AMAZON AS A SELLER OF MARKETPLACE GOODS UNDER ARTICLE 2

Tanya J. Monestier†

You have probably purchased goods on Amazon. Did you know that if the goods you purchased on Amazon turn out to be defective and cause serious personal injury, Amazon is probably not liable for them? Did you know that even though you placed an order on Amazon, gave payment to Amazon, and received the goods in an Amazon box, there is a good chance that the goods are not "sold by" Amazon—but are instead sold by a third-party seller? Did you know that Amazon tries to avoid liability for goods sold on its platform on the technicality that it does not hold "title" to third-party seller goods, even though it promotes those goods online using Amazon branding, stores them in Amazon facilities, and delivers them in Amazon trucks? And did you know that the reason Amazon does not have title to those goods is because it unilaterally sets the title terms in its 68-page contract with third-party sellers?

In this Article, I look at Amazon's liability as a seller of unmerchantable goods under Article 2 of the Uniform Commercial Code. Thus far, litigants and courts have almost exclusively focused on Amazon's liability in tort. I argue that there is a compelling argument that Amazon is liable for defective third-party goods because it is a merchant seller under § 2-314 of the Uniform Commercial Code. The biggest stumbling block to recovery under Article 2 is Amazon's title argument. I deconstruct the title argument in detail, positing that Article 2 may not require the seller to hold title to ground liability, and, even if it does, it is not clear that Amazon does not have title to third-party goods in its possession. I also look specifically at a completely under-the-radar provision that should have a huge impact on Amazon's title defense: the commingling clause in the Amazon Services' Business Solutions Agreement. I maintain that this clause seriously undermines Amazon's title argument and opens the door to Article 2 liability. This could be a game changer in terms of future litigation.

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† Professor of Law, University at Buffalo School of Law. The author would like to thank Anna Kramer, Madison Picard and Lucas Sylvia for their very helpful research and editorial assistance in the preparation of this Article. This Article is dedicated to my brother, Dennis Monestier, who I sometimes think singlehandedly keeps Amazon in business.

I also broaden the lens beyond title to argue that Amazon casts itself in the role of seller with respect to all transactions on its platform. It does everything it can to convince buyers that they are purchasing from Amazon, not through Amazon. This is deliberately designed to capitalize on the trust that buyers place in the Amazon brand. Based on its degree of control over sales transactions and its efforts to hide the identity of the supposed "true seller," Amazon should be equitably estopped from arguing that it is not a seller of third-party goods sold on its website.

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> "Amazon seeks to have all the benefits of the traditional brick and mortar storefront without any of the responsibilities."[1]

INTRODUCTION

On May 25, 2015, Lynette Bosco purchased a French press coffee maker from Amazon.com as a gift for her son, Jacob Eberhart, a 23-year-old student in New York.[2] Unbeknownst to Lynette, the coffee maker was not sold directly by Amazon. Instead, it was "sold by" a third-party seller named CoffeeGet,[3] a Chinese company that participated in Amazon's Fulfillment by Amazon program.[4] Under this program, the coffee maker was stored in inventory at an Amazon facility; when Lynette placed the order, an Amazon employee selected, packaged, and shipped the coffee maker directly to her.[5] Neither Lynette nor Jacob were aware that Amazon was not the actual seller of the coffee maker.[6]

On August 20, 2015, Jacob was washing the coffee maker in the sink when the glass bottom of the coffee maker shattered.[7] The shards of glass sliced deep into Jacob's hand, causing "blood [to] gush[ ] everywhere."[8] He was immediately transported to Lennox Hill hospital for emergency medical treatment.[9] Jacob sustained a complicated laceration on his thumb with digital nerve injury as well as shock to the central nervous system.[10] Due to his injuries, Jacob suffered from loss of feeling and weakness in his thumb, an inability to grip objects, pain, suffering, anxiety, and trauma.[11] The injury caused Jacob to be "disabled and absent from school, and . . . unable to perform the duties and functions of his occupation as

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1 State Farm Fire & Cas. Co. v. Amazon.com Servs., Inc., 137 N.Y.S.3d 884, 889 (Sup. Ct. 2020).

2 Complaint at 1–2, 6, Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393 (S.D.N.Y. 2018) (No. 16-cv-8546).

3 *Id.* at 2.

4 *Eberhart*, 325 F. Supp. 3d at 396.

5 *Id.*

6 *See id.* ("The coffeemaker that caused Eberhart's injury was purchased on amazon.com. . . . Eberhart formally denies that CoffeeGet sold him the coffeemaker.").

7 Complaint, *supra* note 2, at 3.

8 *Id.*

9 *Id.*

10 *Id.* at 5.

11 *Id.* at 6.

a student."[12] Jacob was also "unable to do activities and things after the incident that he could do before, including personal tasks and recreational acts."[13]

Jacob sued Amazon for selling him a defective coffee maker.[14] Amazon's response was that Amazon was not the "seller" of the coffee maker; instead, CoffeeGet, the Chinese company, was.[15] The court agreed. In *Eberhart v. Amazon.com*,[16] the court concluded that Amazon's "failure to take title" to the coffee maker put it outside the chain of distribution necessary to ground a claim in products liability.[17] In other words, because Amazon technically did not take title to the coffee maker—even though it stored, packaged, shipped, and received payment for the coffee maker—it did not qualify as a "seller."

The majority of courts considering whether Amazon is liable for defective third-party goods sold on its website have hung their hat, at least in part, on this title argument. That is, Amazon is not a "seller" subject to liability because Amazon does not hold title to third-party goods sold on and through its platform.[18] And, to be clear, the reason Amazon does not hold title to these goods is because Amazon unilaterally sets the title terms in a contract of adhesion that it requires third-party sellers to agree to as a condition of doing business with Amazon.[19]

Most of the cases thus far have involved actions premised on products liability in tort. Indeed, the *Eberhart* case focused primarily on tort-based theories of recovery such as negligence and products liability. There is another possibility, however: contractual recovery. Under § 2-314 of the Uniform Commercial Code, a merchant seller warrants that the goods he sells will be merchantable, i.e., fit for their ordinary purpose.[20] To date, most litigants and courts have treated Article 2 as a passing afterthought in potentially holding Amazon liable for third-

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12 *Id.*

13 *Id.*

14 *Eberhart*, 325 F. Supp. 3d at 396.

15 *Id.* at 395–96.

16 *Id.* at 398.

17 *Id.* at 397–98.

18 *See, e.g.*, Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 141–42 (4th Cir. 2019) (finding that Amazon is not a seller because it does not hold title to goods in question). *See* discussion *infra* subpart I.B.

19 *See Eberhart*, 325 F. Supp. 3d at 396 ("Amazon requires all third-party sellers to agree to Amazon's 'Amazon Services Business Solutions Agreement' . . . .").

20 U.C.C. § 2-314(2)(c) (AM. L. INST. & UNIF. L. COMM'N 1977).

party goods sold through its marketplace.[21] This Article suggests that there may be more scope for Article 2 liability than appears at first blush.

In particular, this Article suggests that Amazon can qualify as a "seller" under § 2-314 even though it may not have title to the goods in question. I use the word "may" in the preceding sentence because it is not 100% clear who has title to goods sold on Amazon's platform. Alternatively, based on Amazon's exercise of control over third-party goods, Amazon should be estopped from arguing that it is not a seller for the purposes of Article 2. Amazon has made a deliberate choice to position itself as the seller of all goods on its platform, not just goods it directly sells to buyers. And it does everything it can to hide from the buyer the identity of the supposed true seller. In these circumstances, Amazon cannot have its cake and eat it too: it cannot *be* a seller and not face the consequences associated with *being* a seller.

This Article proceeds as follows. In Part I, I examine Amazon's business model, which is essentially a hybrid of a store and an online platform. I discuss the emerging case law and the split of authority as it concerns whether Amazon is liable for third-party goods sold on its website. In Part II, I argue that litigants and courts have taken too narrow a focus in seeking to hold Amazon liable for defective third-party products. Rather than pinning all their hopes on products liability in tort, litigants should explore potential Article 2 liability as a means to recovery. I then transition in Parts III and IV to Amazon's core argument in resisting liability: title. I examine title from both a legal and a factual perspective. I look specifically at the scope of Article 2, the text of § 2-314, the anti-title bent of the statute, and relevant case law to argue that title to goods may not be required to ground Amazon's liability under § 2-314. I also examine title from a factual perspective and posit that Amazon's "we don't have title" argument should not be accepted at face value. In Part V, I engage in a thought experiment where I illustrate the consequences of Amazon's title argument. I use an analogy to a brick-and-mortar store to show that Amazon's

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21 *See, e.g.*, McDonald v. LG Elecs. USA, Inc., 219 F. Supp. 3d 533, 542 (D. Md. 2016) ("Similarly, Maryland's Uniform Commercial Code ('UCC') provides that, 'a warranty that the goods shall be merchantable is implied in a contract for their sale *if the seller is a merchant with respect to goods of that kind*.' . . . Here, Amazon's role as the 'platform' for the third-party sales does not qualify it as a merchant or a seller under Maryland's UCC. Accordingly, plaintiff's breach of implied warranty claim against Amazon also must fail." (quoting Md. Code Ann., Com. L. § 2-314(1))).

title argument would have profound implications for retail and for consumer protection if carried to its logical conclusion. In Part VI, I shift to the argument that Amazon is, for all intents and purposes, the seller of all third-party goods on its platform and should be estopped from arguing otherwise. Finally, I offer some concluding remarks.

I
AMAZON'S BUSINESS MODEL AND THE EMERGING CASE LAW

Amazon.com, Inc. ("Amazon"), a company which began with the sale of a single book out of a garage, has evolved into an impressive and ubiquitous e-commerce giant.[22] Amazon has thrived in a society that has become increasingly dependent on the internet and technology-based services.[23] While the company's services run the gamut from film and television production to brick-and-mortar grocery stores, it is best known for its multi-billion-dollar online marketplace.[24] The company's vast selection of goods, no-hassle returns, simplified checkout experience, growing repository of reviews, and Prime membership program have made Amazon the go-to website for consumers.[25] According to the Los Angeles Times, "So ingrained is Amazon in our purchasing habits that more than half of all product searches begin on the site rather than alter-

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22 *History of Amazon: From Garage Startup to the Largest E-Commerce Marketplace*, CAPITALISM.COM (Aug. 19, 2020), https://www.capitalism.com/history-of-amazon/ [https://perma.cc/PV6L-G4NY].

23 *See* Alana Semuels, *Many Companies Won't Survive the Pandemic. Amazon Will Emerge Stronger Than Ever*, TIME (July 28, 2020), https://time.com/5870826/amazon-coronavirus-jeff-bezos-congress/ [https://perma.cc/D53E-XT34] (noting that Amazon "has 38% of the e-commerce market, trailed by Walmart with 6%").

24 *Id. See also* Jon Swartz, *How Amazon Created AWS and Changed Technology Forever*, MARKETWATCH (Dec. 7, 2019), https://www.marketwatch.com/story/how-amazon-created-aws-and-changed-technology-forever-2019-12-03 [https://perma.cc/Z9HU-Q8FU] (describing Amazon's breakthrough cloud computing industry).

25 Sarah Schmidt, *Amazon's Competitive Advantage and How Retailers Are Fighting Back*, MARKETRESEARCH.COM: MKT. RSCH. BLOG (Nov. 20, 2019), https://blog.marketresearch.com/amazons-competitive-advantage-and-how-retailers-are-fighting-back [https://perma.cc/P4XP-ESX9]. As of April 2020, sales on Amazon accounted for 49% of the e-commerce market in the United States and 5% of total retail sales. Patrick McKnight, *Amazon Sellers Face Unique Legal Challenges in 2020*, AM. BAR ASS'N (April 10, 2020) https://www.americanbar.org/groups/business_law/publications/committee_newsletters/cyberspace/2020/202004/fa_1/ [https://perma.cc/5XQB-XVA4].

natives such as Google."[26] This is perhaps not surprising given that Amazon offers over 100 million items for sale.[27]

With a "market cap of $1.7 trillion, Amazon is currently the most valuable retailer in the world."[28] If Amazon were a country, it would have the 58th highest GDP in the world.[29] Amazon makes up an enormous portion of the online retail market, selling "more than its next twelve online competitors combined."[30] For a sense of perspective, Amazon accounts for 38% of online U.S. retail sales; its next highest competitor is Walmart with a total of 5.8% of online retail sales, followed by Ebay with a total of 4.5% of online retail sales.[31] Amazon's reported sales revenues are astronomical. In 2020, it reported sales of $236.28 billion, up 38% from the previous year.[32] Amazon's total revenues for fiscal year 2020 were $386 billion.[33]

A. Amazon's Business Model: Half-Platform, Half-Store

Amazon's business model is unique in that it sells goods directly to buyers, and it provides a marketplace where other sellers can sell their goods on Amazon—all through the same

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26 David Pierson, *Extra Inventory. More Sales. Lower Prices. How Counterfeits Benefit Amazon*, L.A. TIMES (Sep. 28, 2018), https://www.latimes.com/business/technology/la-fi-tn-amazon-counterfeits-20180928-story.html [https://perma.cc/522B-CVCJ].

27 Robert Sprague, *It's a Jungle Out There: Public Policy Considerations Arising from a Liability-Free Amazon.com*, 60 SANTA CLARA L. REV. 253, 254 (2020).

28 Carmen Ang, *Visualized: A Breakdown of Amazon's Revenue Model*, VISUAL CAPITALIST (Oct. 14, 2020), https://www.visualcapitalist.com/amazon-revenue-model-2020/ [https://perma.cc/RS9P-3G67].

