible party, as the lessor was the closest link in the supply chain in regard to delivery to the consumer.[35] The *Francioni* court understood that the role of the lessor functioned

somewhat differently as compared to the original truck manufacturer.[36] As such, the court provided the "similarity of function" standard—if the lessor essentially maintained the same "function" within the supply chain as a traditional seller or manufacturer, they too ought to be considered a seller.[37]

The court further held that a "seller" is one that introduces items into the "stream of commerce."[38] Supplying items to the general public automatically makes that supplier liable as a "seller," even if they are technically a lessor by title.[39] However, this standard was left open by the caveat that a financial lessor may not be held to the same standard as a typical lessor.[40] *Fox v. Amazon.com, Inc.* presents a similar viewpoint: that to be considered a "seller," the merchant in question must be "engaged in the business of selling."[41]

In an attempt to further substantiate the *Francioni* factors, the court in *Musser v. Vilsmeier Auction Co.* applied a similar test to the case of an auctioneer.[42] In *Musser*, an auctioneer published brochures notifying the general public of a sale on a mass of items, including tractors.[43] When the buyer of two tractors was injured through their use, he sued the auctioneer under the premise of strict liability.[44] The *Musser* court, for means of assessing that auctioneer's ability to be classified as a "seller," developed a set of factors for analysis.[45] While many of the *Musser* factors focused on public policy and consumer safety, one key factor related to marketplace dynamics: whether or not a sufficient relationship existed between the manufacturer and the auctioneer.[46] Because the auctioneer did not personally manufacture the tractors, the auctioneer was not in the ideal position to "prevent circulation of defective products" and therefore was unlikely to be a "seller."[47]

It should be further noted that the auctioneer had ninety tractors up for sale that day.[48] The court held that in such an instance where the market is so substantially large, an intermediate

party like an auctioneer should not have to take on the responsibility of assessing each and every product for its safety, especially as an intermediary who is unfamiliar with each tractor's manufacture, repairs, and eventual journey to reach the auction.[49] Such is similar to the *Hoskins v. Jackson Grain* case, in which a wholesaler was not responsible for the fact that a package of seeds was of a different variety than originally advertised.[50] The *Hoskins* court held that the wholesaler was simply an intermediary, not a true "seller," and that the wholesaler would not possess the intimate knowledge necessary to determine exactly what kind of seeds were in the packaging.[51] Each of these courts zoned in on the idea that only those who are truly capable of identifying and preventing defects should be held liable.[52]

Finally, one of the most important factors involved in the marketplace-based test is whether the proposed "seller" owns title to the defective product.[53] If the party in question owned title to a product at the moment before it was transferred to a customer, that party would be considered a "seller" and would be subject to the consequences enumerated in the Restatement. However, not owning title to a product would classify the party as a "non-seller" and absolve that party from liability. This factor is delineated clearly in *Erie v. Amazon.com, Inc.*, in which the 4th Circuit held that for a defect to be attributed to a "seller," the defective product must have been owned by the "seller" at the time.[54] Simply distributing a product without actually owning it, as Amazon did with a headlamp in the *Erie* case, would not be enough to attain the "seller" classification.[55]

D. The Consumer-Based Test

On the other hand, various courts have expressed factors for determining "seller" classification based in consumer interests and public safety. These factors, which stem from

public policy concerns, focus on shifting liability to whosoever can best bear the risk of defective products and mitigate their societal consequences.[56]

The *Musser* case, which assumes elements of both tests explained within this Comment, offers a significant framework based on consumer protection. The *Musser* court stated that if an auctioneer (or any other similar supplier) was the only available source of "consumer redress," was in the best position to prevent "circulation of defective products," and could "distribute the cost of compensation" for injuries which stemmed from defective products, then they would be classified as a "seller."[57] The primary purpose in enacting such consumer-based factors was to minimize the risk of defective products and provide as much protection to the public as possible without restricting the free course of the market.[58]

