A BEHEMOTH'S DILEMMA: THE CASE FOR CLASSIFYING AMAZON AS A SELLER UNDER RESTATEMENT OF TORTS 402A

INTRODUCTION

Mail orders opened a new platform for retail to provide goods and services. Once the internet was introduced in the 1960s, businesses transformed the traditional mail order system into one with global accessibility. A company that has taken advantage of this new approach to retail is Amazon—an online retail company who has specialized in providing books and household goods.[1] One of the most profitable companies in the world, Amazon's innovative business model has allowed it to become an unprecedented feat with a myriad of legal questions ranging from taxation to liability.[2] An issue of particular interest is whether Amazon can be found liable through the use of its "Fulfillment by Amazon" program, which is one of Amazon's unique features.[3]

"Fulfillment by Amazon" ("FOA") provides logistic opportunities to third-parties to improve their business.[4] The seller ships its inventory to an Amazon warehouse for storage, and once and order is received online for a product, Amazon retrieves the product from inventory, boxes it, and then ships it to the purchaser.[5] The program has attracted litigation to determine whether Amazon falls within the scope of Restatement of Torts 402A ("The Restatement").[6] While Restatements are not legally binding, some jurisdictions have adopted Restatement of Torts 402A to establish their common law framework for strict products liability.[7] The Restatement provides that:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and

> does reach the user or consumer without substantial change in the condition in which it is sold; and
>
> (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller. [8]

If Amazon were found to be a "seller" within the meaning of the Restatement, then Amazon would be strictly liable for product defects manufactured by third-parties through FOA.

Part I will give a background into the history of the Restatement, the importance its comments have had in the course of its litigation, and the initial court cases that started the controversy. Part II will discuss why modern courts have overlooked certain aspects of FOA, and why looking at the factors of "control" and "promotion of the product for the use and consumption by the public" create a better test that furthers good public policy to compensate victims of products liability. Part III proposes that the application of the test will pose economic benefits to the market and consumers.

I. BACKGROUND

A. The Brief History on Restatement of Torts 402A

The Restatement was created from a long, rich practice of holding suppliers and sellers responsible under strict liability. It began in the early days of common law where businesses involved in the food industry were held to a high degree of responsibility for their products.[9] There were special criminal statutes that imposed penalties upon these businesses if they supplied faulty products.[10] This view was upheld many times in subsequent court decisions, where the courts in several states wanted to find a way to hold these sellers liable in the absence of negligence.[11] It was a remarkable feat because it strayed away from the general rule that a

supplier was not liable to third persons in the absence of negligence or privity.[12] In modern cases, some courts have somewhat agreed that there is an implied "warranty" from the seller to the consumer, while others have indicated that there is just a strict liability in tort.[13] In either case, the rule has been expanded outside of the food industry into areas such as products for intimate use and products that may be expected to cause physical harm.[14]

B. The Power of the Comments

Comment C of the Restatement says that the justification for strict liability to hold the seller responsible toward any individual who might be injured by the product is because the seller has assumed a special responsibility towards anyone that may be injured by it.[15] This is critical because it assumes that the public expects that reputable sellers will stand by their goods and ensure safety and compensation.[16] Comment C is just one example of how the authors of the Restatement viewed the state of the law and its application to products liability questions.[17] Since the authors are from well-respected legal backgrounds, judges use these comments to guide their jurisprudence. However, the comment that has been the most contentious in terms of applicability is Comment F.[18]

Comment F's influence in the litigation cannot be understated. The comment specified that the Restatement applies to a person engaged in selling products for use or consumption.[19] It specifically states that the rule not only applies to the manufacturer, but also to any wholesale or retail dealer; distributor; and operator of a restaurant.[20] Moreover, the Comment indicates that it can only be applied to individuals making the sale of products part of their business, with the restatement not applying to occasional or one time sales.[21] Because a clear reading of the comment illustrates that the authors of the Restatement wanted to hold anyone in the supply chain liable, the comment has played a crucial role in determining whether the courts believe

Amazon should be held liable for defective products under the Fulfilment by Amazon program.[22]

C. Judicial Decisions on Applying the Restatement on Sales Through an Intermediary

This comment argues that the courts holding Amazon's relationship with third-parties as "minimal" to be considered a seller ignores the historical purpose behind the Restatement to withhold lessors and dealers responsible for faulty products, which in turn allows Amazon to have legal protections that would lead to dire consequences for consumers.[23] Therefore, this section introduces relevant cases illustrating the way courts have interpreted the dilemma.