29 Fernando Belinchón & Qayyah Moynihan, *25 Giant Companies That Are Bigger Than Entire Countries*, BUSINESS INSIDER (July 25, 2018), https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7#amazons-revenue-exceeded-kuwaits-gdp-22 [https://perma.cc/429D-ZUPF].

30 Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 712 (2017).

31 Tonya Garcia, *Walmart Surpasses eBay in U.S. E-commerce for the First Time, Amazon Still Tops: eMarketer*, MARKETWATCH (June 16, 2020), https://www.marketwatch.com/story/walmart-surpasses-ebay-in-us-e-commerce-for-the-first-time-amazon-still-tops-emarketer-2020-06-15 [https://perma.cc/3NW9-RFSN].

32 *Amazon North America Sales*, MARKETPLACE PULSE, https://www.marketplacepulse.com/stats/amazon/amazon-north-america-sales-10 [https://perma.cc/X7WL-QQ2L] (last visited Feb. 11, 2021).

33 Anne Sraders, *Amazon Stock Rose 225,000% Under Jeff Bezos, Bringing His Net Worth to $195 Billion as He Steps Down as CEO*, FORTUNE (Feb. 2, 2021), https://fortune.com/2021/02/02/jeff-bezos-steps-down-amazon-stock-net-worth-andy-jassy/ [https://perma.cc/X9A6-2U84].

online platform.[34] In other words, Amazon wears two hats even though it operates only one online interface. It wears a "seller" hat in some cases, and it wears (or claims to wear) a "service provider" hat in other cases.[35] One publication refers to this unusual business setup as "half-platform, half-store."[36]

In fact, the majority of goods sold on Amazon are not sold *by* Amazon, but rather by third-party sellers using Amazon as a marketplace.[37] The growth of third-party sellers on Amazon has risen from just 3% in 1999 to 58% of physical gross sales today,[38] a trend former Amazon CEO Jeff Bezos described as "strange and remarkable."[39] The trend continues—third-party sales on Amazon are growing at a rate of 52% a year compared to 25% for first-party sales by Amazon.[40] In 2020 alone, Amazon generated over $80 billion from third-party sales on its platform, which "[i]ncludes commissions, related fulfillment and shipping fees, and other third-party seller services."[41] This revenue from third-party sales accounted for approximately 20.4% of Amazon's total revenues.[42] Currently, there are over

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34 *Conditions of Use*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM [https://perma.cc/P29T-8JE9] (last updated May 3, 2021).

35 Sprague, *supra* note 27, at 253 ("Through its website, Amazon.com retails its own products as well as those of nearly three million third-party vendors through the Amazon Marketplace.").

36 Colin Lecher, *How Amazon Escapes Liability for the Riskiest Products on Its Site*, VERGE (Jan. 28, 2020), https://www.theverge.com/2020/1/28/21080720/amazon-product-liability-lawsuits-marketplace-damage-third-party [https://perma.cc/9Z3K-42E6] ("[Amazon] acts as a direct seller of products, while also providing a platform, called Marketplace, for third parties to sell their products.").

37 Brian Huseman, *Amazon Stands Ready to Support AB 3262 if All Stores Are Held to the Same Standards*, AMAZON (Aug. 21, 2020), https://www.aboutamazon.com/news/policy-news-views/amazon-stands-ready-to-support-ab-3262-if-all-stores-are-held-to-the-same-standards [https://perma.cc/3AZ8-B345] ("These sellers, which are mainly small and medium-sized businesses, now sell the vast majority of new products—and nearly 60% of *all* products—purchased on Amazon.com.").

38 Sprague, *supra* note 27, at 255 ("In 2018, fifty-eight percent of Amazon's physical gross merchandise sales were through third-party sales on its website. This reportedly represented $200 billion in worldwide sales by 3 million active sellers." (footnotes omitted)).

39 McKnight, *supra* note 25.

40 AMAZON, THE BEGINNER'S GUIDE TO SELLING ON AMAZON, https://m.media-amazon.com/images/G/01/sell/guides/Beginners-Guide-to-Selling-on-Amazon.pdf?initialSessionID=Apay %3D140-0340979-9568435&ld=%2BAZUSSOA-sitedirectory&ldStackingCodes=SDUSSOADirect%3E%2BAZUSSOA-sitedirectory [https://perma.cc/QBF4-8J3M].

41 *Amazon Third-Party Seller Services Sales*, MARKETPLACE PULSE, https://www.marketplacepulse.com/stats/amazon/amazon-third-party-seller-services-sales-106 [https://perma.cc/GQ9Y-DPW8] (last visited Feb. 18, 2021).

42 Don Davis, *Amazon's Share of US Online Retail Revenue Dips Slightly in Q3*, DIGIT. COM. 360 (Nov. 3, 2020), https://www.digitalcommerce360.com/ 2020/

2.5 million third-party sellers on Amazon.[43] And third-party sales are actually far more profitable for Amazon than first-party sales: "Combined with transaction fees, fulfillment services and advertising, Amazon can take up to half a seller's revenue. By comparison, Amazon earns less than 5% profit margins on goods it sells directly . . . ."[44]

There are two main categories of third-party sales on Amazon, which are largely based on how the product will reach the consumer: "Fulfillment by Amazon" and "Fulfillment by Merchant."[45] Irrespective of the product's classification, Amazon will take orders, provide all order and shipping related updates to customers, and handle payment processing.[46] Through the Fulfillment by Amazon option, Amazon stores the third-party goods in Amazon's fulfillment centers and will select, pack, ship and provide customer service for the goods.[47] The Fulfillment by Amazon option includes the benefits of Amazon Prime, including the "Prime" designation and free two-day shipping.[48] The Fulfillment by Amazon program "also offers a

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11/03/amazons-share-of-us-online-retail-revenue-dips-slightly-in-q3/ [https://perma.cc/ST2C-XSQQ].

43 Jay Greene, *Burning Laptops and Flooded Homes: Courts Hold Amazon Liable for Faulty Products*, WASH. POST (Aug. 29, 2020), https://www.washingtonpost.com/technology/2020/08/29/amazon-product-liability-losses/ [https://perma.cc/SZ4Q-4SVX].

44 Pierson, *supra* note 26.

45 There is also a third category referred to as "Seller Fulfilled Prime," which is essentially a hybrid of Fulfillment by Merchant and Fulfillment by Amazon. *See generally* John E. Lincoln, *Fulfillment by Amazon vs. Fulfillment by Merchant vs. Seller-Fulfilled Prime (The Ultimate Guide)*, IGNITE VISIBILITY (July 25, 2017), https://ignitevisibility.com/fulfillment-amazon-vs-fulfillment-merchant-vs-seller-fulfilled-prime-ultimate-guide/ [https://perma.cc/P48A-39H5] (explaining the three different ways to fulfill Amazon orders). To date, no cases have involved Seller Fulfilled Prime. As of September 2021, Amazon was not accepting new registrations for the Seller Fulfilled Prime program. *Sell Products with the Prime Badge Directly from Your Warehouse*, AMAZON, https://sell.amazon.com/programs/seller-fulfilled-prime.html [https://perma.cc/FD65-AAPL] (last visited Sept. 4, 2021).

46 *See generally* Tom Baker, *FBA V SFP V FBM: Which Amazon Fulfilment Method Is Best for Your Business*, FORDE BAKER (June 28, 2020), https://fordebaker.com/fba-v-sfp-v-fbm-which-fulfilment-method-is-best-for-your-amazon-seller-business [https://perma.cc/P6X6-YKCN] (comparing the three fulfilment methods); *Communicate Effectively with Customers*, AMAZON, https://sellercentral.amazon.com/gp/help/external/G201901640 [https://perma.cc/G5V9-SM6N] (last visited Jan. 2, 2021) (explaining that Amazon handles most communication with customers).

47 *Fulfillment by Amazon*, AMAZON, https://sell.amazon.com/fulfillment-by-amazon.html [https://perma.cc/MX65-VB42] (last visited Feb. 18, 2021).

48 *Id.* Touting the benefits of the Prime logo, Amazon states, "FBA listings are displayed with the Prime logo, so customers know that Amazon handles packing, delivery, customer service, and returns." *Id.* Amazon advertises to third-party sellers that "$3.5+ billion [in] sales [were reported] by third-party Selling Partners

suite of software services that allows sellers to track sales performance, maintain inventory levels, and launch advertising campaigns through Amazon."[49] The majority of third-party sellers on Amazon—66%—participate in Fulfillment by Amazon.[50] This option is particularly "attractive to third-party vendors because it allows them to pay Amazon to handle basic distribution services without the need to make significant capital investments in warehousing or supply-chain logistics themselves."[51] In an effort to draw in even more third-party sellers, Amazon offers discounts to third-party sellers who are new to Fulfillment by Amazon. The "New Selection" program offers "free monthly storage, free removals, and free return processing for all eligible new-to-[Fulfillment by Amazon sellers] for a limited time."[52]

In contrast, under the Fulfillment by Merchant option, merchants are required to handle storage, shipping, and some customer service independently and do not have access to the Amazon Prime benefits.[53] But even under the Fulfillment by Merchant program, Amazon retains significant control over the sales process.[54] For instance, Amazon makes it clear to these

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during Prime Day 2020." THE BEGINNER'S GUIDE TO SELLING ON AMAZON, *supra* note 40. *See also* Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J.L. & TECH. 181, 194 (2019) ("Perhaps most importantly, though, is that third-party vendors using FBA are able to market their products to Amazon's 'Prime' members. . . . A 2018 report estimated Amazon's Prime membership included 95 million people, and that Prime members spend, on average, approximately $1,400 per year on merchandise bought through Amazon (compared to $600 of yearly spending on the site for the average non-Prime customer).").

49 Bullard, *supra* note 48, at 193–94.

50 Michael Waters, *How Amazon's Vast Logistics Network May Become a Liability Trap*, ModernRetail (Nov. 5, 2020), https://www.modernretail.co/platforms/how-amazons-vast-logistics-network-may-become-a-liability-trap/ [https://perma.cc/6QQA-CZ68] ("Amazon FBA has, in just over a decade, become the shipping service of choice for the company's millions of third-party sellers. [Sixty-six percent] of Amazon third-party sellers now rely entirely on FBA, according to the research firm Jungle Scout.").

51 Bullard, *supra* note 48, at 194.

52 *FBA New Selection*, AMAZON, https://sellercentral.amazon.com/gp/help/external/WHQRT98SAZC29VQ [https://perma.cc/Y7UC-ELV4] (last visited Feb. 18, 2021).

53 Lincoln, *supra* note 45.

54 Amy Elizabeth Shehan, Note, *Amazon's Invincibility: The Effect of Defective Third-Party Vendors' Products on Amazon*, 53 GA. L. REV. 1215, 1220 (2019) ("However, even in the absence of an FBA relationship, Amazon retains some control over the sales process. For example, Amazon retains the right to determine the appropriateness of the products sold on its marketplace and the right to edit the content of product listings. Amazon also 'collect[s] money from purchasers and direct[s] it to third-party vendors after deducting a fee.' Customers do not pay third-party sellers directly. . . ." (footnotes omitted) (alterations in original)).

third-party sellers that they are not to go outside of the "Amazon sales process" so as "to avoid . . . confusion for the customer."[55] To that end, all sellers are required to use the Seller Central Portal, Amazon's online interface for sellers, to manage their "selling account, add[ ] product information, mak[e] inventory updates, [and] manag[e] [orders and] payments."[56] All correspondence between third-party sellers and buyers must be done through Amazon's "Buyer-Seller Messaging" Service.[57] Additionally, once a third party has shipped[58] an order, it must inform Amazon so that Amazon can take over and update the buyer and process payment.[59] Amazon handles payment processing for all of its transactions, including Fulfillment by Merchant transactions.[60] Moreover, Amazon has strict fulfillment parameters for Fulfillment by Merchant transactions. For instance, the company requires third-party sellers to ship all media products (books, music, DVDs, and videos) within two business days and all other products within Amazon's defined shipping timelines.[61] Finally, Amazon controls the third-party seller's customer service options by mandating that the

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55 *What You Need to Know to Sell on Amazon*, AMAZON, https://sellercentral.amazon.com/gp/help/external/help.html?itemID=200421970 [https://perma.cc/82AS-FUJU] (last visited Feb. 17, 2021) ("You must not market or advertise to Amazon customers, nor divert them in any way from the Amazon sales process. You should follow this even during permitted communications, such as when responding to buyer inquiries about your products or their orders.").

56 THE BEGINNER'S GUIDE TO SELLING ON AMAZON, *supra* note 40.

57 *Selling Policies and Seller Code of Conduct*, AMAZON, https://sellercentral.amazon.com/gp/help/external/G1801 [https://perma.cc/9ZQ5-AT7B] (last visited Feb. 17, 2021). Amazon makes it very clear that third-party sellers may only contact customers solely to obtain additional information required to fulfil the order and to provide customer service. *Id.* Marketing to customers is strictly prohibited. *Id.* For more information about the Buyer-Seller Messaging Permissions, see *Buyer-Seller Messaging Permissions*, AMAZON, https://sellercentral.amazon.com/gp/help/external/G201054220 [https://perma.cc/VPS4-BXAR] (last visited Feb. 17, 2021).

58 Amazon also sets the shipping rates for Fulfillment by Merchant sales; Amazon will charge the customer the predetermined amount and pass along its estimate to the seller as a credit to use when shipping the item. THE BEGINNER'S GUIDE TO SELLING ON AMAZON, *supra* note 40.

