A Static Definition of "Seller" In A Changing Economy: Why Amazon Should be Considered a Seller Under § 402A Restatement Second of Torts

Introduction

Consumers expect a lot from their sellers: they expect their product to arrive on the guaranteed shipping date, they expect their product to work, and, most importantly, they expect to not get injured by their product. These expectations derive from the simple concept that manufacturers, developers, or sellers are all in a better position to ensure their products are safe because they are the ones creating or marketing their product. Yet, occasionally these products are damaged and cause injury to the consumer. The injured consumer will turn to the nearest scapegoat they can: the store from which the product was purchased.

However, the meaning of the word "store" has evolved from a simple, physical location to a complex online system from which consumers can spend hundreds of dollars in one simple click of their computer mouse. Online sellers are tremendously increasing their sales and taking over the economy.[1] Amazon makes up 46% of the online retail marketplace and sold more than the "next twelve online competitors combined."[2] Specifically, Amazon "cuts out the middlemen between manufacturers and consumers, reducing the friction that might keep foreign . . . manufacturers from putting dangerous products on the market."[3] Because of these virtual stores, corporations like Amazon have done more than revolutionize the economy; they have transformed the way in which courts rule on products liability cases. With large corporations selling a variety of products from third party vendors, it is difficult for injured plaintiffs to pinpoint liability on the proper defendant.

§ 402A of the Second Restatement of Torts requires that, in order for a seller to be liable for a consumer's injuries, it must regularly engage in the business of supplying that product.[4] However, this idea has created a loophole in which Amazon takes advantage – many courts hold

that Amazon simply "fulfills" third-party sellers' orders to consumers and does not sell the items itself. [5] For example, in Tennessee, Amazon is not a seller because it did not "exercise sufficient control" over the product.[6] Or in Maryland, Amazon is not a seller because it did not hold title of the product, and therefore did not "transfer ownership of property for a price," an element required to be a seller.[7] Circuit courts have shielded Amazon from consumers and sellers who use the website as a platform to sell their own products. This places Amazon on a pedestal, immune from accountability by virtue of operating its sales online.

This Comment will analyze how Amazon should be considered a seller under § 402A Restatement Second of Torts. Specifically, it will break down how the complicated understanding of the word "store" has created confusion as to who can be considered a "seller," and thus liable under products liability. Part I discusses the origination of products liability and the public policy behind its creation. Part II analyzes the rationale behind many courts' recent decisions holding that Amazon is not a seller, and why these decisions have been erroneous. Finally, Part III explains the positive effects of considering Amazon a seller under § 402A.

I. CONSUMERS' TRUST IN THE MARKETPLACE AND THEIR NEED FOR QUALITY CONTROL

A. *The Expansion of Products Liability*

§ 402A of the Restatement Second of Torts states that a seller is liable for physical harm caused to a consumer if "(a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the . . . consumer . . . without substantial change in the condition in which it is sold."[8] Ideally, public policy aims to levy a high standard of accountability against the seller because consumers are entrusting the seller to provide safe products free from defects or danger.[9] The enforcement of strict liability was originally directed

at sellers of food – consumers were vulnerable and their high trust in cooks or butchers was rightfully held; laws ensured the seller would be responsible for any danger placed on the consumer.[10] Even if the seller exercised due diligence in ensuring the product was safe, she was still held to strict liability because, by placing her food or product in the market, she was assuming responsibility for the safety of her products.[11]

Slowly, courts expanded the strict liability realm to include sellers of products intended for external body use.[12] This again grew to include any "product sold in the condition . . . in which it is expected to reach the ultimate user or consumer," and thus reached to drivers of cars, operators of stoves, and users of power tools.[13] Yet, the rule makes clear that it does not include sellers irregularly involved in their business, a policy that protects sellers who may lack the expertise to check their products – the "occasional" seller would not be liable to the consumer unless he was negligent.[14]