Fox v. Amazon.com, Inc. further delineates consumer-based concerns by introducing the "sufficient control" test to determine which entity ought to be strictly liable.[59] In *Fox*, a family home caught on fire due to a defective hoverboard which was bought through a "Fulfillment by Amazon" third-party channel.[60] Contention arose within the case as to whether Amazon or the third-party seller exercised such sufficient control over the product.[61] In her complaint, plaintiff expressed confusion over the identity of the listed seller and source of the product.[62] Furthermore, the *Fox* court indicated that Amazon involved itself to a significant extent in the transaction by sending out emails to consumers about potential dangers associated with hoverboards.[63] The court in *Fox* thus created the "significant control test" as a means of identifying which party was best equipped to handle products liability issues.[64] To be considered a "seller" under this test, not only would a party have to take substantial control and be greatly involved in the sale and delivery of a product, but they would also have to be considered "most likely to compensate" as compared to the other involved parties.[65] Although Amazon is a highly

valued, large corporation,[66] the *Fox* court weighed the "most likely to compensate" factor in more than just a financial sense.[67] As such, "most likely to compensate" likely refers to the party whose compensation would do the most to protect and incentivize consumer safety going forward.

II. THE CASE FOR NON-SELLER CLASSIFICATION OF AMAZON

The use of both aforementioned tests is equally widespread across common law. While one is focused on the economy and one is focused on the consumer, both have strong rationales for use in "seller" classification. Therefore, examining Amazon's potential "seller" status against both tests will provide the clearest answer as to its correct classification. It is likely that Amazon will not be considered a "seller" under either test, though it may be harder to disprove "seller" status under the consumer-based model.

First, Amazon is easily distinguished from the "seller" definition under the marketplace-based test. Although Amazon serves an important role in the supply chain, the "seller" definition ought not be extended to Amazon because of its somewhat-removed role in regard to the transaction. Under the *Francioni* "similarity of function" test, it is true that Amazon operates a lot like a "seller" by holding products and delivering them to customers.[68] However, Amazon is actually more of an agent, or "*ad hoc* salesman," of these third-party products.[69] By taking actions on behalf of the true "seller" like sending out orders and receiving payment, Amazon itself is not engaging in a similar function, but rather assisting the third-party seller in completing its own transaction.

Amazon also distinguishes itself from the "lessor" classification. Although a pseudo-"lease" exists between Amazon and the third-party seller where Amazon holds third-party goods for a time until they are ordered, such a "lease" is not substantive enough to mean Amazon is strictly

liable. Amazon's role functions more as a tangential lessor in the same way a financial lessor would operate.[70] Just as financial lessors are exempt from the lessor extension developed in *Francioni*, so too should Amazon be exempt in our case.[71] Furthermore, while Amazon arguably is engaged in the stream of commerce (as it hosts a platform that dominates much of the commercial realm), the fact that Amazon does not truly "own title" to the third-party products weighs heavily in favor of "non-seller" classification.[72] When a third-party merchant transfers goods to Amazon to hold and use within the "Fulfillment by Amazon" program, they must sign a Business Solutions Agreement.[73] Nowhere in the agreement does the third-party transfer deed or ownership of the products to Amazon. The agreement functions more as a service agreement between Amazon and the third-party rather than a title transfer. Under *Erie*, if Amazon does not own title to the products, it is not a seller.[74] And if it is not a seller, there is little chance that it can be "engaged in the business of selling." If anything, Amazon is engaged in the business of hosting or providing online floor space to showcase the products of another merchant. Perhaps if Amazon made substantial changes to the products before sale, it might be liable.[75] But as it stands, Amazon's interaction with these products is strictly limited to only sending the products out as they are.

However, it should be noted that because strict liability law is mostly state-based, there are certain exceptions that might sway Amazon toward the "seller" category.[76] For example, as seen in *Erie*, Maryland law considers a "distributor" to also be a "seller."[77] While the label of "distributor" has a definition equally as evasive as that of a "seller," Amazon is far more likely to meet the "distributor" standard because of its role in supplying and delivering third-party products to consumers—literally *distributing* said products. While this issue can be resolved through identifying parties within the supply chain that are more closed involved with products

than Amazon (i.e. a manufacturer), it still stands that Amazon may have difficulty evading "seller" status depending on the state in which the issue occurs.