59 *What You Need to Know to Sell on Amazon*, *supra* note 55 ("Amazon will provide all the order and shipping emails to customers . . . . This is to avoid conflicting messaging or confusion for the customer. Remember that selling on Amazon requires less communication by you to customers, since much of the process communication is handled by Amazon.").

60 *See Ordering from a Third–Party Seller*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=201889310 [https://perma.cc/D6NW-P5S8] (last visited Feb. 18, 2021) (showing that irrespective of the distribution program a third-party seller uses, Amazon is always in control of the payment processing).

61 *What You Need to Know to Sell on Amazon*, *supra* note 55.

seller's "return policies must be at least as favorable to buyers as Amazon return policies" and requiring sellers to accept new and unopened items within thirty days for a full refund.[62]

Increasing attention has been paid lately to the danger posed by goods sold on Amazon.[63] In 2019, the Wall Street Journal published an exposé on the proliferation of dangerous goods sold on Amazon by third-party sellers.[64] Its investigation found "4,152 items for sale on Amazon.com Inc.'s site that have been declared unsafe by federal agencies, [were] deceptively labeled or [were] banned by federal regulators—items that big-box retailers' policies would bar from their shelves."[65] Nearly half of these items were shipped to buyers from Amazon warehouses.[66] And dozens of these dangerous or mislabeled goods "had the Amazon's Choice designation, which many consumers take to be Amazon's endorsement."[67] These dangerous goods run the gamut from exploding batteries[68] to defective

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62 *Id.*

63 Recently, the Consumer Product Safety Commission sued Amazon for selling dangerous third-party goods. Complaint at 1, In the Matter of Amazon.com, Inc., CPSC Docket No. 21-2 (filed July 15, 2021), https://www.federalregister.gov/documents/2021/07/21/2021-15440/amazoncom-inc [https://perma.cc/2E4T-ANN5]. In response to Amazon's motion to dismiss on the basis that Amazon was not a "distributor" within the meaning of the Act, the court concluded that "undisputed facts show that Amazon meets the statutory definition of the term *distributor* and does not fall within the terms of the safe harbor for *third-party logistics providers*." Order on Motion to Dismiss and Motion for Summary Decision at 27, In the Matter of Amazon.com, Inc., CPSC Docket No. 21-2 (Jan. 19, 2022), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/027-Order-on-Motion-to-Dismiss-and-Motion-for-Summary-Judgement.pdf?VersionId=FGW05hge.c7FvPZZOijVWVapvJBQKudZ [perma.cc/U54L-G6QE]. There is also the very serious problem of counterfeits. *See, e.g.*, Pierson, *supra* note 26 (discussing Amazon's rampant counterfeit issue).

64 Alexandra Berzon, Shane Shifflett & Justin Scheck, *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned Unsafe or Mislabeled Products*, WALL ST. J. (Aug. 23, 2019), https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990 [https://perma.cc/48FE-JDWS].

65 *Id. See also* Sprague, *supra* note 27, at 257 ("In addition, a wave of Chinese merchants have joined Amazon's millions of third-party sellers worldwide. A new product listing is reportedly uploaded to Amazon from China every 1/50th of a second, many of them mislabeled, defective, or counterfeit. Some third-party sellers are literally selling garbage on the Amazon website." (footnotes omitted)).

66 Berzon, Shifflett & Scheck, *supra* note 64, at 1 ("Of the 4,152 products the Journal identified, 46% were listed as shipping from Amazon warehouses.").

67 *Id.*

68 *See* McDonald v. LG Elecs. USA, Inc., 219 F. Supp. 3d 533, 535 (D. Md. 2016) (exploding batteries).

hoverboards[69] to unregulated caffeine powder.[70] Buyers have died,[71] been seriously injured,[72] and have had their homes or businesses destroyed[73] by third-party goods they thought they were purchasing *from* Amazon.[74]

B. The Case Law: Amazon's Liability for Defective Third-Party Goods

A number of these buyers have sought to hold Amazon responsible for personal or economic injuries caused by third-party goods sold on Amazon. Plaintiffs have generally attempted to premise liability on Amazon's status as a seller or distributor under state products liability law.[75] By and large, U.S. courts have held that Amazon is not strictly liable for the goods sold by third parties on Amazon's website.[76] In the words of one court, there is "an emerging consensus against

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69 *See, e.g.*, Carpenter v. Amazon.com, Inc., No. 17-cv-03221-JST, 2019 WL 1259158, at *1 (N.D. Cal. Mar. 19, 2019) (defective hoverboard); Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 770 (N.D. Ill. 2019) (defective hoverboard); Fox v. Amazon.com, Inc., 930 F.3d 415, 418 (6th Cir. 2019) (defective hoverboard).

70 *See* Stiner v. Amazon.com, Inc., 164 N.E.3d 394, 396 (Ohio 2020) (caffeine powder).

71 *Id.*

72 *See, e.g.*, Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 142 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.,* 818 F. App'x 138 (3d Cir. 2020) (en banc) (defective goods caused permanent blindness in plaintiff's left eye); Bolger v. Amazon.com, LLC, 267 Cal. Rptr. 3d 601, 620 (Cal. Ct. App. 2020), *review denied*, No. S264607, 2020 BL 455500 (Cal. Nov. 18, 2020) (defective goods exploded and severely burned plaintiff).

73 State Farm Fire & Cas. Co. v. Amazon.com Inc., 407 F. Supp. 3d 848, 849 (D. Ariz. 2019), *aff'd,* 835 F. App'x 213 (9th Cir. 2020) (defective hoverboard ignited and caused severe home damage); *see, e.g.*, Erie Ins. v. Amazon.com, Inc., 925 F.3d 135, 138 (4th Cir. 2019) (defective headlamp caught fire and damaged insured's home).

74 In *Carpenter v. Amazon.com*, the plaintiffs purchased a hoverboard from a third-party seller on Amazon. No. 17-cv-03221-JST, 2019 WL 1259158, at *1 (N.D. Cal. Mar. 19, 2019). The hoverboard caught fire, damaged their home, and killed their two dogs. *Id.* The plaintiffs did not know that third-party sellers operate on Amazon. Instead, the plaintiffs believed that the hoverboard was vetted by Amazon because they didn't think Amazon would put its name behind dangerous goods. Plaintiff Dave Carpenter elaborated, "That's why we got it from there; it was Amazon." Greene, *supra* note 43.

75 Shehan, *supra* note 54, at 1220 ("There is no uniform federal scheme of product liability. As a result, states vary on their approach to product liability: some states have adopted the *Restatement* in its entirety, some have adopted the *Restatement* in part, and others have chosen to independently draft a state product liability statute." (footnotes omitted)).

76 *See* Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENN. ST. L. REV. 322, 334 (2020) ("Interestingly, courts have generally decided cases involving [Fulfilment by Merchant] products and [Fulfilment by Amazon] products similarly, even though the amount of contact

construing Amazon as a 'seller' or 'distributor'—and, therefore, against holding Amazon strictly liable for defective products sold on its website."[77] With that said, the tides may be turning, with several recent decisions holding Amazon liable for defective products sold by third-party sellers on its website.[78]

So far, the Fulfillment by Merchant cases have been nearly unanimous in holding that Amazon is not liable for goods sold by third-party sellers.[79] The reasoning is usually twofold. First, because Amazon does not have title to the goods in question, it cannot be a seller under relevant state law.[80] And second, under the Fulfillment by Merchant program, Amazon does not exercise sufficient control over the goods to qualify as a seller.[81] The two notable exceptions in the Fulfillment by Merchant cases are *Oberdorf v. Amazon.com Inc.*[82] and *Loomis*

Amazon has with the product differs greatly between the two fulfillment methods.").

77 Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 400 (S.D.N.Y. 2018).

78 *See infra* pp. 120–22.

79 *See* Stiner v. Amazon.com, Inc., 164 N.E.3d 394, 398–401 (Ohio 2020) (holding that Amazon is not responsible for the third-party sale of a caffeine powder that resulted in the death of a teenager because Amazon did not exert any control over the product and therefore, was not liable under the Ohio Products Liability Act); Carpenter v. Amazon.com, Inc., No. 17-cv-03221-JST, 2019 WL 1259158, at *2 (N.D. Cal. Mar. 19, 2019) (holding that Amazon is not strictly liable for the damage caused by a defective hoverboard purchased from a third-party seller because it was not shown that Amazon's conduct was a "necessary factor" in bringing the goods to market); Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 778–79 (N.D. Ill. 2019) (holding that Amazon is not liable for damage caused by a defective hoverboard sold by a third-party seller because Amazon was not a "seller" or "otherwise part of the distributive chain," nor did it play an "integral role" in the marketing enterprise); Fox v. Amazon.com, Inc., 930 F.3d 415, 425 (6th Cir. 2019) (holding that Amazon is not liable for significant property damage caused by a defective hoverboard sold by a third-party seller because Amazon did not exercise sufficient control over the product to deem it a "seller" within the meaning of the Tennessee Products Liability Act); State Farm Fire & Cas. Co. v. Amazon.com, Inc., 528 F. Supp. 3d 686, 695 (W.D. Ky. Mar. 24, 2021) (holding that "[r]egardless of which approach Kentucky courts would use to define sellers for purposes of strict liability (transfer of title, control over the product, role in the transaction), Amazon . . . . [could not] be considered a seller of the hoverboard for purposes of strict liability.").

80 *See, e.g.*, Wallace v. Tri-State Assembly, LLC, No. 155741/2017, 2020 WL 3104357, at *9–10 (N.Y. Sup. Ct. June 11, 2020), *aff'd*, 2021 N.Y. Slip Op. 06664 (1st Dept. 2021) (granting Amazon's motion for summary judgment on the grounds that Amazon was not a seller of the bicycle because it did not manufacture, ship, or ever possess title to the bicycle).

81 *See, e.g.*, Fox v. Amazon.com, Inc., 930 F.3d 415, 425 (6th Cir. 2019) (stating Amazon did not exert sufficient control over third-party goods because it did not choose to offer the hoverboard for sale, set its price, or make any representations about the hoverboard on its website).

82 930 F.3d 136 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 818 F. App'x 138 (3d Cir. 2020) (en banc).

v. Amazon.com LLC.[83] In both of these cases, the courts were not persuaded that Amazon should escape liability for defective third-party goods.

In *Oberdorf*, the plaintiff purchased a dog collar on Amazon from the third-party seller, The Furry Gang.[84] The ring on the dog collar broke unexpectedly and caused the leash to recoil, hitting the plaintiff in the face, and leaving her permanently blind in one eye.[85] The Third Circuit Court of Appeals held that under Pennsylvania law, Amazon should be considered a seller.[86] The court's reasoning was based in part on the following factors: Amazon in some cases may stand "as the only member of the marketing chain available to the injured plaintiff for redress;"[87] imposing liability on Amazon would serve as an incentive to safety;[88] Amazon is in a "better position than the consumer to prevent the circulation of defective products;"[89] and Amazon "can distribute the cost of compensating for injuries resulting from defects" by adjusting the fees it charges third-party sellers.[90] Additionally, the court rejected Amazon's argument that the transfer of title is dispositive of whether or not someone is a seller under Pennsylvania law.[91] After Amazon's petition for rehearing was granted, the Third Circuit asked the Pennsylvania Supreme Court to hear *Oberdorf* and decide the question of Amazon's liability for third-party goods.[92] In July of 2020, the Pennsylvania Supreme Court agreed to do so.[93] However, prior to litigating the issue, the parties settled.[94]

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83 277 Cal. Rptr. 3d 769 (Cal. Ct. App. 2021).
84 930 F.3d at 142.
85 *Id.*
86 *Id.* at 151.
87 *Id.* at 145.
88 *Id.* at 145?46.
89 *Id.* at 146?47.
90 *Id.* at 147.
91 *Id.* at 150.
92 Alison Frankel, *Amazon Zig and Zags in Latest Strategy to Avoid Product Liability Claims,* REUTERS (Sept. 24, 2020), https://www.reuters.com/article/us-otc-amazon/amazon-zigs-and-zags-in-latest-strategy-to-avoid-product-liability-claims-idUKKCN26F3FY [https://perma.cc/U8PK-EHX2].
93 *Id.*
94 The precedential value of *Oberdorf* is somewhat unclear and depends on the Third Circuit's treatment of vacated opinions. *See* Michael D. Moberly, *This Is Unprecedented: Examining the Impact of Vacated State Appellate Court Opinions,* 13 J. APP. PRAC. & PROCESS 231, 233–34 (2012) ("[T]he courts are not uniform in their treatment of vacated opinions. For example, several courts have indicated that vacated opinions retain their precedential value in some circumstances. Even in jurisdictions in which vacated opinions cannot be cited as precedent (at least in the stronger, binding sense), litigants presumably could cite them for some other purpose, including their ability to persuade the court in a subsequent

In *Loomis v. Amazon.com*, the plaintiff purchased a hoverboard from a third-party seller who participated in Amazon's Fulfillment by Merchant program.[95] The hoverboard caught fire, causing property damage and severe burns. The plaintiff sued and the lower court granted summary judgment in favor of Amazon.[96] The California Court of Appeal reversed. It concluded that there was a triable issue of fact on the plaintiff's products liability claim.[97] The court stated that "Amazon's own business practices make it a direct link in the vertical chain of distribution under California's strict liability doctrine."[98] The court was also persuaded that the "stream of commerce approach or market enterprise theory offer[ed] an alternative basis for strict liability."[99] Given that *Oberdorf* was vacated, *Loomis* stands as the only case to potentially impose liability on Amazon for goods that are fulfilled directly by the third-party merchant.