Before the enforcement of products liability became so widespread, courts relied on negligence to hold sellers accountable for any harm caused to their consumers. For example, in *Escola v. Coca Cola Bottling Co. of Fresno*, a glass Coca Cola bottle exploded in the plaintiff waitress' hand.[15] The Supreme Court of California held that the glass bottle was already damaged before the waitress came in contact with it and was not damaged by an extraneous force after Coca Cola delivered it to the restaurant.[16] The court utilized the doctrine of res ipsa loquitor, a theory of negligence stating that the defendant had exclusive control of the product that caused the injury, and the accident would not have occurred had the defendant not been negligent.[17] Specifically, because there was a commonly-used method to test bottles for defects not apparent to the eye, Coca Cola could not escape accountability.[18] The defect was

discoverable, meaning that in an ordinary inspection, the defect could only be overlooked due to negligence.[19]

Escola brings awareness to the overlapping similarities between products liability and negligence. Specifically, Justice Traynor's concurring opinion explains that the law of negligence "approaches the rule of strict liability" regarding manufacturing defects.[20] Justice Traynor argued that manufacturers and sellers of goods should still be held liable for consumers' injuries despite a lack of negligence, and that it is the "public interest to discourage the marketing of products having defects that are a menace to the public."[21] Further, a retailer should still be under "absolute liability" even if he is not equipped to check the quality of his product, creating an incredibly high standard for the manufacturer to guarantee his product is safe.[22]

Courts were reluctant to impose any obstacles against injured plaintiffs in seeking a remedy from a seller. For example, in *Hoskins v. Jackson Grain Co.*, the Supreme Court of Florida held that the purchaser should still be allowed to sue the seed wholesaler on the premise that, as a manufacturer, he is in the best position to know exactly what he is selling.[23] Purchasers, on the other hand, are reliant on the manufacturer's knowledge.[24] In *Hoskins*, the planter had little choice but to trust that the seeds he was buying were the seeds that were labeled on the package – he had no other way of knowing the seeds were mislabeled unless he had manufactured and packaged the seeds himself.[25] The seeds did not cause physical damage to the planter, but the court still decided in the planter's favor because the defendant was held to a much higher standard of accountability simply by virtue of selling a product that would be used by consumers.[26]

The Supreme Court of Pennsylvania, in *Francioni v. Gibsonia Truck Corp.,* extended the doctrine of strict liability to all suppliers engaged in the business of supplying products for use or

consumption by the public.[27] Here, the steering wheel's defects, which existed at the time the truck was delivered to the plaintiff, made the seller of the truck responsible for the plaintiff's injuries, and thus the seller was held strictly liable.[28] Again, the court reiterated the importance of placing responsibility on manufacturers who were selling products for the sole purpose of gaining a profit from them. Further, the court focused on the idea that injured plaintiffs should always be able to find remedies despite not being able to locate the exact manufacturer of the product that caused their injuries; "in some instances the lessor, like the seller, may be the only member of the marketing chain available to the injured plaintiff."[29]

Yet, courts began to draw distinctions between the type of sellers that should be held strictly liable for injuries caused by their products. While it is obvious to see that the regular sellers that market products for human use or consumption should be held strictly liable, courts struggled to define a "regular seller." An early attempt at defining the extent of products liability can be found in *Musser v. Vilsmeier Auction Co.,* where the Supreme Court of Pennsylvania drifted from their holding in *Francioni* and denied following the strict liability approach.[30] In *Musser,* an individual was injured by a tractor bout at an auction.[31] However, the court found that the auctioneer of a tractor was simply an agent of the tractor's manufacturer, and thus the auctioneer was not a seller under § 402A.[32]

The court in *Rollins v. Cherokee Warehouses* also restricted the definition of a seller under § 402A by holding that in order for a manufacturer to be strictly liable for a consumer's injuries, it had to be "in the business of selling a product."[33] Here, the defendant reconditioned a forklift and sold it to the plaintiff.[34] However, the defendant was not deemed a seller because it did not engage in the business of reconditioning forklifts, or rather, he was not "continuously involved in placing a particular product . . . in the stream of commerce through

selling the product to other persons."[35] The *Rollins* court thus placed a major restriction on what constitutes a seller for the purpose of § 402A.