Under the consumer-based model, there is more contention over whether or not Amazon is actually a "seller." The consumer-based test emphasizes consumer safety and protection; as such, policy advocates are more likely to support the idea that Amazon is a "seller" for the benefit of the general public. Under their view, Amazon is large and powerful enough of a player in the global marketplace that it should take on the responsibility of ensuring consumer safety.[78] With an overall net worth of $249 billion,[79] critics believe that under the *Musser* consumer-based factors, Amazon is the best entity to bear the cost associated with defective products. The *Erie* concurrence also suggests that shifting the burden from Amazon back to the third-party sellers would put an undue burden on consumers to manage their own product safety.[80] The *Erie* concurrence further contends that Amazon itself has disrupted the traditional supply chain and now owes a duty to be strictly liable for the sake of the public, many of whom utilize Amazon as a primary means of obtaining products.[81]

Nevertheless, in both an economic and consumer-based sense, Amazon should be classified as a "non-seller" because it does not have the ability or knowledge to effectively prevent product defects.[82] As such, strict liability law should be applied only to those "sellers" that are directly involved and responsible for product safety. Just as in *Musser* and *Hoskins*, in which entities further down the supply chain were not considered "sellers" because there were too many products to check and no reason why those entities should be aware of any risks, Amazon should also be absolved of any future strict liability claims due to a lack of knowledge and involvement in product manufacture.[83] Amazon partners with over 1 million third-party sellers in the "Fulfillment by Amazon" program.[84] While Amazon is admittedly an economic giant, it does not

have sufficient resources to learn and understand every product's manufacturing system, nor does it have the time nor employee manpower to go through each item to ensure its safety—to ask this of Amazon would be overly burdensome and bad for both economic growth and consumer safety.[85]

The same public policy arguments for consumer safety suggest that Amazon still ought not be considered a "seller" under such a consumer-based model.[86] In reality, placing responsibility directly on manufacturers would be a far better means of incentivizing product safety. To force a "seller" label on Amazon for defective products that they have no part in manufacturing would cause significant setbacks in the way of consumer safety because Amazon itself cannot adequately assess all products that come through its channels, especially if Amazon has no understanding of the manufacturing process of these items.[87] If Amazon must face the brunt of all strict liability cases, actual manufacturers and other members of the supply chain will be disincentivized from channeling their own resources toward safety and product testing. As a lasting impact, consumers would be forced to be responsible for their own safety in a way that would revert much of the commercial progress made in society to date.[88]

III. PUBLIC POLICY AND THE FUTURE OF STRICT LIABILITY LAW

So far, the "seller" framework has been the preferred means of analyzing strict liability law as such a framework is closely intermingled with economic policy and marketplace dynamics. Although common law has been lenient in its definition of "seller" and extended it greatly, there is some pushback regarding the effect of these extensions on the market as a whole. Under the Theory of the Second Best, if optimal economic conditions cannot be achieved, the next best option is to shift the variables upon which success is based.[89] Upon holistically viewing the economy and its potential for distortion, the Theory of the Second Best opens the door to the

idea that the "seller" framework may not always be ideal in our changing economy and that some market distortions may not be flexible.[90]

Thus far, Amazon has not been found strictly liable in any of the 4 major cases brought across the country.[91] However, strict liability law may decline in use due to its inherent ambiguity along with underlying economic criticisms against it.[92] Such criticisms have contributed to the idea that strict liability law should be abandoned as a whole and that the legal system should revert back to a negligence-only framework.[93]

As strict liability evolved from negligence law, the idea has emerged that strict liability is too "messy" of a concept to continue utilizing.[94] Opponents claim that the strict liability system has devolved as the marketplace has shifted.[95] They further contend that strict products liability law is no longer effective in analyzing cases and that truly meritorious claims will fare just as well if assessed under a negligence-only framework.[96] While a negligence-only basis might simplify the assessment of cases, wholly eliminating strict liability law might be a step too far. As previously stated, common law has developed different factors and tests which help classify potential "sellers." In this era, the marketplace is simply too advanced to function without specific factors to extend and define "seller" classification. Although each state has different laws, each factor helps courts get closer to a more effective interpretation of strict products liability law in favor of the market and the consumer.