Cases involving Fulfillment by Amazon arguably present more of a challenge since Amazon takes on the exclusive role of getting the third-party goods into the hands of buyers: it is already in possession of the goods, it selects the goods, packages them, ships them, handles complaints and returns, and processes payment.[100] Nonetheless, even in this context, most courts have refused to hold Amazon liable for defective third-party goods. *Eberhart v. Amazon.com, Inc.*[101] is emblematic of the logic being used by courts to absolve Amazon of liability for third-party seller goods. As described at the beginning of this Article, the plaintiff in *Eberhart* sued for personal injuries he sustained to his hand when he was washing a glass coffee pot that had been purchased from a third-party seller on Ama-

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case." (footnotes omitted)). In a later case out of New Jersey, a district court denied Amazon's motion to dismiss the plaintiff's claims largely because of the *Oberdorf* holding. After the *Oberdorf* rehearing was granted, the New Jersey court issued a stay of its opinion. *See* Papataros v. Amazon.com, Inc., No. 2:17-cv-9836 (KM)(MAH), 2019 WL 4740669 (D.N.J. Sept. 3, 2019) (staying the effect of the opinion pending a decision in *Oberdorf*).

95 277 Cal. Rptr. 3d 769, 772 (Cal. Ct. App. 2021). Just a month earlier, a federal court ruled in favor of Amazon in a case involving a defective hoverboard sold through Amazon's Fulfillment by Merchant program. Great N. Ins. Co. v. Amazon.com, Inc., 524 F. Supp. 3d 852, 858 (N.D. Ill. 2021) (ruling in Amazon's favor based on the "Seventh Circuit's admonition against expanding state tort liability beyond the bounds established by state courts.").

96 *Loomis*, 277 Cal. Rptr. 3d at 772.

97 *Id.* at 775.

98 *Id.* at 779.

99 *Id.* at 780.

100 *See* Lincoln, *supra* note 45.

101 325 F. Supp. 3d 393, 396–400 (S.D.N.Y. 2018).

zon.[102] The court noted that the New York Court of Appeals had extended strict liability to "certain sellers, such as retailers and distributors," where the "products . . . [were] sold in the normal course of business."[103] While the Court of Appeals had not precisely identified exactly which entities were within the chain of distribution, the *Eberhart* court was of the view that because Amazon failed to take title to the product, it "was not within the coffeemaker's chain of distribution such that Amazon could be considered a 'distributor' subject to strict liability."[104]

The Fourth Circuit Court of Appeals reached the same conclusion in *Erie Insurance Company v. Amazon.com, Inc.*[105] In *Erie Insurance*, a homeowner purchased a headlamp from Dream Light, a third party-seller on Amazon that participated in the Fulfillment by Amazon program.[106] The headlamp ignited and caused severe property damage.[107] The plaintiff, the insurance company for the homeowner, brought an action against Amazon for negligence, breach of warranty, and strict liability in tort.[108] The Fourth Circuit held that the actors who retain title to goods in the chain of distribution (such as manufacturers, distributors, dealers, and retailers) are sellers who are subject to liability, whereas those who do not take title (like shippers, warehousemen, and marketers) are not sellers.[109] The court went on to conclude that although the good was stored in Amazon's warehouse, it was never actually sold by Dream Light to Amazon, and therefore Amazon did not take title to the good at any point.[110] Thus, regardless of the active role Amazon played in distributing the product, because Amazon did not take title to the good, it was not a seller.[111]

In *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*,[112] a federal district court in New Jersey held that Amazon's actions did not constitute those of a "product seller," and thus it could not be held liable under the New Jersey Products Liability Act

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102 *Id.* at 395.

103 *Id.* at 397 (quoting Sukljian v. Charles Ross & Son Co., Inc., 503 N.E.2d 1358, 1360 (1986)).

104 *Id.* at 398.

105 925 F.3d 135 (4th Cir. 2019).

106 *Id.* at 138.

107 *Id.*

108 *Id.* at 137.

109 *Id.* at 141.

110 *Id.* at 141-42.

111 *Id.*

112 No. 17-2738 (FLW) (LHG), 2018 WL 3546197 (D.N.J. July 24, 2018).

(PLA).[113] The plaintiff in *Allstate* brought suit against Amazon as the subrogee for the insured after a replacement battery for the insured's laptop started a fire in her home.[114] The plaintiff argued that Amazon was a "product seller" because it fell within the distribution chain.[115] Although the court indicated that it was "a close question," the court ultimately granted Amazon's motion for summary judgment.[116] The court reasoned that the "touchstone" for determining whether a party is a "product seller" in New Jersey is control over the product itself.[117] The court noted that although the transfer of title is not dispositive in New Jersey, it is relevant to the question of whether a distributor like Amazon exercised sufficient control over the good.[118] Here, the court found that although Amazon "may have technically been a part of the chain of distribution," it never exercised sufficient control over the product to be a "product seller" under the PLA.[119]

The Ninth Circuit Court of Appeals also held that Amazon is not a seller and therefore could not be held strictly liable in *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*[120] In *State Farm*, the insured purchased a hoverboard from Amazon that ignited and destroyed his home.[121] The Ninth Circuit, pursuant to Arizona case law, applied a multi-factor test and contextual analysis to conclude that that Amazon was not a seller of the goods.[122] The court found that the majority of the factors considered, including the fact that Amazon never took title to the hoverboard, weighed in favor of Amazon.[123] The court went on to say that although Amazon facilitated the shipment of the good through the Fulfillment by Amazon program, that "did not make Amazon the seller of the product any more than the U.S. Postal Service."[124]

The Supreme Court of Texas held that Amazon was not liable as a seller of the defective third-party goods in *Ama-*

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113 *Id.* at *1.

114 *Id.* The battery was purchased from a third-party seller on Amazon, Lenoge, who participated in the Fulfillment by Amazon program. *Id.* at *2–3.

115 *Id.* at *5.

116 *Id.*

117 *Id.* at *7.

118 *Id* at *8.

119 *Id.*

120 835 F. App'x 213, 216 (9th Cir. 2020).

121 Appellee's Opening Brief at 1, 4, *State Farm Fire & Cas. Co.*, 835 F. App'x (No. 19-17149).

122 *State Farm Fire & Cas. Co.*, 835 F. App'x at 215–16.

123 *Id.* at 216.

124 *Id.*

zon.com, Inc. v. McMillan.[125] In *McMillan v. Amazon.com, Inc.*,[126] the plaintiffs ordered a television remote control from a third-party seller on Amazon.[127] The plaintiffs were unaware that the remote's battery compartment contained a lithium button battery that could come loose and fall out.[128] The plaintiff's nineteen-month-old daughter ingested the battery and had to have it surgically removed.[129] The battery's caustic fluid caused "severe, permanent, and irreversible damage" to the child's esophagus.[130] The plaintiffs filed suit and Amazon filed a motion for summary judgment on the grounds that it was not a seller of the remote.[131] The district court disagreed and held that Amazon is "integrally involved in" and "exerts control over" products sold by third parties and thus is a seller under the Texas statute.[132] The Fifth Circuit Court of Appeals granted Amazon's appeal and ultimately certified the issue for the Supreme Court of Texas.[133] In holding that Amazon was not liable for the defective third-party goods, the court stated, "[b]ecause the product in this case was sold on Amazon's website by a third party and Amazon did not hold or relinquish title, Amazon is not a seller even though it controlled the process of the transaction and the delivery of the product."[134]

As the above illustrates, multiple courts have concluded that Amazon is not a seller despite its role in getting the product into the buyer's hands through the Fulfillment by Amazon program.[135] For many of these courts, Amazon's argument that it does not retain title and is therefore not a seller has been integral to the holding. Nonetheless, Amazon's success with this argument may be transient. As discussed below, some courts have begun to be less sympathetic to Amazon's defense

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125 625 S.W.3d 101, 112 (Tex. 2021).

126 983 F.3d 194 (5th Cir. 2020), *certified question answered*, 625 S.W.3d 101 (Tex. 2021).

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.* at 197–98.

132 *Id.* at 200.

133 *Id.* at 203.

134 *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 112 (Tex. 2021).

135 *See* Sean M. Bender, Note, *Product Liability's Amazon Problem*, 4 J.L. & TECH. TEX. 95, 116 ("Of the 22 lawsuits that reached some form of adjudicative outcome, only six have resulted in opinions even suggesting that Amazon might be strictly liable in tort, several of which are still being appealed . . . . Even at a time when civil plaintiff success rates are approaching all-time lows, winning just 7% of filed cases (and 27% of adjudicated cases) stands out as an especially dismal track record." (footnotes omitted)).

and have imposed liability on Amazon for defective third-party seller goods despite Amazon's purported lack of title to the goods in question.

In *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*,[136] the plaintiff, the insurer of a homeowner whose house flooded due to a defect in a bathtub faucet adaptor purchased from a third-party seller on Amazon, brought suit against Amazon for strict products liability.[137] Amazon moved for summary judgment on the grounds that it was not a seller within the meaning of the relevant statute, but the district court for the Western District of Wisconsin disagreed and denied Amazon's motion.[138] The court held that under these facts, Amazon was a "critical component of the chain of distribution" and "deeply involved" in the transaction, and that because the manufacturer and the third-party seller were not amenable to suit in the state, Amazon was strictly liable under Wisconsin law.[139]

In a later case out of New York, also titled *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*,[140] the court joined a growing number of jurisdictions and denied Amazon's motion for summary judgment.[141] The plaintiff brought an action against Amazon as the property owners' subrogee for damages caused by a defective thermostat.[142] Amazon again argued that it was not a seller of the thermostat because it never retained title to the good; instead, it "merely provide[d] temporary storage for an item" through the Fulfillment by Amazon program.[143] The court found that this argument minimized Amazon's role in the transaction. The court concluded that when viewing the facts in the light most favorable to the plaintiff, Amazon "exercises sufficient control over the product to be considered among 'retailers and distributors.'"[144]

And finally, in *Bolger v. Amazon.com, LLC*,[145] the plaintiff purchased a replacement computer battery from Lenoge, a

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136 390 F. Supp. 3d 964 (W.D. Wisc. 2019).
137 *Id.* at 966.
138 *Id.*
139 *Id.* at 973.
140 137 N.Y.S.3d 884 (Sup. Ct. 2020).
141 *Id.* at 889.
142 *Id.* at 885.
143 *Id.* at 888.
144 *Id.* There are two federal cases out of New York that have held for Amazon. *See* Eberhart v. Amazon.com, Inc. 325 F. Supp. 3d 393, 394–95 (S.D.N.Y. 2018); Phila. Indem. Ins. Co. v. Amazon.com, Inc., 425 F. Supp. 3d 158, 159, 165 (E.D.N.Y. 2019).
145 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020), *review denied*, No. S264607, 2020 BL 455500 (Cal. Nov. 18, 2020).

third-party seller, that later exploded and caused injuries.[146] The plaintiff sued Amazon under multiple causes of action, including strict products liability.[147] The trial court granted Amazon's motion for summary judgment on the ground that Amazon was not a seller.[148] The plaintiff appealed and, in August of 2020, the California Court of Appeals for the Fourth District agreed with the plaintiff and reversed the judgment for Amazon.[149] The court held that Amazon's role, whether it be described as "retailer, distributor, or merely facilitator," was "pivotal," and that Amazon directly placed itself between the third-party seller and the consumer in the chain of distribution.[150] The court went on to say that the principles underlying the doctrine of strict liability compel the application of strict liability to Amazon in these circumstances.[151] In its opinion, the court emphasized the "powerful intermediary" role that Amazon plays in third-party transactions, specifically with respect to those sellers that use the Fulfillment by Amazon program.[152] The court noted that this integral role that Amazon plays sometimes makes it the only enterprise "reasonably available to the injured plaintiff."[153] In November 2020, the California Supreme Court denied Amazon's petition for review of the decision as well as its request to depublish the opinion.[154]

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146 *Id.* at 604.
147 *Id.*
148 *Id.*
149 *Id.* at 605.
150 *Id.* (internal quotation marks omitted).
151 Such as to account for "market realities" and "cover new transactions in 'widespread use . . . in today's business world.'" *Id.* (alterations in original).
152 *Id.*
153 *Id.* at 612.
154 Bolger v. Amazon.com, LLC, No. S264607, 2020 BL 455500 at *1 (Cal. Nov. 18, 2020); *California Supreme Court Has Denied Amazon's Petition for Review in* Bolger v. Amazon, CASEYGERRY, https://caseygerry.com/case-results/california-supreme-court-has-denied-amazons-petition-for-review-in-bolger-v-amazon/ [https://perma.cc/9B6H-ERYE] (last visited Feb. 14, 2021).

Several other cases have been decided on procedural grounds,[155] or without extensive legal discussion,[156] largely in Amazon's favor.[157] And a number of other cases involving Amazon's potential liability for defective third-party goods are currently at various stages of litigation or arbitration.[158] The number of cases that have been litigated or are pending shows how big this problem is. Buyers are buying goods on Amazon, thinking they are *from* Amazon, and are largely being deprived of a remedy when those goods prove dangerous or deadly.