In *Escola v. Coca Cola*, the plaintiff placed Coca Cola bottles in the refrigerator, and after moving one about 18 inches from the case, it exploded in her hand.[24] Here, the plaintiff argued that their case should prevail under Res Ipsa Loquitor, a rule of evidence that subjects an individual to liability if they can prove that they had control of the instrumentality, and that the act would not have occurred in the absence of negligence.[25] The court held that the plaintiff could rely on the doctrine because Coca Cola displayed a lack of reasonable care in inspecting their bottles.[26] Although there were tests in place to assess the quality of the bottles, Coca Cola did not use them to test used bottles; thus, allowing for the possibility of harm to occur.[27]

The concurrence in *Escola* also provides insight on how some judges have viewed imposing liability on suppliers.[28] Justice Trynor believed that manufacturers should incur strict liability when a product was placed on the market that could potentially cause injury. [29] This stems from Justice Trynor's belief that public policy demands that responsibility be fixed wherever it can reduce the harmful effect defective products have on the market.[30] In particular, Justice Trynor states that even if a retailer is not equipped to test the product, they are still under absolute liability to their customer because the implied warranty of fitness includes a warranty for the safety of the product.[31] The public policy concern displayed by Trynor became relevant for

future court decisions that held third-parties liable for injuries. For example, in *Franconi v. Gibsonia Truck Corp*, the court held that the Restatement included lessors because of public policy concerns.[32] It particularly held that all suppliers of products for use or consumption by the public are subject to strict liability for injuries and harm caused by their defective products.[33] This is important because the *Franconi* decision opened the possibility for the Restatement to apply to all members of the supply chain.

After *Escola* and *Franconi* were decided, however, litigation began to favor the argument that liability could not be extended to third-parties, particularly those who were believed to have an insignificant role with the overall transaction.[34] In *Musser v. Vielsmeier*, the court held that the defendant could not be classified as a "seller" under Pennsylvania's product liability common law (adapted from the Restatement) because defendant's role as an auctioneer fell outside the term's practical limits.[35] In this case, the plaintiff's dad purchased two used tractors, which then caused injury to the plaintiff once he attempted to start them.[36] The court focused on the fact that the auction was simply a platform to ease the transaction, and that since the action company had no role in the selection of goods to be sold, it would be against public policy to hold them liable of a product defect.[37] This case served as the catalyst for the court to prevent Amazon being recognized as a "seller" in recent court decisions.[38]

In the late 2010s, some State courts have held that Amazon should not be liable for actions involving third-party products. In *Oberdorf v. Amazon.com*, the plaintiff suffered injuries when she used a retractable leash and it malfunctioned.[39] The plaintiff bought the leash from a third-party through Amazon's FOA program.[40] The court held that Amazon should not be held liable because the platform was simply used as a "means of marketing," and not as a direct sale.[41] The court focused on Amazon's lack of participation in the selection of goods and the manufacturing of the product to arrive to the conclusion that making Amazon liable would not further the purpose of the Restatement.[42] Likewise, in *Erie Insurance Co. v. Amazon.com*, the court held that

Amazon's role as an online retailer fell outside of the Restatement because it was not considered a seller.[43] Lastly, in *Fox, et al v. Amazon*, the court held that Amazon should not be held liable because the company did not exert enough control in the sale.[44]

II. WHY HOLDING AMAZON STRICTLY LIABLE FOR PRODUCT DEFECTS IS APPROPRIATE

This Part evaluates why holding Amazon strictly liable for product defects must be decided by the courts. While the most recent decisions have favored Amazon immensely, the courts have overlooked different aspects of FOA that could potentially serve to hold Amazon liable for third-party product defects. This comment advocates for a test that considers two different factors that could be used by modern courts: (1) control, and (2) the promotion of the product for the use and consumption by the public.[45] Control has been viewed by some courts as an important consideration for products liability to account for instances where an outside party has enough control in the transaction to determine the condition of the chattel and prevent them from escaping liability.[46] Furthermore, some courts have argued that strict liability does not revolve around the means of marketing, but rather whether the marketing of the product was meant to be used or consumed by the public.[47] In this sense, this factor relies heavily on an expansive interpretation of Comment F of the Restatement that would hold every member of the supply chain liable to the final customer, which in turn creates policy favoring the consumer.[48]