B. *Navigating Away from Strict Liability: The Support for Virtual Stores*

Recently, however, circuits have issued a series of decisions protecting online companies, specifically Amazon, from liability in products liability actions. First, in *Oberdorf v. Amazon.com*, the District Court of Pennsylvania stated that Amazon was not strictly liable to the customer who purchased a dog leash through its website because Amazon did not have any role in the selection of products sold on its website, and therefore was ill-equipped to check the quality of each product.[36] Hiding behind the Communications Decency Act (CDA) under Pennsylvania law – which states that websites should not be treated as the speaker of any information provided by another content provider – the court held that Amazon was similar to an auctioneer, or even a newspaper classified ad section that "connect[s] potential consumers with eager sellers."[37] Specifically, Amazon is a third-party vendor's means of marketing, and these third-party vendors are choosing the products to sell on Amazon.com.[38] Thus, the court held that Amazon was not a seller and therefore could not be liable under § 402A.[39]

Continuing this trend of minimizing the definition of a seller under § 402A, in *Fox v. Amazon.com* the Sixth Circuit held that Amazon was not a seller because it only stored third party seller's products but did not set the price of these products.[40] Here, the plaintiff bought a hoverboard that exploded in her house.[41] She argued that Amazon should be liable for the damages because it basically controlled every aspect of the sale of the hoverboard, and therefore was the one to sell it – it stored and shipped the hoverboard, it obtained payment in exchange for the hoverboard, it retained this payment, and communicated with the plaintiff regarding the hoverboard.[42] Amazon argued that it never owned title to the hoverboard and thus could not be

considered the seller of it.[43] The court decided in favor of Amazon, saying that Amazon was not a seller of the hoverboard because it did not exercise sufficient control over the product; it did not choose to offer the hoverboard for sale, nor did it set its price.[44] Thus, Amazon was not a seller for the purposes of § 402A.[45] Overall, Amazon has seemingly escaped liability by refusing to accept title or complete control of any product, and somehow sits in a limbo between a seller and a storage place for the products it lists on its website. This business model has created a loophole for Amazon to remove itself from any definition of a seller courts may use.[46]

C. *Owning Title of a Product: A Prerequisite for Acting as a Seller*

The Fourth Circuit in *Erie v. Amazon.com* also declined including Amazon as a seller under § 402A. In *Erie*, a buyer purchased a headlamp through Amazon.com, but it was manufactured by Dream Light, a third-party seller.[47] The headlamp's batteries malfunctioned and caused a fire.[48] Erie argued that Amazon is similar to a "brick-and-mortar store such as Home Depot," and thus is a seller of products and is liable for any defective products it sells.[49] Even though the contract for the transaction stated that Dream Light was the seller of the headlamp, Erie still argued that Amazon, through its Fulfillment by Amazon program, had enough control over the transaction that it became the seller.[50] Amazon's fulfillment services include storing the product, retrieving it when a consumer places an order, boxing it, and shipping it to the consumer.[51] Here, Dream Light shipped its headlamps to Amazon's warehouse, and then Amazon packaged and shipped it to the buyer; this was all included in a logistics service fee paid to Amazon.[52] Once the product was purchased by the consumer, Amazon collected payment, withdrew its logistics service fee, and then remitted the remaining balance to Dream Light.[53]

However, the Fourth Circuit rejected Erie's arguments, stating that the test to determine whether someone is a seller is "one who transfers ownership of property for a price."[54] Thus, a