The case law is currently a hodge-podge, offering no clear answers for plaintiffs who are injured by third-party goods sold on Amazon. Amazon's liability seems to turn on the exact sales arrangement between Amazon and the third-party seller (Fulfillment by Merchant vs. Fulfillment by Amazon), as well as the peculiarities of state-based tort law. Superimposed on all this

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155 *See* Ind. Farm Bureau Ins. v. Amazon.com, Inc., 498 F. Supp. 3d 1075, 1078 (S.D. Ind. 2020) (granting Amazon's motion to dismiss the strict products liability claim without addressing whether Amazon is a seller because the plaintiff failed to allege that the court did not have jurisdiction over the third-party seller as required by the Indiana Products Liability Act); Wright v. Amazon.com, Inc., No. 2:19-CV-00086-DAK, 2020 WL 6204401, at *6 (D. Utah Oct. 22, 2020) (failing to address whether Amazon was a seller of the motorcycle brakes the plaintiff purchased from a third-party seller on Amazon because the plaintiff did not have an expert to opine on causation, design defect, or manufacturing defect, and thus could not proceed with any of his six causes of action).

156 McDonald v. LG Elecs. USA, Inc., 219 F. Supp. 3d 533, 542 (D. Md. 2016) (dismissing the plaintiff's claims stemming from a defective battery purchased from a third-party seller on Amazon on the grounds that the plaintiff did not sufficiently allege that the defect in the goods was attributable to Amazon).

157 However, some of these cases have held against Amazon. *See* Legal Aid of Neb., Inc. v. Chaina Wholesale, Inc., No. 4:19-CV-3103, 2020 WL 42471, at *3–5 (D. Neb. Jan. 3, 2020) (holding that an injured plaintiff who purchased a space heater from a third-party seller had made sufficient factual allegations to pursue negligence, failure to warn, and breach of warranty claims irrespective of Amazon's preliminary arguments); State Farm Fire & Cas. Co. v. Amazon.com, Inc., 414 F. Supp. 3d 870, 873–76 (N.D. Miss. 2019) (holding that plaintiffs who were injured by a hoverboard sold by a third-party seller had a plausible argument under negligence and negligent failure to warn despite Amazon's argument that it was a service provider and therefore could not be held liable under Mississippi law); Love v. Weecoo (TM), 774 F. App'x 519, 521–22 (11th Cir. 2019) (holding on appeal that the plaintiff did allege sufficient facts to proceed with negligence and negligent failure to warn claims against Amazon for a defective hoverboard sold by a third-party seller); Papataros v. Amazon.com, Inc., No. 2:17-cv-9836 (KM)(MAH), 2019 WL 4011502, at *17, *19 (D.N.J. Aug. 26, 2019) (holding that Amazon is a "seller" and therefore denying Amazon's motion for summary judgment insofar as it was based on Amazon not being a "seller"), *order stayed by* 2019 WL 4740669 (D.N.J. Sept. 3, 2019). The order was stayed due to the rehearing granted in *Oberdorf*. *Id.* at *1.

158 For a comprehensive list of currently pending cases as well as cases that settled or were voluntarily dismissed, see Bender, *supra* note 135, at 145–49.

are, of course, policy considerations.[159] A move away from tort-based liability and toward Article 2 liability could bring some much-needed predictability into this area of law.

II
FROM PRODUCTS LIABILITY IN TORT TO STRICT LIABILITY UNDER ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE

As is apparent from the discussion above, strict products liability has been the primary argument advanced by litigants seeking to hold Amazon liable for defective third-party goods, and accordingly, the primary legal argument addressed by courts in their judgments.[160] To be sure, litigants and courts have thrown out a passing reference to Article 2 of the UCC, but more as an afterthought or in support of tort-based liability.[161] Why is this? Several reasons present themselves.

First, some courts have elided strict products liability and Article 2 implied warranty law.[162] Accordingly, these courts

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159 *See, e.g.*, Bolger v. Amazon.com, LLC, 267 Cal. Rptr. 3d 601, 617 (Cal. Ct. App. 2020), *review denied*, No. S264607, 2020 BL 455500 (Cal. Nov. 18, 2020) ("Our consideration of the policies underlying the doctrine of strict products liability confirm that the doctrine should apply here.").

160 *See, e.g.*, Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 396–400 (S.D.N.Y. 2018) (majority of opinion discussing strict products liability).

161 Likewise, almost no academic commentary on Amazon's liability for third-party goods focuses on Article 2. *See, e.g.*, Bender, *supra* note 135 (focusing on strict products liability); Margaret E. Dillaway, Note, *The New "Web-Stream" of Commerce: Amazon and the Necessity of Strict Products Liability for Online Marketplaces*, 74 VAND. L. REV. 187 *passim* (2021) (analyzing strict products liability while making no mention of Article 2); Aaron Doyer, Note, *Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond*, 28 J.L. & POL'Y 719 *passim* (2020) (analyzing strict products liability while making no mention of Article 2); Zoë Gillies, *Amazon Marketplace and Third-Party Sellers: The Battle over Strict Product Liability*, 54 SUFFOLK UNIV. L. REV. 87 *passim* (2021) (analyzing strict products liability while making no mention of Article 2); Rickettson, *supra* note 76 (analyzing strict products liability while making no mention of Article 2); Catherine M. Sharkey, *Holding Amazon Liable as a Seller of Defective Goods: A Convergence of Cultural and Economic Perspectives*, 115 NW. UNIV. L. REV. ONLINE 339 *passim* (2020) (analyzing strict products liability while making no mention of Article 2); Shehan, *supra* note 54, at 1216 (analyzing products liability while making no mention of Article 2); Sprague, *supra* note 27, at 254–55 (analyzing strict products liability while making no mention of Article 2). *But see* Edward J. Janger & Aaron D. Twerski, *Warranty, Product Liability and Transaction Structure: The Problem of Amazon*, 15 BROOKLYN J. CORP. FIN. & COM. L. 49 *passim* (2020) (discussing Amazon's liability under Article 2 of the UCC).

162 26 AM. JUR. 2D *Proof of Facts* § 3, Westlaw (database updated Apr. 2021) [hereinafter *Proof of Facts*] ("Indeed, some courts have spoken of breach of warranty as 'virtually equivalent' to strict liability in tort."). This is unfortunate for a number of reasons, not the least of which is the fact that Article 2, as a statutory creation, cannot simply be commingled with common law tort principles. And even if the tests for design defect in tort and merchantability under Article 2 could

may not see an independent role for Article 2 in potentially holding Amazon responsible for injuries caused by third-party sellers' goods.[163] Second, Article 2 may seem archaic compared to its tort law cousin. Litigants may feel like strict products liability provides a better chance of a remedy than does Article 2 because of its overt policy orientation.[164] Third, courts seem to have bought Amazon's Article 2 title argument hook, line, and sinker.[165] There has been very little pushback to Amazon's contention that because it does not hold title to goods, it simply cannot be held liable under Article 2. Perhaps for this reason, litigants believe that the Article 2 angle is not worth pursuing and have instead focused on whether Amazon is a seller for products liability purposes.[166] Fourth, Amazon disclaims all warranties, including the warranty of merchantability, with respect to sales on its platform.[167] Accordingly, even if a plaintiff were to overcome the title hurdle, there is still the matter of the contractual disclaimer.[168]

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be collapsed, that does not mean that the applicability and scope of Article 2 can be decided by anything other than by reference to Article 2.

163 *See, e.g.*, Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 140–41 (4th Cir. 2019) (conducting a singular analysis for the plaintiff's products liability and breach of warranty claims).

164 *See, e.g.*, Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738 (FLW) (LHG), 2018 WL 3546197, at *5 (D.N.J. July 24, 2018) ("Plaintiff mainly argues . . . (2) [that] public policy supports holding Amazon liable as a 'product seller.'"). For policy arguments on why Amazon should be liable for selling defective third-party goods, see Sprague, *supra* note 27, at 276–79; Sharkey, *supra* note 161, at 353–55.

165 Lecher, *supra* note 36 ("The argument has given Amazon a crucial legal defense, allowing it to completely sidestep the liability that conventional retailers face. For the most part, courts have been satisfied by the claim, and Amazon has been able to expand its third-party seller business into hundreds of billions of dollars in sales.").

166 With that said, many courts regard the test for a "seller" as the same under Article 2 and state products liability law. *See, e.g.*, *Erie Ins. Co.*, 925 F.3d 135 at 141 ("Maryland courts have repeatedly noted that products liability claims sounding in negligence, breach of warranty, and strict liability in tort overlap, all focusing on the liability *of a seller* for a defective product. And we have no basis to conclude that Maryland's understanding of 'seller' is not uniform throughout its products liability law." (citations omitted)).

167 *Conditions of Use*, *supra* note 34 ("TO THE FULL EXTENT PERMISSIBLE BY LAW, AMAZON DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY").

168 U.C.C. § 2-316 permits sellers to contract out of implied warranties provided the disclaimer is conspicuous. *See* U.C.C. § 2-316(2) (AM. L. INST. & UNIF. L. COMM'N 1977). U.C.C. § 2-719(3) imposes additional limits on the effectiveness of a disclaimer of consequential damages: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commer-

This Article posits that litigants should explore, in a more robust way, potential Article 2 liability for marketplace sellers like Amazon separate and apart from strict products liability.[169] Strict products liability in tort originated to ensure that manufacturers could be held responsible for defective goods, even though those manufacturers did not have contractual privity with the ultimate buyer.[170] Strict products liability is a way of overcoming the contractual privity problems presented where goods are sold through distributors or retailers.[171] Article 2, on the other hand, is predicated on the notion of a buyer suing and recovering from its *immediate* seller.[172] This notion is nonintuitive. People tend to be surprised when they learn that buyers can sue their immediate sellers for breach of im-

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cial is not." U.C.C. § 2-719(3). It is doubtful that any court would give effect to Amazon's attempted contractual disclaimer, at least with respect to personal injury. First, the disclaimer is unlikely to be considered "conspicuous" within the meaning of § 2-316 since it is hidden in the middle of a document that no reasonable consumer would ever read. Moreover, it is likely unconscionable for a seller to attempt to contract out of liability for personal injury. *See* 1 MATT CROCKETT, THE LAW OF PROD. WARRANTIES § 8:30, Westlaw (database updated Feb. 2021) ("Given the prima facie unconscionability of a clause purporting to limit liability for personal injury, . . . it is usually futile for the seller to exclude personal injury liability for breach of warranty. Such provisions are rarely upheld by the courts.").

169 Many of these arguments would also apply to other online retailers that take on the role of seller with respect to goods sold by third parties, such as Walmart or Target.

170 Rickettson, *supra* note 76, at 326 ("Before the widespread acceptance of the concept of strict products liability across the United States, common law required privity of contract between a party injured by a defective product and that product's manufacturer." (footnotes omitted)). Note that not all states recognize strict products liability. *See, e.g.*, *id.* at 330, n.72 (observing that five states, Delaware, Massachusetts, Michigan, North Carolina, and Virginia, do not recognize strict products liability).

171 With that said, strict liability is now available as a cause of action against retailers, distributors, or other sellers of the goods. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (AM. LAW INST. 2021) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."). *See also* Edward J. Janger & Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller Not a Neutral Platform*, 14 BROOKLYN J. CORP. FIN. & COM. L. 259, 259 (2020) ("Since the adoption of Section 402A of the Second Restatement of Torts, in 1965, every party in a product's distribution chain has been potentially liable for product defects.").

172 John G. Culhane, *Real and Imagined Effects of Statutes Restricting the Liability of Nonmanufacturing Sellers of Defective Products*, 95 DICK. L. REV. 287, 291 n.19 (1991) ("As Prosser and Keeton have stated, '[w]arranties on the sale of goods were governed in most states by the Uniform Sales Act, and then by its successor, the Uniform Commercial Code; and neither of these statutes had been drawn with anything in mind but a contract between a "seller" and his immediate "buyer".'" (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 97, at 690–92 (5th ed. 1984))).

plied warranty, even though those sellers had nothing to do with the creation, design, or manufacture of the product. For instance, if I buy a Conair-brand curling iron at Target and that curling iron burns my scalp and hair because it gets too hot, I can sue Target for breach of the implied warranty of merchantability.[173] If I recover against Target, Target can then turn around and sue the manufacturer of the product and be made whole. However, the risk of the manufacturer being bankrupt, having disappeared, or being beyond jurisdictional reach is assumed by Target, not by the consumer. In fact, as a matter of Article 2 law, I cannot automatically sue Conair for breach of warranty.[174]

The point is that Article 2 is modelled around the immediate seller/buyer relationship, not the manufacturer/buyer relationship. Amazon is clearly not a manufacturer of third-party goods. Under any common understanding of the relationship between Amazon and the buyer, Amazon is the immediate seller, as that term is understood in everyday language.[175] When someone buys a product on Amazon and is asked where they got it, they will invariably say "Amazon." A buyer considers Amazon their seller, just as I would consider Target my seller in the above example. Under Article 2, a buyer would sue their immediate seller—Amazon—even though the seller did not manufacture or design the goods in question. Article 2 holds the immediate seller strictly liable for selling unmerchantable goods, and then puts the onus on the seller to go after the ultimately responsible party.[176]

Under Article 2, once a merchant is classified as a "seller," strict liability attaches. By contrast, under tort law, courts

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173 Reid v. Eckerds Drugs, Inc., 253 S.E.2d 344, 346–47 (N.C. Ct. App. 1979) (buyer brought action under Article 2 and in strict products liability against retail drugstore seeking to recover damages for personal injuries which resulted from the use of an aerosol deodorant sold by the drugstore).