A. Amazon's Control in the Transaction of the Product Makes it Liable

Amazon's FOA establishes the type of control referenced in *Fox*.[49] When a third-party wants to use Amazon's marketplace (within the FOA or not) they have to sign a Business Solutions Agreement ("BSA"), where Amazon explicitly states that sellers are prohibited from having direct communication with buyers, and Amazon retains initial controls over customer payments.[50] However, instead of focusing on the control Amazon has within its marketplace,

courts have dismissed the argument that Amazon is a "seller" because of two main reasons: (1) Amazon did not choose the products, and (2) Amazon had no impact in the manufacturing of the product.[51] The problem with concentrating in those issues is that it overlooks the fact that Amazon's involvement in selling the third-party's goods is more intrusive than just setting the price.[52]

Focusing on the price of goods and involvement in manufacturing significantly diminishes the purpose of the Restatement. In *Erie*, the concurrence opinion agreed that Amazon should not be held liable because of its lack of title under Maryland law.[53] However, Judge Motz believed that a state court in Maryland may have a more holistic approach to assess Amazon's liability.[54] This is because an individual will order the product and pay amazon directly, then Amazon will take physical possession of the product (Assuming the third-party is party of its Fulfilment program), and they will package it and deliver it.[55] Moreover, Amazon also assumes credit card fraud and receives partial payments for its service.[56] Judge Motz believed that overlooking these facts is no longer sustainable because the customers are forced to bear the costs of injuries by themselves.[57] As a matter of fact, the Judge understood that, in Maryland, holding Amazon as a seller depends on a policy-driven inquiry that could change common law if the rule has become "unsound in circumstance of modern life." [58] That same rule should apply to all jurisdictions because dismissing the amount of control within the transaction is a disservice to unaware customers whose lack of being provided reasonable care harmed them without the possibility of due compensation.

Further proof of Amazon's overwhelming involvement in the transaction is through its implementation of its Business Service Agreement ("BSA").[59] While the process of purchasing products in Amazon entangles the retailer, the BSA asserts Amazon's control to a different level. As stated, the BSA is a mechanism that allows Amazon to force third-party suppliers to forgo their right to directly deal with clients.[60] Amazon created the agreement to ensure that its rules

would supersede the supplier's since, after all, it was Amazon's platform that is being utilized to finalize sales. The agreement makes Amazon the stronger party because it almost controls all aspects of the sale. By not allowing the third-party retailer to talk to the client, Amazon is capable of asserting its interest first rather than the supplier's. Furthermore, forcing the supplier to use their marketplace communication system through the whole transaction ensures that Amazon keeps a tight control on the relationship. Just as the Judge commented in the concurrence of *Erie*, this agreement allows Amazon to take a massive amount of control while still being able to avoid liability.[61] To advocate for injured parties using these products, the courts must put more emphasis on the amount of control Amazon exerts in the relationship.

An argument used to disregard these points is that Amazon simply served as a "means of transaction" similar to an auctioneer rather than as a "seller." [62] However, the amount of control Amazon has within the overall transaction differs significantly from auctioneers because Amazon controls everything in the process except the price and manufacturing. In a regular auction, the only control exercised by the auctioneer is initial communication with the seller. There is no packaging, delivery, or housing of the product; and there is no prohibitions the auctioneers force upon the third-party seller. To ignore the amount of control exercised by Amazon is to aid a corporate giant avoid paying compensation to rightfully deserving victims of accidents arising from products Amazon sold.[63]

B. Amazon is Liable Because They are "in the Business" of Promoting Goods for Use and Consumption by the Public

Amazon's platform was created to market products that would be used for public consumption.[64] In 2015, Amazon surpassed Wal-Mart as the world's biggest retailer.[65] Amazon stated then that it had a net income of $92 million with an overall boost in their market value to about $249 billion.[66] Amazon's massive market value was earned through its business model,

which is to provide a marketplace where books and household goods can be purchased.[67] Moreover, Amazon is also expanding in the realm of movies, TV shows, and grocery delivery.[68] The amount of services that the platform provides to satisfy demand for consumable goods is highly overlooked by the courts. Courts are as dismissive with this as with the "control' factor because of an undue emphasis on manufacturing and price setting.[69] This is dangerous to the average consumer because it highly ignores the main purpose of Amazon, which is to facilitate a platform where goods and services can be bought with the purpose of it being utilized by the consumer. Not only does it ignore Comment F as it has been interpreted by case law,[70] but it also ignores Amazon's inherent business model.