Concerns also emerge regarding the state law framework for the "seller" test. While the Tennessee Products Liability Act in *Fox v. Amazon.com, Inc.*[97] and the "title owner" test of Maryland state law applied in *Erie v. Amazon.com, Inc.*[98] have been useful guidelines for strict liability law in each respective case, there is criticism that the variability of state law makes strict liability an ambiguous and easily distorted legal construction. In fact, the concurrence in *Erie*

expresses that while Amazon may escape the "seller" classification for now, there are some instances in which that may change based on changing laws and circumstances.[99]

While differences in state law may convolute the application of strict liability law, Amazon's unique position as a multi-state retailer may preempt it from such issues. In *South Dakota v. Wayfair Inc.*, the court held that states may charge sales tax on purchases made from out-of-state sellers, even if there is no physical presence in that state.[100] Amazon is an online retailer which serves states across the country, regardless of physical presence. Further, Amazon chooses to pay state taxes regardless of requirements.[101] As such, Amazon subjects itself to the dominion of each state. Although legal results may vary until a uniform federal system emerges, Amazon has made it clear that it has no problem operating under each state's individual laws. Even more so, Amazon has been classified as a "non-seller" in each state where it has faced suit.[102] Although each individual state utilizes substantively different legal frameworks for strict liability law, Amazon has experienced consistent outcomes in all states in which it has faced suit thus far.[103]

CONCLUSION

As technology and society have advanced, so too has the global marketplace. Amazon's "Fulfillment by Amazon" program is a new link in the retail supply chain that has posed unique challenges when it comes to the application of strict products liability law. While some argue for the abolition of strict liability and a return to pure negligence-based suits based on strict liability's complexities and ambiguities, it appears that strict liability won't be going away anytime soon. As such, we must turn to common law tests to determine which entities are liable as "sellers" of defective products. Under both a marketplace-based and consumer-based approach, various circuit courts have all set a precedent that Amazon does not fit the criteria of a

"seller" under strict liability law. However, these cases are riddled with uncertainty, variability, and dissents which prove the "seller" classification may not be entirely cut and dry. The Restatement and common law factors were both left open to broad interpretation for a reason. For now, Amazon should maintain its "non-seller" status. However, as the marketplace and economy continue to shift and grow, lawmakers should consider that the definition of "seller" may need to evolve in response to new societal pressures and needs.

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[1] Shan Li, Amazon Overtakes Wal-Mart as Biggest Retailer, L.A. TIMES Jul. 24, 2015 at 1.

[2] *Id.* at 2.

[3] *Id.*

[4] Fox v. Amazon.com, Inc., No. 18-5661, slip. op. at 1 (M.D. Tenn. Jun. 10, 2019).

[5] Erie Insurance Co. v. Amazon.com, Inc., No. 18-1198, 1 (4th Cir. May 22, 2019).

[6] *Id.* at 4.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] RESTATEMENT (SECOND) OF TORTS § 402A(1) cmt. g. (1965).

[11] RESTATEMENT (SECOND) OF TORTS § 402A(1).

[12] *Id.*

[13] Musser v. Vilsmeier Auction Co., 562 A.2d 279, 283 (Pa. 1989).

[14] *Id.*

[15] *Compare Musser*, 562 A.2d at 283 (noting predominantly economic factors for analysis of the "seller" classification) *with A Modest Proposal to Abandon Strict Products Liability*, 3 U. ILL.

L.REV. 12, 12 (1991) (noting various public policy and consumer-based concerns with the "seller" classification).

[16] Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 438 (Cal. 1944).

[17] William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 3 U. ILL. L.REV. 12, 12 (1991).

[18] *Escola*, 150 P.2d 436, 439 (Cal. 1944).

[19] *Escola*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

[20] RESTATEMENT (SECOND) OF TORTS § 402A cmt. b.

[21] *See generally* RESTATEMENT (SECOND) OF TORTS § 402A.

[22] RESTATEMENT (SECOND) OF TORTS § 402A(1).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] RESTATEMENT (SECOND) OF TORTS § 402A cmt. i.

[27] *Id.*

[28] *See generally* RESTATEMENT (SECOND) OF TORTS § 402A(1).

[29] Francioni v. Gibsonia Truck Corp., 472 A.2d 737, 739 (Pa. 1977).

[30] *Id.*

[31] *Id.*

[32] *Id.* (holding that truck lessors set a precedent for lessors of all kinds to be considered as part of the supply chain), *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. b. (establishing that the definition of "sellers" has expanded and that the types of products available for recovery under strict liability have also been extended).

[33] *Francioni*, 472 A.2d 737, 739 (Pa. 1977).

[34] *Id.* at 737.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 738.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 740.

[41] *Fox*, No. 18-5661, slip. op. at 1 (M.D. Tenn. Jun. 10, 2019).

[42] *Musser*, 562 A.2d 279, 283 (Pa. 1989).