174 Whether I can sue Conair directly will depend on a state's view of vertical privity; some states will permit me to sue, other states will not. Christopher C. Little, Comment, *Suing Upstream: Commercial Reality and Recovery for Economic Loss in Breach of Warranty Actions by Non-Privity Consumers*, 42 WAKE FOREST L. REV. 831, 838–39 (2007) ("Thus, the approach of § 2-318 to the vertical privity question is one of marked and direct avoidance, and the drafters' intent was to simply leave the fate of the remote purchaser's claim in the hands of the courts and legislatures of each state.").

175 For more on this point, *see infra* pp. 168–72.

176 Once a merchant is classified as a seller, liability attaches. *See* U.C.C. § 2-314 (AM. L. INST. & UNIF. L. COMM'N 1977). By contrast, under tort law, courts often have to engage in a complicated policy-based analysis of when to impose liability. For a discussion of the various analyses, see 12 AM. JUR. *Trials* § 402-A, Westlaw (database updated May 2021).

often have to engage in a complicated policy-based analysis of when to impose liability. For instance, in *Garber v. Amazon.com, Inc.*, the court went through a lengthy analysis of whether Amazon was a seller within the "distributive chain" for purposes of strict liability[177]. It then proceeded to consider a separate argument: that Amazon should be liable because it "(1) participated in the manufacture, marketing and distribution of an unsafe product, (2) derived economic benefit from placing the unsafe product in the stream of commerce, and (3) was in a position to eliminate the unsafe character of the product and prevent the loss."[178] This sort of policy-based analysis is at the core of many of the tort law tests that courts use to potentially ground liability against Amazon.[179] It is much more fluid and overtly policy-based than the analysis called for under Article 2—i.e., determining whether Amazon qualifies as a "seller" for the purposes of § 2-314.

Under § 2-314, a seller who is a merchant in goods of the kind warrants that the goods will be merchantable.[180] Merchantability is a multi-faceted test, but at a baseline, it requires that the goods be fit for the ordinary purposes for which such goods are used.[181] While not always a straightforward inquiry, merchantability is generally considered a lower bar than design defect under strict products liability. The latter requires that courts engage in a risk-utility balancing test to determine whether the goods were defectively designed.[182] This entails weighing the benefits that the goods provide

177 380 F. Supp. 3d 766, 775–78 (N.D. Ill. 2019).

178 *Id.* at 779.

179 *See, e.g.*, Carpenter v. Amazon.com, Inc., No. 17-cv-03221-JST, 2019 WL 1259158, at *4 (N.D. Cal. Mar. 19, 2019) (noting three-factor test under a "marketing enterprise doctrine"); Oberdorf v. Amazon.com Inc., 930 F.3d 136, 144 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182, 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 818 Fed. Appx. 138, 143 (3d Cir. 2020) (en banc) (noting four-part test under Pennsylvania law for determining "seller" status).

180 18 WILLISTON ON CONTRACTS § 52:68 (4th ed. 1993) ("[T]he implied warranty of merchantability is the broadest and most important warranty in the Uniform Commercial Code.").

181 *Id.*

182 "A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product: . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe . . . ." RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (AM. L. INST. 1998).

against any product risks and defects.[183] Merchantability, on the other hand, relies on a consumer expectations test: are these goods fit for the ordinary purposes for which such goods are used?[184] Given that the merchantability standard under Article 2 is generally an easier test to satisfy than the design defect test, plaintiffs would be wise to explore Article 2 as an independent basis for recovery.

There is one final reason why it makes sense to look to Article 2 for potential recovery: Article 2 permits a plaintiff to sue for economic loss, while tort law does not.[185] Economic losses caused by unmerchantable goods can be significant. For instance, if a retailer purchases a credit card reader from a third-party seller on Amazon and that credit card reader is defective, the business will likely lose out on revenue. Those lost profits are a form of consequential damages, which may be recoverable under Article 2.[186] These damages are simply not recoverable in tort. As such, premising liability on Article 2 could open up the possibility of suing for pure economic loss when such loss is suffered.

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183 *Id.*

184 While some courts collapse the tests into one, this is arguably not the correct doctrinal approach. Merchantability is its own test, with its content supplied by U.C.C. § 2-314 and developed under Article 2 case law. *See* U.C.C. § 2-314 (AM. L. INST. & UNIF. L. COMM'N 1977); *see, e.g.*, Caronia v. Philip Morris USA, Inc., 715 F.3d 417, 434 (2d Cir. 2013), *certified question accepted*, 990 N.E.2d 130, 130 (N.Y.), *and certified question answered*, 5 N.E.3d 11, 14 (N.Y. 2013) ("[T]he New York Court of Appeals has taken care to distinguish this merchantability-related strict liability from the liability that is more typically associated with claims for defective products. . . . In products liability cases, the New York courts will inquire whether, 'if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner.' By contrast, 'the UCC's concept of a "defective" product requires an inquiry only into whether the product in question was fit for the ordinary purposes for which such goods are used.' Products liability's 'negligence-like risk/utility approach is foreign to the realm of contract law.'" (internal citations omitted)).

185 *See, e.g.*, Morrow v. New Moon Homes, Inc., 548 P.2d 279, 283–86 (Alaska 1976) (strict products liability count properly dismissed where plaintiff sought only economic damages); Spring Motors Distribs. v. Ford Motor Co., 489 A.2d 660, 665–72 (N.J. 1985) (purely economic damages not recoverable under theory of strict products liability); *see also* Danielle Sawaya, Note, *Not Just for Products Liability: Applying the Economic Loss Rule Beyond Its Origins*, 83 FORDHAM L. REV. 1073, 1077–78 (2014) ("In the most basic sense, the economic loss rule is a judicially created doctrine that serves to prevent plaintiffs from recovering damages under tort law (generally, strict liability claims and negligence claims) when the only harm suffered is pure economic loss." (footnotes omitted)).

186 *See* U.C.C. § 2-715 ("Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.").

Thus, while tort liability is certainly worth pursuing, this Article suggests that litigants and courts should independently consider Article 2 arguments in their own right.[187] If they do so, they might discover that Article 2 has some flexibility in its joints and may provide a more direct and principled basis for recovery than products liability.

III
SELLERS AND TITLE: A CLOSER EXAMINATION OF ARTICLE 2

Amazon's primary line of defense—a line of defense that has thus far been very successful—is that Amazon is not a "seller" of goods sold by third parties on its platform. Amazon has maintained that whether an action is cast in terms of products liability or as a breach of warranty under Article 2, the definition of "seller" requires that the seller has held title to the goods in question and then transferred that title directly to the buyer.

Under § 2-314, merchant sellers impliedly warrant that the goods they sell will be merchantable.[188] In order to be merchantable, goods must, among other things, be "fit for the ordinary purposes for which such goods are used."[189] Amazon argues that Article 2's merchantability section does not apply to the sale of third-party goods on Amazon because Amazon is not a "seller" of those goods since Amazon never held title to the goods. If Amazon is not a seller, it cannot be held liable for breach of the implied warranty of merchantability. This argument has been accepted by most courts that have considered this issue.[190]

However, the interpretation of "seller" under Article 2 that Amazon advances is not a foregone conclusion. Below, I examine whether the direct transfer of title from a seller to a buyer is an absolute pre-requisite to liability under Article 2. First, I look at the scope of Article 2 generally, which provides

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187 *Proof of Facts*, *supra* note 162, at § 4 ("Counsel's choice of theories may ultimately be dictated by the facts of his client's case. Still, it should be noted that the theory of breach of warranty has been widely applied by the courts and has served in recent years as the basis of perhaps as much as one-third of all litigation arising from sales of goods. Where available, a cause of action based on breach of warranty has several advantages over causes based on other theories." (footnotes omitted)).

188 U.C.C. § 2-314.

189 *Id.* In most cases involving injuries caused by third-party goods on Amazon, it seems pretty plain that the goods in question are not fit for their ordinary purpose. *See supra* subpart I.B.

190 *See supra* subpart I.B.

that Article 2 will apply to "transactions" in goods, not just "sales" of goods. I raise the issue of whether this broader concept of transactions can be used to ground liability against Amazon despite Amazon purportedly not directly transferring title to goods to the buyer. Second, I look at the actual text of § 2-314 in an effort to deconstruct Amazon's title argument. I posit that there is wiggle room for concluding that a "seller" under § 2-314 does not necessarily have to have title to the goods in question in order to be liable for breach of the implied warranty of merchantability. I then shift the focus from the specific to the general and note that the drafters of the UCC intended to eliminate the significance of title in sale of goods transactions; this anti-title orientation should inform the interpretation of who is considered a seller of goods for the purposes of Article 2. Finally, I examine the relevant Article 2 case law and reveal that there are several categories of cases where courts have held a merchant liable for breach of implied warranty under § 2-314 even though the merchant did not transfer title to the goods to the buyer. The case law thus demonstrates that it is not essential to § 2-314 liability that the seller had title to the goods in question.

A. The Scope of Article 2: "Transactions" in Goods

Article 2's scope section, § 2-102, provides that "[u]nless the context otherwise requires," Article 2 "applies to transactions in goods."[191] The choice of the word "transactions" is significant; Article 2 does not apply only to "sales" of goods, but rather, applies more broadly to "transactions" in goods.[192] Courts have routinely held that Article 2 applies in a variety of non-sale transactions, including leases, bailments, distributorships, franchise agreements, and licensing transactions.[193] Based on the scope provision alone, it can be argued that the relationship between Amazon and a buyer of third-party goods constitutes a "transaction" in goods, subject to Article 2.[194]

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191 U.C.C. § 2-102 ("Unless the context otherwise requires, this Article applies to transactions in goods.").

192 *See* Sonja A. Soehnel, Annotation, *What Constitutes a Transaction, a Sale, or Contract for Sale Within the Scope of UCC Article 2*, 4 A.L.R.4th 85, § 2 (1981) ("The term 'transactions' in UCC § 2-102 is not defined in Article 2, with the result that arguments have been made that the term encompasses contracts other than sales and that Article 2 is therefore applicable to these non-sale contracts.").

193 *Id.* There are, of course, cases going both ways with respect to each of these arrangements. *Id.*

194 *See, e.g.*, In re Tennessee Forging Steel Corp., No. BK-3-77-722, 1978 WL 23481, at *2 (Bankr. E.D. Tenn. Feb. 28, 1978) ("'Transaction' is not a defined term. It seems clear, however, that the use in some Code sections of the words

The question, however, is whether the *warranty provisions* of Article 2 apply only to sales transactions, given explicit references to a "sale" or "seller" contained in those sections.[195] In other words, was the intention to limit warranty protection under Article 2 only to "sales"? Or, do the warranty provisions apply to "transactions" more generally? One practice publication is of the view that the warranty provisions are not limited solely to sales transactions:

> Article 2 is introduced in § 2-102 as applying to "transactions" in goods. The difference between the words "sale" and "transaction" is significant. "Sales" are limited to situations in which legal "title" moves from seller to buyer, while the term "transaction" is broader, encompassing non-sale relationships. The drafters' choice of the term "transaction" to lead off Article 2 invites a broader application of the warranty provisions.[196]

And indeed, a different publication notes that the "majority of courts have applied provisions of Article 2 which use sales

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'contract for sale' and in others of the word 'contracts' can be taken to mean that the scope of the Article is not limited to a transaction involving solely a 'sale' with 'title' and 'property' as its symbols and marks. 'Clearly, a "transaction" encompasses a far wider area of activity than a "sale" and it cannot be assumed that the word was carelessly chosen.'" (citations omitted)); Mieske v. Bartell Drug Co., 593 P.2d 1308, 1312 (Wash. 1979) (en banc) ("While article 2 is entitled 'Sales,' RCW 62A.2-101, the declared scope is more comprehensive. RCW 62A.2-102 sets the parameters of the article by its declaration that it applies to transactions in goods, excluding security transactions. If article 2 were limited to sales it would not be directly applicable to this bailment transaction as RCW 62A.2-106(1) defines 'Sales' as the passing of title from a seller to a buyer, a factor not present here. Obviously 'transactions in goods'—the scope of article 2—is broader than 'sales.' Had the drafters of the code intended to limit article 2 to sales they could have easily so stated. They did not." (emphasis omitted)).

195 Howard O. Hunter, *Transaction Must Involve Sale of Goods*, *in* MODERN LAW OF CONTRACTS § 9:20, Westlaw (database updated March 2021) ("Section 2-102 is one of the general governing provisions of Article 2. This section limits the application of Article 2 to transactions in goods, a somewhat broader concept than simply a sale of goods. There is support for the argument that the sale limitation of Section 2-314 should be read in the context of the general definition of 'coverage' in Section 2-102. This is not a universally held opinion, however, and several courts have given a narrow reading to the 'sale' requirement of Section 2-314." (footnote omitted)).

196 CROCKETT, *supra* note 168, at § 2:2 (footnotes omitted); *see also Proof of Facts*, *supra* note 162, at § 9 ("[A]t least one commentator has argued that '[t]he significance of the use of the term "transaction" rather than "sale" . . . makes it clear that Article 2 is not to be confined merely to those transactions in which there is a "sale," and in recent years many courts have demonstrated a willingness to extend the implied warranties under the Code to transactions deemed analogous to sales. Thus, in some jurisdictions the Code's warranty provisions have been held applicable to bailments and chattel leases, as well as to contracts for work and labor, for repair, for services provided by utilities, and for professional services." (most alterations in original) (citations omitted)).

language to nonsale transactions if the policies underlying the provision are reasonably applicable to the nonsale transaction in issue."[197]

One other important clue to the drafters' intention for certain non-sale transactions to be included within the ambit of Article 2's warranty protection is Official Comment 2 to § 2-313, the provision dealing with express warranties. The comment states that "the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that *warranties need not be confined either to sales contracts* or to the direct parties to such a contract."[198] Although the drafters were speaking specifically about relaxing privity requirements and allowing a buyer to sue a remote seller, one authority writes that this comment "almost cries out for judicial extension of the Article 2 warranty provisions beyond the sale of goods"[199] and that "the language of the drafters points the way to a wider use of Code warranties in other areas of commercial law."[200] Thus, looked at from the macro-level, there is an argument to be made for extending Article 2 warranty provisions to non-sales that are otherwise considered "transactions" in goods subject to Article 2.[201] This would avoid any title issues since it is only a "sale" and not a "transaction" that requires the so-called "seller" to have title.