A barrier to plaintiffs receiving proper compensation is established if Amazon is allowed to bypass strict liability. This can be observed in the analogous case of *Rollins v. Cherokee Warehouses Inc.*[71] In this case, plaintiff was operating a forklift when it overturned and pinned him; thus, causing him severe injury.[72] The issue in the case involved extending the statute of limitations under the state statute to allow the plaintiff to file suit for products liability.[73] The court denied the defendants motion for summary judgment and stated that there was an issue of material fact to understand whether the defendant was "in the business" of rebuilding forklifts to determine liability, which the court held was a critical factor to determine whether the statute of limitations would be renewed.[74]

A similar holistic approach must be entertained by the courts here because it allows for a more substantial inquiry that takes into consideration multiple factors. In the case of Amazon, the company is "in the business" of marketing goods and services that will be used and consumed by the public. Their whole business model is formulated on creating a platform to ease transactions between customers and third-parties with Amazon's heavy involvement in the background.[75] Taking into consideration Amazon's inherent business nature means holding Amazon liable as part of the overall supply chain is exactly what *Franconi* believed to be for the betterment of the

consumer.[76] While there may be current precedent that views the Restatement too narrowly, focusing on Amazon being "in the business" of providing goods and services is beneficial to consumers.

III. THE BENEFITS OF USING THE TEST TO IMPOSE STRICT LIABILITY ON AMAZON

This Part will discuss the benefits brought to consumers by utilizing the test in Part II to hold Amazon strictly liable for product defects. This Part will particularly focus on the economic benefits for consumers and the marketplace that will occur if Amazon is held accountable.

So far, Amazon has received favorable decisions to keep it outside of the scope of strict liability.[77] However, what the courts have failed to consider is the fact that leaving Amazon outside of the scope of strict liability involving their FOA creates problems of economic fairness. The injured parties would lack a means to receive compensation from products purchased in the marketplace, even when Amazon is heavily involved in the method of purchase.[78] Aside from the issue of fairness, not holding Amazon strictly liable poses economic harm to the market. This occurs because consumers are not given fair prices to correct the propensity of a product to become faulty; thus, harming the individual.[79] The result is that accident costs are undervalued, which poses an issue for consumers trying to make an educated decision in a purchase since prices are distorted.[80] In Amazon's case, they do not set the price of the products themselves, but rather have a set fee for third-parties to use their marketplace.[81] The fee must be taken into consideration by these companies, which are, presumably, calculated into their final price.[82] All things considered, the fact that Amazon is not held under strict liability gives them less of an incentive to inquire the third-party to increase the price to account for potential product defects.

This lack of pressure towards Amazon is an issue that scholars have advocated against. The reason for this is because of its economic inefficiency. When analyzing Amazon's role in the

economy, the company performs the role of a sale-service hybrid supplier.[83] In a sale-service hybrid, a product is typically delivered and consumed by the buyer in the course of the seller rendering service.[84] Similar to a repairman who supplies a faulty part during their service of repairing a chattel, Amazon would fall in this category because they could potentially package and deliver a faulty item in the course of rendering service, which is the completion of a sale through their marketplace.[85] The label is used to classify Amazon into one of three categories currently being debated in the courts: commercial supplier of used goods, suppliers of sale-service hybrids, and non-sell suppliers.