[43] *Id.*

[44] *Id.*

[45] *Id.* at 282.

[46] *Id.* (noting more specifically that to be considered a seller, a lessor must be in a better position than a consumer to prevent the circulation of defective products).

[47] *Id.*

[48] *Id.*

[49] *Musser*, 562 A.2d 279, 283 (Pa. 1989) (noting that identifying two defective tractors from a lot of ninety may be unreasonable for an intermediate party); *see also* Oberdorf v. Amazon.com, Inc., 295 F.Supp.3d 496, 498 (2017) (holding that Amazon is unable to adequately assess products from over 1 million third-party sellers).

[50] Hoskins v. Jackson Grain, 63 So.2d 514, 515 (Fla. 1953).

[51] *Id.*

[52] *See Musser*, 562 A.2d 279, 282-283 (Pa. 1989).; *see also Hoskins*, 63 So.2d at 515 (Fla. 1953).

[53] *Erie Insurance Co.*, No. 18-1198, 9-10 (4th Cir. May 22, 2019).

[54] *Id.*

[55] *Id.*

[56] *See Oberdorf*, 295 F.Supp.3d 496, 501 (2017).

[57] *Musser*, 562 A.2d 279, 282 (Pa. 1989).

[58] *Id.*

[59] *Fox*, No. 18-5661, slip. op. at 1 (M.D. Tenn. Jun. 10, 2019).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 5.

[64] *Id.* at 9-10.

[65] *Id.* at 11.

[66] Li, *supra* note 2.

[67] *Fox*, No. 18-5661, slip. op. at 1 (M.D. Tenn. Jun. 10, 2019).

[68] *Francioni*, 472 Pa. 362, 372 A.2d (pin cite) (1977).

[69] *See Musser*, 562 A.2d 279, 282 (Pa. 1989) (holding that an auctioneer is an example of an agent or "*ad hoc*" salesman for the goods of another); *see also Oberdorf*, 295 F.Supp.3d at 501 (2017).

[70] *Francioni*, *supra* note 40.

[71] *Id.*

[72] *Erie Insurance Co.*, No. 18-1198, 1, 4 (4th Cir. May 22, 2019).

[73] *Erie*, *supra* note 53.

[74] *Id.*

[75] Rollins v. Cherokee Warehouses, Inc., 635 F.Supp 136, 138 (E.D. Tenn. 1986).

[76] *Erie Insurance Co.*, No. 18-1198, 3 (4th Cir. May 22, 2019).

[77] *Id.*

[78] Li, *supra* note 2.

[79] *Id.*

[80] *Erie Insurance Co.*, No. 18-1198 at 16 (4th Cir. May 22, 2019) (Gribbon Motz, D., concurring).

[81] *Id.*

[82] *Musser* & *Oberdorf, supra* note 49.

[83] *Musser*, 562 A.2d 279, 282-283 (Pa. 1989).

[84] *Oberdorf*, 295 F.Supp.3d 496, 498 (2017).

[85] *Musser* & *Oberdorf*, *supra* note 49.

[86] *See Musser*, *supra* note 84.

[87] *Hoskins*, *supra* note 50.

[88] *See Oberdorf*, *supra* note 56.

[89] James A. Henderson, Jr., *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1037-44 (1980).

[90] *Id.*

[91] Alison Frankel, *Is Amazon Liable for Selling Defective Products? Three Appeals Courts Will Decide*, Reuters, Aug. 20, 2018, at 1.

[92] *See* James A. Henderson, Jr., *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1037-44 (1980).

[93] William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 3 U Illinois L.R. 12, 12-13 (1991).

[94] *Id.*

[95] *Id.*

[96] *Id.* at 52.

[97] *Fox*, No. 18-5661, slip. op. at 9 (M.D. Tenn. Jun. 10, 2019).

[98] *Erie Insurance Co.*, No. 18-1198 at 9 (4th Cir. May 22, 2019).

[99] *Erie Insurance Co.*, No. 18-1198 at 16 (4th Cir. May 22, 2019) (Gribbon Motz, D., concurring) (holding that as public policy shifts, Amazon may be considered a "seller" in the future to take burden away from consumers).

[100] S. Dakota v. Wayfair Inc., 138 U.S. 2080, 2090 (2018).

[101] *Id.*

[102] *Frankel*, *supra* note 91.

[103] *Id.*