B. A Textual Analysis of § 2-314

Even if one does not accept the premise that Article 2's warranty provisions should be applied broadly to "transactions" in goods, there is nonetheless some wiggle-room within § 2-314 for arguing that the provision does not require a direct transfer of title from a seller to a buyer for the section to apply. To understand this argument, it is necessary to examine how Amazon has crafted its "seller = title" argument. Amazon's title argument proceeds as follows: § 2-314 only applies if the defendant is a merchant "seller."[202] In order for there to be a "seller," there must be a "sale" between the buyer and the seller. A "sale" is defined in § 2-106 as "the passing of title from the

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197 1 PHILLIP T. LACY & RALPH ANZIVINO, UCC TRANSACTION GUIDE § 2:4, Westlaw (database updated Oct. 2020).

198 U.C.C. § 2-313 cmt. 2 (AM. LAW INST. & UNIF. LAW COMM'N 1977) (emphasis added).

199 CROCKETT, *supra* note 168, at § 2:2.

200 *Id.*

201 The concomitant assumption here is that a sale facilitated by Amazon to a buyer would constitute a "transaction" in goods.

202 U.C.C. § 2-314.

seller to the buyer for a price."[203] Since Amazon never held title to the goods in question, it is not the "seller" of the goods and therefore, § 2-314 is inapplicable. In other words, Amazon comes to its conclusion—that § 2-314 requires that a seller hold and transfer title to goods—indirectly and by combining certain propositions. Amazon's logic is best illustrated in its own words. In *Erie Insurance v. Amazon,* Amazon argues:[204]

> Under Maryland law, a "seller" is defined as "a person who sells or contracts to sell goods." Maryland law also provides that "a 'sale' consists in the passing of title from the seller to the buyer for a price." *Taken together*, those provisions make clear that a "seller" must be a person who holds title to goods and then transfers title to a buyer—a person who did not at some point hold title could not engage in "the passing of title" to a buyer.[205]

This passage demonstrates that Amazon's title argument is arrived at by "tak[ing] together" certain propositions. Below, I explore whether an alternative reading of the section is possible such that Amazon's title argument is not an absolute trump card for avoiding liability under § 2-314.

As noted, § 2-314 imposes a warranty of merchantability on a "seller" who is "a merchant with respect to goods of that kind."[206] The term "seller" is defined in § 2-103 as follows: "In this Article unless the context otherwise requires . . . 'Seller' means a person who sells or contracts to sell goods."[207] Notably absent from this definition of "seller" is the mention of title. That is, § 2-103 does not define a "seller" as one who transfers or contracts to transfer *title* to goods to a buyer. Instead, the section refers generically to a "seller" as one who "sells."[208] It does not define the word "sells."[209] According to Amazon, the argument relying on title as the determinant of "seller" status

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203 *Id.* § 2-106.

204 Brief for Appellee at 12, Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135 (4th Cir. 2019) (No. 18-1198).

205 *Id.* (emphasis added) (internal citations omitted).

206 U.C.C. § 2-314; *see also* Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 HOFSTRA L. REV. 839, 871 (2016) ("Amazon likely qualifies as a merchant-seller under the broadest definition in the *UCC*—one who deals in goods of that kind.").

207 *See* U.C.C. § 2-103.

208 Moreover, § 2-301 outlines the fundamental obligation of a seller under Article 2. It provides that "[t]he obligation of the seller is to transfer and deliver [goods] . . . ." U.C.C. § 2-301. Again, the section does not say that the obligation of a seller is to transfer and deliver *title* to goods, but rather to transfer and deliver goods.

209 *See, e.g.*, Powers v. Coffeyville Livestock Sales Co., Inc., 665 F.2d 311, 312 (10th Cir. 1981) ("Section 84-2-103(d) merely defines a seller as 'a person who

hinges on the definition of a "sale" found in § 2-106. § 2-106(1) reads, in part, "[a] 'sale' consists in the passing of title from the seller to the buyer for a price."[210] Using this logic, Amazon concludes that to qualify as a "seller" under § 2-314 one must have title to the goods in question and transfer that title to the buyer.

Other interpretations are possible, however. First, it can be argued that the definition of seller is simply "[s]omeone who sells."[211] And Amazon clearly "sells" goods—though ostensibly as an agent for someone else.[212] Since there is no statutory definition of "sells" and since title is not explicitly referenced in the definition of "seller," it should not be imported through a different defined term—"sale." The drafters chose not to incorporate the title concept into the definition of "seller" when they readily could have done so. In other words, the drafters must have deliberately chosen not to define "seller" by reference to the notion of title.

Second, it can be argued that § 2-106(1) does not limit "seller" status *only* to those who consummate a sale via a direct transfer of title. Put a different way, a "sale" may require a "seller," but a "seller" can engage in a "transaction in goods" that is broader than a "sale." Thus, there are "sellers" who engage in the sale of goods, and "sellers" who engage more broadly in "transactions" in goods. For instance, courts generally find that a licensor of software is a "seller" and that Article 2 applies to him even though he does not transfer title to the goods in question.[213]

Third, not all "sales" actually require the transfer of title from a seller to a buyer despite the definition found in § 2-106(1). For instance, § 2-312 overtly contemplates that a sale can take place without the transfer of title.[214] Under this section, a "seller" can disclaim the warranty of title in certain circumstances. These transactions still constitute "sales" with

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sells or contracts to sell goods.' Certainly an auctioneer sells goods, although generally as agent for someone else.").

210 U.C.C. § 2-106.

211 *Seller*, BLACK'S LAW DICTIONARY (11th ed. 2019).

212 Black's Law Dictionary defines "sell" as simply "to transfer (property) by sale." *Sell*, BLACK'S LAW DICTIONARY (11th ed. 2019).

213 JEFF C. DODD, DRAFTING EFFECTIVE CONTRACTS: A PRACTITIONER'S GUIDE § 4.03 n.20 ("However, as to title: A transaction which involves a license to use software will be considered a sale under the UCC if it involves a single payment for an unlimited possession period." (citing Softman Prods. Co., LLC v. Adobe Sys., Inc., 171 F. Supp. 2d 1075, 1086 (C.D. Cal. 2001) (quoting RAYMOND NIMMER, THE LAW OF COMPUTER TECHNOLOGY 1-103 (2015))).

214 U.C.C. § 2-312.

a "seller" even though the "seller" has not transferred title to the buyer. Accordingly, it is possible to disaggregate title from "seller" status.

Even if one does not accept any of these interpretations, one must consider the "unless the context otherwise requires" language in both § 2-103 and § 2-106.[215] § 2-103 provides that "*unless the context otherwise requires* . . . 'Seller' means a person who sells or contracts to sell goods."[216] Similarly, § 2-106 provides, in part,

> In this Article *unless the context otherwise requires* "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2-401).[217]

Under § 2-106, it is somewhat unclear whether the language of "unless the context otherwise requires" applies only to the first sentence or to the entire section. Based upon the use of the phrase in other sections of Article 2, it appears to apply to the entirety of § 2-106(1).[218] That is, both § 2-103 and § 2-106 envision that the context may necessitate a different interpretation of "seller" than one who directly transfers title to the buyer. If this is the case, then it is possible to envision a different interpretation of "seller" based on its use in § 2-314.

There is one other point worth exploring. It could be argued that the language of § 2-314 imports the title concept through another phrase, not simply through the use of the word "seller." The section reads, in part, "[u]nless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a *contract for their sale* if the seller is a merchant with respect to goods of that kind."[219] Although Amazon has not made this argument (yet), it is possible to argue that the explicit use of the word "sale" in § 2-314 means that a transfer of title from a seller to a buyer is required.

The wording here, however, is interesting. § 2-314 refers to a "contract for *their* sale" (meaning, a sale of the goods). This is

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215 *Id.* §§ 2-103, 2-106.
216 *Id.* § 2-103 (emphasis added).
217 *Id.* § 2-106 (emphasis added).
218 *See id.* § 2-102 ("Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.").
219 *Id.* § 2-314 (emphasis added).

the only instance in Article 2 where the drafters used that particular expression. A "sale," as defined in § 2-106, is not the same as "a contract for *their* sale." The expression "contract for sale" is defined in § 2-106 (alongside a "sale"). Thus, a "contract for *their* sale" must be taken to be different than a "contract for sale." Applied to the online marketplace context, Amazon can make a contract for *their* sale (the sale of the goods) even though it does not meet the § 2-106 definition of a "contract for sale" or a "sale." Put a different way, the expression "contract for their sale" should be taken as intentional. The drafters could have simply stated that "a warranty that the goods shall be merchantable is implied in a *contract for sale* if the seller is a merchant with respect to goods of that kind." But instead, the drafters used the expression "contract for *their* sale," suggesting that this was not to be regarded as synonymous with a "contract for sale." Under this interpretation, it is possible to argue that Amazon makes a "contract for their sale" (i.e., the sale of third-party goods), and as such, is subject to § 2-314.[220]

The purpose of this section was not to convince a reader of any particular interpretation of § 2-314 or related provision, but simply to raise the possibility that a more sustained and thoughtful statutory interpretation exercise could yield a different understanding of the relevant law. Thus far, no court has engaged in *any* statutory analysis of Article 2 beyond that which has been advanced by Amazon.

C. The Irrelevance of Title Under Article 2

It is also important to consider the backdrop against which Article 2 was drafted in assessing the significance that Amazon places on title as the sole determinant of "seller" status.[221] Article 2 was intended to largely do away with title as being

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220 Professors Janger and Twerski make a similar argument:

> It does not appear that one needs to be a seller to make a warranty: "a warranty that the goods shall be merchantable is implied in a *contract for their sale* if the *seller* is a *merchant* with respect to *goods of that kind*." The language in § 2-314 does not say "contract for sale." It is possible that a contract can be entered into between two parties that contemplates the sale of goods, but where the contracting parties are not the buyer and seller. I can bind myself to a contract where I (Party A) may commit to ensure that somebody else (Party B) will deliver title to goods to a buyer (Party C). In other words, a contract for sale can be made with one person, where the actual deliveries will be fulfilled by another.

Janger & Twerski, *supra* note 161, at 13.

221 *See* 1 THOMAS M. QUINN & BRYAN D. HULL, QUINN'S UCC COMMENTARY & LAW DIGEST § 2-106[A][1] (Rev. 3d ed. 2009) ("Article 2, in short, was parting company

dispositive of the rights and liabilities of the parties.[222] The comment to § 2-101 makes this crystal clear:

> The arrangement of [Article 2 of the UCC] is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence . . . .[223]

One commentator writes:

> The Code's drafters expressly rejected title theory for transactions in goods. They felt the concept was analogous to scattershot from a blunderbuss. To Karl Llewellyn, the legal realist who both stumped for the Code's adoption and played a key role in its drafting, title was both too theoretical and too static a concept to be efficient. He reasoned that its all-or-nothing approach lacked precision. The drafters proclaimed that under the new Code, consequences in the marketplace would be determined pragmatically. The transaction would be ruled as the parties shaped it by their contract, consistent with their expectations, yet sensitive to those of third parties.[224]

The de-emphasizing of title under Article 2 is reinforced by § 2-401, which provides that "[e]ach provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title."[225] Based on this section, it appears that unless § 2-314 "refers" to title, then title is irrelevant to its operation.

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from the pre-Code tradition of solving problems in the sales area by recourse to 'title' concepts.").

222 *See* Task Force of the A.B.A. Subcomm. on Gen. Provisions, Bulk Transfer, and Documents of Title & Comm. on the U.C.C., *An Appraisal of the March 1, 1990, Preliminary Rep. on the Unif, Com. Code Article 2 Study Grp.*, 16 DEL. J. CORP. L. 1121, 1121 (1991) ("The rejection in § 2-401 of 'title' as a problem solving device was a major innovation in Article 2.").

223 U.C.C. § 2-101 cmt.

224 William L. Tabac, *The Unbearable Lightness of Title Under the Uniform Commercial Code*, 50 MD. L. REV. 408, 408–09 (1991) (footnotes omitted); *see also* JEFF C. DODD, DRAFTING EFFECTIVE CONTRACTS: A PRACTITIONER'S GUIDE, § 4.03 (3d ed. Supp. 2020) ("The UCC generally downplays [the] operational importance [of title]. Everything—rights, remedies, obligations—works the same way, unless the Code provision expressly refers to title. One court has gone so far as to say that the passage of title and the consummation of a sale are two separate concepts. The latter is not dependent on the former." (footnotes omitted)).