"manufacturer, distributor, dealer, and retailer who own the products during the chain of distribution are sellers, but shippers, marketers, or auctioneers are not sellers because they do not take title to property during the course of a distribution."[55] The Fourth Circuit explains that Amazon did not receive title of the headlamp when Dream Light shipped it to Amazon's warehouse, mainly because Dream Light set the price of the headlamp, designed the headlamp's description for the website, and paid Amazon for its fulfillment services.[56] These fulfillment services only facilitated the sale of the headlamp, similar to the delivery services provided by UPS.[57] Ultimately, the Fourth Circuit held that because Amazon did not hold title of the headlamp during its fulfillment services, it was not considered a seller and thus not liable under § 402A.[58]

II. WHY AMAZON IS CONSIDERED A SELLER UNDER PRODUCTS LIABILITY AND THEREFORE SHOULD BE HELD STRICTLY LIABLE IN A PRODUCTS LIABILITY CLAIM

This Part will analyze why it is wrong to follow the test in *Erie* and define a seller as someone who must hold title of a product. Specifically, this part will evaluate how, by using this definition, Amazon is able to circumvent liability by using its Fulfillment by Amazon program.

The Fourth Circuit defined a seller as "one who transfers ownership of a property for a price."[59] This is exactly what Amazon does. It markets third party's products on its websites, stores the products, and then ships them to consumers. When Amazon has the product in its warehouse, the third-party no longer has the product, effectively transferring the product from itself to Amazon. Physically, the product has been transferred to Amazon for an indefinite time – it is only until a consumer buys the product through Amazon.com that Amazon packages and ships the product to them.[60] Amazon is in exclusive possession of this product once it is stored in a fulfillment warehouse. Without the fulfillment program, Amazon would have no interaction with a third-party vendor's product at any time.[61]

The *Erie* court states that Amazon did not transfer ownership of property for a price because it provides a website for use by third-party sellers and only facilitates those sales.[62] Yet, this reasoning is weak; it allows Amazon to store products anywhere around the world but uses its fulfillment program as an excuse to not claim title to the products. Simply because Amazon does not legally own a product should not mean it is not a seller. At most, the *Erie* test is saying that because Amazon pays third-parties for the product *after* the sale is complete, it never owned title of the product. After the product has been sold to the consumer, Amazon "collect[s[payment and, after withdrawing its service fee, remit[s] the balance to" the third party.[63] This is contrasted with normal sellers who first buy a product from a third-party and then resell it to consumers.

Essentially, Amazon's business model is a backwards version of buying a product and selling it to make a profit. Simply because Amazon chooses to pay for the product subsequent the consumer's purchase should not hold it immune from liability.[64] At its core, Amazon transfers the ownership of property to a consumer and accepts a profit, the very definition the Fourth Circuit used to argue Amazon was not a seller.

The court in *Erie* also equated Amazon to UPS because they both facilitate the process of a third-party's sale.[65] However, UPS does not sell goods (with the exception of items such as cardboard boxes, stamps, and cards), and UPS's existence does not depend on third-party's sales. While Amazon and UPS operate in the same manner in the sense of holding products and then sending them to people, this is the only similarity they share. Conversely, Amazon markets products. Without its website, third-party manufacturers or sellers like Dream Light would probably not be in existence. Similarly, Amazon would not be as large as it is without third-party manufacturers and sellers using its website as a platform. This understanding hindered the Fourth Circuit from performing an accurate analysis of how Amazon acts as a seller.

At the very least, third-party retailers who utilize the "Fulfillment by Amazon" program are similar to sales associates in a clothing store. A clothing store is utilizing these sales associates to sell their clothes to shoppers that stop in the store. This is quite the same as Amazon using third party vendors to market their products on Amazon.com to shoppers that visit the website. The clothing store would be liable to any injuries caused by their products, and thus Amazon should be held to this same liability.