The classifications help determine the economic necessity of including different industries within the realm of strict liability. To do so, it has been suggested that the "Theory of Second Best" is an option to assess the current economic impact of holding organizations like Amazon outside of the realm of strict liability. The theory is primarily concerned with the effects upon allocative efficiency of boundary extensions.[86] It considers the impact of alternative actions when all conditions of the original action cannot be fulfilled.[87] Thus, if the "first best" position cannot be satisfied, the "second best" position may be able to satisfy partially the original requirements of the sought action.[88]

When assessing a sale-service hybrid, an influential consideration is whether the defendant is a professional.[89] A professional is referred a defendant's professional character such as a dentist or a lawyer.[90] Historically, courts have been more willing to impose strict liability on nonprofessional providers of services so long as a product sale of services can be identified.[91] Therefore, this inquiry divides sale-service hybrids into two subcategories: Professional and nonprofessional providers of services (which Amazon falls into).[92] When assessing the market distortion of excluding nonprofessional sale-service hybrids, it can be seen that the great distortion will generate in Amazon's case because the substitutes to Amazon's marketplace are almost non-existent.[93] Of course, an individual could buy the item in a regular store, but the

commodity of buying items through the internet is difficult to substitute. Because of this, the test illustrates that strict liability must be imposed as customers will only be capable of going through one company to use the accessibility of Amazon's marketplace.[94] Therefore, even if the items are still coming from a third-party, the fact that it is in the platform holds Amazon strictly liable since there are no great substitutes available.

Even if the Theory of Second Best does not convince the courts, public policy on a grander scale illustrates that not holding Amazon as a "seller" can have dire consequences. A similar analogy to accident losses can be done with states losing tax revenue.[95] In *South Dakota v. Wayfair*, the state of South Dakota attempted to instill a sales tax on internet companies.[96] The defendant refused to pay because there was a physical requirement needed for a state to tax a business, and internet companies did not meet that burden.[97] The Supreme Court held that the physical requirement was antiquated and that states could, and should, tax internet companies and platforms for their sells.[98] The Supreme Court understood that these online retailers were engaging in selling goods and services, which gave them an unfair advantage in the marketplace.[99] If the Supreme Court decided online platforms were in fact in the business of selling for taxing purposes, then it would not be a large logical leap to hold it liable for product defects under strict liability because both instances have the goal of classifying online retailers as "sellers" for the purpose of instilling just compensation. Just as a state has the right to be compensated from retailers benefitting from its business, individuals have a right to be compensated for damages that occur from products obtained using the platform; thus, creating an economic benefits for the victims.

CONCLUSION

While the most recent court decisions have kept Amazon outside of the realm of strict products liability, it does not mean that it is the end of the conversation. Plaintiffs will

continuously attempt to seek compensation from their injuries that direct the courts to think about the issues using a holistic approach. Although Amazon does not set the prices for its third-party goods, the amount of control and promotion of goods for public use the company has with the process can be a plausible argument to ensure that victims are compensated. It is unlikely that this oversimplification of the Fulfillment program is sustainable as companies like Amazon become the norm in retailing; thus, the courts will look more closely at doctrines such as the Restatement with new insight that will further good public policy and economic efficiency.

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[1] Shan Li, Amazon Overtakes Wal-Mart as Biggest Retailer, LA Times (Jul. 24, 2015, 1:06PM), https://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html.

[2] *See* South Dakota v. Wayfair Inc., 138 S.Ct. 2080, 2084 (2018) (physical rule for taxation is "unsound and incorrect."); *See also* Allison Frankel, Is Amazon Liable for Selling Defective Products? Three Appeal 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.

[3] *Id.*

[4] *See* Erie Ins. Co. v. Amazon.com, Inc., No. 90-567, slip op. at 4-5 (4th Cir. 2019).

[5] *Id.*

[6] *Id.* at 13-14.

[7] *See* Oberdorf v. Amazon.com, Inc., 295 F. Supp.3d 496, 499-501 (M.D. Pa. 2017).

[8] Restatement (Second) of Torts § 402A (1965).

[9] Restatement (Second) of Torts § 402A cmt. f (1965).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Restatement (Second) of Torts § 402A cmt. c (1965).

[16] *Id.*

[17] Restatement (Second) of Torts § 402A cmt. a (1965).

[18] *See* Erie Ins. Co. v. Amazon.com, Inc., No. 90-567, slip op. at 14-15 (4th Cir. 2019).

[19] Restatement (Second) of Torts § 402A cmt. f (1965).

[20] *Id.*

[21] *Id.*

[22] *See* Erie Ins. Co. v. Amazon.com, Inc., No. 90-567, slip op. at 14-15 (4th Cir. 2019).

[23] *See* Franconi v. Gibsonia Truck Corp, 372 A.2d 736, 738 (Pa. 1977); *See also* Restatement (Second) of Torts § 402A cmt. f (1965).