Admittedly, *Erie* was decided in the midst of an economic transformation. Some critics argue that products liability should be abolished completely because each case is too different to propose a uniform test.[66] However, without using a test at all, Amazon and other large online corporations will increasingly gain power. Removing strict products liability is only a temporary fix and does nothing to define whether Amazon is a seller. It is important to return to early decisions such as *Francioni* to uphold the original reasoning behind § 402A, which is to place responsibility on those who distribute their products into the market.[67]

III. THE IMPLICATIONS OF CONSIDERING AMAZON A SELLER UNDER § 402A

Because Amazon sells such a diverse array of products, it is imperative that the corporation be held accountable for any injury caused to a consumer by Amazon's product.[68] It is helpful to analyze § 402A Restatement Second in parts. First, it states: "one who sells any product in a defective condition unreasonably dangerous to that user or consumer is subject to liability for physical harm . . . if (a) the seller is engaged in the business of selling such a product."[69] Undeniably, Amazon is in the business of selling their products. Simply because the corporation chooses to sell a wide variety of products does not mean it is not accustomed to selling products. Amazon is also not an auctioneer.[70] It is not negotiating prices with consumers, nor is it only

producing one product at a time. Unlike what the court held in *Oberdorf*, Amazon should not be able to use the excuse of being a third-party vendor to claim they are "ill equipped" with checking the quality of every product.[71]

Part (b) of the Restatement requires that the product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."[72] Again, it is undeniable that Amazon expects its products to reach the consumer without any change in its condition. Thus, because Amazon fulfills the two elements of liability required under § 402A, it is necessary that Amazon is considered a seller. To state that Amazon is not a seller due to simple technicalities that Amazon does not "hold title" of the product completely diminishes the authority behind § 402A.[73]

Listing Amazon as a seller might disrupt the normal flow of the economy. However, – considering Amazon as a seller under § 402A is not adding any new definitions to §402 A, but rather ensuring that the definition encompasses all sellers. Simply because Amazon is a virtual store should in no way hold it in a different spotlight than a physical store. Further, including Amazon in the definition of a seller under § 402A will increase the standard for products bought on Amazon. Because the corporation will be held strictly liable for any injuries caused by its products, it will no longer be willing to sell low quality items from any third-party vendor.

Finally, Amazon's fulfillment warehouses are located around the world.[74] This is a powerful tool for a corporation that has escaped products liability. Amazon can obtain products from foreign countries and store these products in Amazon fulfillment warehouses, receive a profit for them, but still not be deemed a seller under the test in *Erie.* If Amazon continues operating without any obstacles standing in its path, the quality of products listed on its website will deteriorate.

CONCLUSION

Amazon should be considered a seller for the purpose of § 402A Restatement Second of Torts where a third-party retailer utilizes the "Fulfillment by Amazon" feature to sell its products on Amazon.com. Using a test that requires sellers to transfer title of their products will only allow Amazon to continue escaping liability under § 402A. Amazon should not be allowed to circumvent the normal process of transferring of title simply because it "facilitates" the process of a third-party vendor's sale. It is critical that Amazon be considered a seller because in a growing yet closely-knit economy, it is easy for sellers to provide a more diverse array of products. Yet, without any liability placed on these sellers, corporations such as Amazon will increase in size but decrease in quality. Imposing products liability on Amazon will increase the quality of products sold online.

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[1] Shan Li, *Amazon overtakes Wal-Mart as biggest retailer*, LA Times (Jul. 24, 2015, 1:06 PM), http://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html.

[2] Erie Ins. Co. v. Amazon.com, Inc., No. 18-1198, *1, *16 (4th. Cir. 2019).

[3] *Id.*

[4] RESTATEMENT (SECOND) OF TORTS §402A. (AM. LAW. INST. 1965).

[5] Erie, No. 18-1198, at *14.

[6] Fox v. Amazon.com, Inc., No. 18-5661, at *13 (6th Cir. 2019).

[7] Erie, No. 18-1198, at *9.

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

[9] RESTATEMENT (SECOND) OF TORTS § 402A, cmt. c.