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

[25] *Id.*

[26] *Id.* at 440.

[27] *Id.*

[28] *Id.* at 440 (Justice Traynor concurring).

[29] *Id.*

[30] *Id.* at 440-41.

[31] *Id.* at 441.

[32] *See Franconi*, 372 A.2d 736 at 739.

[33] *Id.*

[34] Musser v. Vilsmeier, 562 A.2d 279 (Pa. 1989).

[35]*Id.* at 283.

[36] *Id.* at 280.

[37] *Id.* at 283.

[38] Oberdorf v. Amazon.com, Inc., 295 F. Supp.3d 496 (M.D. Pa. 2017).

[39] *Id.* at 497.

[40] *Id.*

[41] *Id.* at 501.

[42] *Id.*

[43] *See* Erie Ins. Co. v. Amazon.com, Inc., No. 90-567, slip op. at 14 (4th Cir. 2019).

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

[45] *Id.* at 12 (emphasizing "control" as being an important consideration to determine products liability); *See also* Franconi v. Gibsonia Truck Corp, 372 A.2d 736, 738 (Pa. 1977) (discusses the importance viewing strict products liability in terms of what is being promoted for the use by the public).

[46] *Id.* at 11.

[47] Franconi v. Gibsonia Truck Corp, 372 A.2d 736, 738 (Pa. 1977).

[48] *Id.* at 739.

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

[50] *Id.* at 4.

[51] *See Id.* at 13; *see also* Oberdorf v. Amazon.com, Inc., 295 F. Supp.3d 496, 501 (M.D. Pa. 2017).

[52] *See* Erie Ins. Co. v. Amazon.com, Inc., No. 90-567, slip op. at 17 (4th Cir. 2019).

[53] *Id.* at 16.

[54] *Id.*

[55] *Id.* at 17.

[56] *Id.*

[57] *Id.*

[58] *Id*. at 18.

[59] *See* Fox v. Amazon.com, Inc., No. 18-5661, slip op. at 4 (6th Cir. 2019).

[60] *Id.*

[61] *Id.* at 13 (affirming district court's dismissal but agreeing that Amazon's control of direct communications with plaintiff was proof of control).

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

[63] Shan Li, Amazon Overtakes Wal-Mart as Biggest Retailer, LA Times (Jul. 24, 2015, 1:06PM), https://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html

[64] Li, *supra* note 61.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *See* Oberdorf v. Amazon.com, Inc., 295 F. Supp.3d 496, 501 (M.D. Pa. 2017).

[70] *See Franconi*, 372 A.2d at 738.

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

[72] *Id*. at 137.

[73] *Id.*

[74] *Id*. at 138-39.

[75] *See* Erie Ins. Co. v. Amazon.com, Inc., No. 90-567, slip op. at 17 (4th Cir. 2019); *see also* Li, *Supra* note 61.

[76] *See Franconi*, 372 A.2d at 740.

[77] Allison Frankel, Is Amazon Liable for Selling Defective Products? Three Appeal 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.

[78] *See* Erie Ins. Co. v. Amazon.com, Inc., No. 90-567, slip op. at 17 (4th Cir. 2019)

[79] James A. Henderson, Jr., *Extending the Boundaries of Strict Products Liability: Implications of the Theory of Second Best*, 128 U. Pa. L. Rev. 1036, 1037-38 (1980).

[80] *See generally* Henderson, *supra* note 76, at 1037.

[81] *See* Erie Ins. Co. v. Amazon.com, Inc., No. 90-567, slip op. at 7 (4th Cir. 2019).

[82] *Id.*

[83] Henderson, *supra* note 76, at 1053.

[84] *Id.*

[85] *Id.* at 1051.

[86] *See generally* Henderson, *supra* note 76, at 1059.

[87] *Id.* at 1060.

[88] *Id.*

[89] *Id.* at 1054.

[90] *Id.*

[91] *Id.* at 1055.

[92] *Id.*

[93] *See* Henderson, *supra* note 76, at 1086.

[94] *Id.*

[95] South Dakota v. Wayfair Inc., 138 S.Ct. 2080 (2018).

[96] *Id.* at 2088.

[97] *Id.* at 2089.

[98] *Id.* at 2100.

[99] *Id.* at 2099.