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

[11] RESTATEMENT (SECOND) OF TORTS § 402A, cmt. a.

[12] *Id.*

[13] RESTATEMENT (SECOND) OF TORTS § 402A, cmt. d.

[14] RESTATEMENT (SECOND) OF TORTS § 402A, cmt. f (an example of an "occasional" seller is someone selling his used car to his neighbor).

[15] Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 437 (Cal. 1944).

[16] *Id.* at 439.

[17] *Id.* at 438.

[18] *Id.* at 440.

[19] *Id.* at 439.

[20] *Id.* at 441 (Traynor, J., concurring opinion, holding that in cases where no negligence occurred, there should nonetheless be a standard of liability that makes the manufacturer guarantee the safety of his product).

[21] *Id.*

[22] *Id.* at 441-442.

[23] Hoskins v. Jackson Grain Co., 63 So.2d 514, 515 (Fl. 1953).

[24] *Id.*

[25] *Id*.

[26] *Id.* at 515-516.

[27] Francioni, 372 A.2d at 739 (holding that the purpose of § 402A is to hold responsible those who intend their products to reach the market).

[28] *Id.* at 741.

[29] *Id.* at 739.

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

[31] *Id.* at 279.

[32] *Id.* (holding that the auctioneer was an "*ad hoc* salesman" of the manufacturer of the tractor).

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

[34] *Id.* at 137.

[35] *Id.* at 138.

[36] Oberdorf v. Amazon.com, Inc., 295 F.Supp.3d 496, 497 (M.D.Pa. 2017); *see also* Alison Frankel, *Is Amazon liable for selling defective products? Three appeals courts will decide*, Reuters (Aug. 20, 2018, 1:22 PM), https://www.reuters.com/article/legal-us-otc-amazon/is-amazon-liable-for-selling-defective-products-three-appeals-courts-will-decide-idUSKCN1L51WM.

[37] Oberdorf, 295 F.Supp.3d 496 at 501.

[38] *Id.*

[39] *Id.*

[40] Fox v. Amazon.com, Inc., No. 18-5661, *3 (6th Cir. 2019).

[41] *Id.* at *6.

[42] *Id.* at *12.

[43] *Id.*

[44] *Id.* at *13.

[45] *Id.*

[46] Frankel, *supra* note 36, at 4.

[47] Erie, No. 18-1198 at *4.

[48] *Id.*

[49] *Id.* at 6*;* Frankel, *supra* note 36, at 3.

[50] Erie, No. 18-1198 at *4; *see* Oberdorf, 295 F.Supp.3d at 498 (Amazon will have no interaction with third-party vendor's products unless the third-party vendor participates in the "Fulfillment by Amazon" program).

[51] Erie, No. 18-1198 at *4; *see also* Oberdorf, 295 F.Supp.3d at 498.

[52] Erie, No. 18-1198 at *4-5.

[53] Erie, No. 18-1198 at *5.

[54] *Id*.

[55] *Id.* at *9.

[56] *Id*. at *10.

[57] *Id.* at *11 (UPS Ground was a third-party service used by Amazon to help facilitate the fulfillment services).

[58] *Id.* at *14.

[59] *Id.* at *5.

[60] *See* Fox, No. 18-5661 at *3.

[61] Oberdorf, 295 F.Supp.3d at 498.

[62] Erie, No. 18-1198 at *14.

[63] Erie, No. 18-1198 at *5; *see also* Fox, No. 18-5661 at *3 (Amazon "remits . . . payments to third-party sellers every 14 days but retains the right to impose a 90-day hold on those payments").

[64] Frankel, *supra* note 36, at 4.

[65] Erie, No. 18-1198 at *11.

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

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

[68] Li, *supra* note 1, at 4.

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

[70] *See* Oberdorf, 295 F.Supp.3d at 501.

[71] *Id.*

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

[73] Erie, No. 18-1198 at *14.

[74] Fox, No. 18-5661 at *4.