225 U.C.C. § 2-401.

Under § 2-314, the concept of title is not "refer[red] to"—at least not explicitly. In order to import title considerations into the section, one must take the word "seller" in § 2-314 and combine it with the definitions in § 1-103 and § 1-106. It is only by process of inference that title is indirectly "refer[red] to" in § 2-314.[226] Given that title is not explicitly mentioned in § 2-314 and that it takes several inferential leaps to import title into that section, there is a plausible argument that title is irrelevant to qualifying as a merchant "seller" under § 2-314. This reasoning would be in keeping with the anti-title bent that the drafters of Article 2 adopted.[227]

D. The Case Law: Title is Not a Pre-requisite to Seller Status

Above, I have largely focused on a textual analysis of Article 2 to argue that Article 2 may not require that a seller directly transfer title to the goods in question in order to potentially be liable under § 2-314 for breach of the implied warranty of merchantability. Case law also bears out that § 2-314 liability may attach even where the seller has not directly transferred title to the buyer. There are at least three categories of cases where courts have applied § 2-314's warranty provisions even though the purported "seller" did not have title to the goods in question.[228] First, there are cases where courts have applied the Article 2 implied warranties to non-sale transactions—i.e., where courts have determined that the warranty provisions apply to "transactions" in goods and not just sales of goods. Second, there are cases involving near-sales where there has

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226 *See id.* § 2-314.

227 With all this said, it could be argued that title is the very essence of a sales transaction. That is, while title issues under Article 2 are generally irrelevant, title is nonetheless the defining feature of *when* a sales agreement exists under Article 2. In this respect, a sale—requiring the transfer of title—is the gateway into Article 2. After the gateway has been crossed, *then* title is largely beside the point.

228 There are undoubtedly additional categories of cases where courts extended warranty protection to buyers even though a seller did not transfer title to a buyer. For an example of a case that does not fall into one of the three categories I identified, see Jaroslawicz v. Prestige Caterers, Inc., 739 N.Y.S.2d 670 (N.Y. App. Div. 2002). In *Jaroslawicz,* the plaintiff purchased a tour package through a company called Leisure Time. *See id.* at 670. Leisure Time contracted with Wyndham to prepare meals for customers. *Id.* A customer alleged that he suffered personal injury after eating food prepared by Wyndham. *Id.* The court allowed the plaintiff to advance a merchantability claim against Leisure Time, the purported seller of the food. *Id.* at 671. It is doubtful that Leisure Time ever had title to the food in question and that it transferred that title to the buyer. The court did not focus on this point at all in its judgment, showing that it took a broad approach to the notion of "seller."

not been a transfer of title because there actually has not been a sale, as traditionally understood. Despite this, courts have directly applied § 2-314's warranty protection to these transactions. And third, there is a unique category of cases where courts have applied § 2-314's warranty protections to a buyer who purchased goods from an auctioneer who did not have title to the goods in question. Below, I examine each of these categories of cases to demonstrate that there is jurisprudential authority for extending § 2-314 beyond what may appear to be its textual domain.

1. *"Transactions in Goods"*

As mentioned in section III.A. above, a number of courts have held that Article 2's warranty protections apply broadly to "transactions" in goods, not merely to "sales" of goods. For instance, in *Januse v. U-Haul Co.*, a Florida resident leased a U-Haul moving truck and sustained injuries when the truck's steering mechanism malfunctioned.[229] The resident brought a claim against the lessor alleging, among other things, a breach of the implied warranty of merchantability under § 2-314.[230] Relying on Illinois law, the Florida court held that provisions of Article 2 have "been extended . . . to cover non-sale transactions."[231] The court based its decision on the fact that "certain provisions of Article 2 should apply by analogy to equipment leases."[232] The court also noted that the "transactions of goods" language in § 2-102 supported its conclusion that the warranty protections of Article 2 should extend to the lease in question.[233] Similarly, in *Cucchi v. Rollins Protective Services Co.*, the Supreme Court of Pennsylvania applied Article 2's provisions to the lease of a burglar alarm system, reasoning that "[c]onsidering that a large volume of commercial transactions is being cast in the form of a lease instead of a sale, and that leases reach the same economic result as sales, it would be illogical to apply a different set of rules to leases than to sales."[234] In *Redfern Meats, Inc. v. Hertz Corp.*,[235] the court

229 Januse v. U-Haul Co., Inc. 399 So. 2d 402, 403 (Fla. Dist. Ct. App. 1981); *see also* Gary D. Spivey, Annotation, *Application of Warranty Provisions of Uniform Commercial Code to Bailments*, 48 A.L.R.3d 668 § 6 (1973) (noting that courts have applied Article 2's warranty provisions either directly or by analogy to bailments).

230 *Januse*, 399 So. 2d at 403.

231 *Id.*

232 *Id.*

233 *Id.*

234 574 A.2d 565, 569 (Pa. 1990).

235 215 S.E.2d 10, 12 (Ga. Ct. App. 1975).

also grappled with whether to apply Article 2's warranty provisions to the lease of a refrigerated transportation vehicle. The court noted that although a "literal reading of these Code sections" suggests that the warranty provisions were intended to apply only to sales and not leases, "the question unanswered by the Code is whether or not Article 2 applies to transactions that are analogous to a sale, though denominated something else."[236] The court was persuaded that the warranty provisions of Article 2 should be extended to the transaction in question and that the defendant's "rentention [sic] of title is a misleading feature of th[e] case," noting that title "does not hold the same position as it did under former Georgia sales law."[237] These are but a few of the numerous examples where courts have chosen to take a broad view of "transactions" under Article 2.

This is likely the cleanest analytical route to potentially grounding liability against Amazon with respect to the third-party goods it sells on its platform. If Amazon's relationship with a buyer can be classified as a "transaction" in goods—which I believe it clearly is—then there is authority for suggesting that Article 2's warranty protections should apply.

2. *Near-Sales*

A second category of cases is also instructive in terms of the willingness of courts to extend Article 2 warranty protection to buyers in a sales-like transaction. There are a handful of cases where a prospective buyer has removed a product from a shelf with the intention of purchasing it. Prior to the purchase—and therefore prior to the passing of title— the buyer is injured by the goods. It is clear from all these cases that a sale, as traditionally understood, has not occurred. Yet, courts have been willing to consider these near-sales as within the ambit of Article 2's warranty protections.

For instance, in *Barker v. Allied Supermarket*,[238] the plaintiff was shopping at a grocery store when he was seriously injured after one of the glass soda bottles he was placing in his shopping cart exploded and struck him in the eye.[239] The Oklahoma Supreme Court reasoned that taking possession of goods, coupled with the intent to pay for the goods, is sufficient to create a § 2-314 "contract for their sale," effectively giving

236 *Id.* at 15.
237 *Id.* at 18.
238 596 P.2d 870, 870 (Okla. 1979).
239 *Id.* at 871.

rise to the implied warranty of merchantability.[240] The same issue presented itself in *Giant Food, Inc. v. Washington Coca-Cola Bottling Co., Inc.*[241] There, the plaintiff sustained injuries when a pack of soda he was carrying to his cart exploded and caused him to slip and fall.[242] The Court of Appeals of Maryland held that there was a contract for the sale of goods between the retailer and the plaintiff.[243] The court stated that the plaintiff's "act of taking physical possession of the goods with the intent to purchase them manifested an intent to accept the offer and a promise to take them to the check-out counter and pay for them."[244] Accordingly, because the court determined there was a contract for the sale of goods, there was an implied warranty of merchantability under § 2-314.[245]

As these cases demonstrate, courts are flexible with the notion of a sale and do not always insist upon an actual exchange of money or the transfer of title to conclude that a sale has taken place. These cases show that courts have been willing to conclude that a sale has taken place even in the absence of a technical transfer of title from a seller to the buyer.

3. *Auctioneer Cases*

The final group of cases is perhaps the most instructive and the most factually similar to the issue at hand: whether a non-title holding seller can be liable for breach of the implied warranty of merchantability. These cases involve an auctioneer who is selling goods on behalf of a third-party seller. Much like the Amazon scenario, after the goods are purchased, the plaintiff suffers personal injury and seeks to hold the auctioneer liable under Article 2. Several courts have explicitly held that an auctioneer who sells goods on behalf of a seller, and who does not hold title himself, can nonetheless be deemed to be a "seller" under § 2-314 in certain circumstances.

The leading case in this respect is *Alabama Powersport Auction, LLC v. Wiese*.[246] In that case, the owner of various consumer goods, including go-carts, consigned them to Alabama Powersport Auction, an auctioneer. The auctioneer sold one of these go-carts to Weise, the buyer. After a couple of years of owning the go-cart, Weise's minor son was riding the

240 *Id.*
241 *See* 332 A.2d 1, 3 (Md. 1975).
242 *Id.*
243 *Id.* at 7.
244 *Id.* at 8.
245 *See id.* at 10.
246 *See* 143 So. 3d 713, 713 (Ala. 2013).

go-cart and had an accident in which he hit his head, causing a brain injury that resulted in his death. Weise brought an action under Article 2 against the auctioneer, from whom he had purchased the go-cart. The court characterized the issue as follows: "Whether an auctioneer selling consigned goods on behalf of a seller may be held liable under Alabama's version of the Uniform Commercial Code as a merchant-seller for a breach of an implied warranty of merchantability."[247] It then stated, "We answer this question in the affirmative."[248]

The court started its analysis by noting that "[a]n implied warranty of merchantability exists only if there is a 'seller,' . . . who is a 'merchant with respect to goods of that kind.'"[249] The court noted that it was "well settled that under Alabama law an auctioneer may be considered a merchant under Alabama's version of the UCC."[250] The court then moved on to the novel issue presented in the case: whether an auctioneer selling goods on behalf of a consignor—and, thus, not holding title to the goods—could be considered a seller under § 2-314.

The court reviewed the relevant Tenth Circuit precedent on the liability of auctioneers, quoting extensively from the *Powers v. Coffeyville Livestock Sales Co.*case.[251] In *Powers*, the court explained that common law agency principles should apply in interpreting the liability of an auctioneer who does not hold title to goods. The court in *Powers* stated:

> Certainly an auctioneer sells goods, although generally as agent for someone else. The statute provides no explicit guidance on whether an auctioneer acting as agent for another is a seller under the statute. When the statute is not specific we look to the common law as an aid to interpretation.
>
> Under traditional agency law, an agent is liable as if it were the principal when the agent acts for an undisclosed principal. This rule applies whether the agent holds itself out as principal or only as agent but does not disclose the identity of its principal. Applying this common law rule to auctioneers, courts in other jurisdictions have held that an auctioneer is liable as a seller if the auctioneer fails to disclose to the buyer the identity of the principal. The UCC did not alter the com-

247 *Id.* at 720.
248 *Id.*
249 *Id.* at 721.
250 *Id.* (citing Bradford v. Nw. Ala. Livestock Ass'n, 379 So. 2d 609, 611 (Ala. Civ. App. 1980)).
251 665 F.2d 311 (10th Cir. 1981).

> mon law application of agency principles to sales made by an auctioneer.[252]

Based on this reasoning, the court in *Alabama Powersport* came to the conclusion that "an auctioneer may be held liable as a merchant-seller for the implied warranty of merchantability . . . if the auctioneer fails to disclose the principal for whom the auctioneer is selling the goods."[253]

Alabama Powersport opens up the possibility that an entity in an auctioneer-type role could face Article 2 liability if it does not disclose the identity of its principal.[254] The court comes to this conclusion based on the fact that Article 2 is written against a common law background, and therefore common law agency principles continue to apply to sales transactions unless specifically abrogated by the act.[255] The auctioneer cases demonstrate that courts have been willing to consider an auctioneer who does not hold title to the goods in question a "seller" under § 2-314.

Interestingly, Amazon claims in various pleadings that its role is akin to that of an auctioneer.[256] Amazon contends that, like an auctioneer, it simply "facilitates" a transaction between a buyer and seller.[257] Leaving aside whether the auctioneer analogy is appropriate,[258] if Amazon wishes to characterize itself as a would-be auctioneer, then it must wrestle with the

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252 *Powers*, 665 F.2d at 312–13 (citations omitted).

253 143 So. 3d at 723–24.

254 *Ala. Powersport Auction*, 143 So. 3d at 724. Four of the nine justices concurred in part and dissented in part. The Chief Justice dissented in part, explaining that a "sale" under Alabama law is defined as a "passing of title from the seller to the buyer for a price," adding that the court "has held that a consignee does not hold title to the goods consigned to it by a consignor but that title passes from the consignor to the buyer." *Id.* at 725 (Moore, C.J., concurring in part and dissenting in part).

255 U.C.C. § 1-103(b) (AM. L. INST. & UNIF. L. COMM'N 1977).

256 Bolger v. Amazon.com, LLC, 267 Cal. Rptr. 3d 601, 620 (Cal. Ct. App. 2020) *review denied*, No. S264607, 2020 BL 455500 (Cal. Nov. 18, 2020) ("Amazon analogizes its role to an auctioneer or finance lessor, which California courts have found not strictly liable for product sales that they merely facilitate."); Appellee's Answering Brief at *16, Carpenter v. Amazon.com, Inc., No. 19-15695, 2020 WL 5914622 (9th Cir. Oct. 5, 2020) ("The services Amazon provided here put it in the same position as a finance lessor or auctioneer.").

257 *See Bolger*, 267 Cal. Rptr. 3d, at 620.

258 *Id.* at 620–21 ("[T]he role of the auctioneers in these opinions was much more limited than Amazon's role. The auctioneers played no more than a 'random and accidental role' in transferring the goods from the seller to the buyer. They had no continuing relationship with anyone in the original chain of distribution to the consumer and therefore could not exert any influence on product safety. Here, Amazon was part of the original chain of distribution, and its role was anything but random and accidental." (citations omitted)).

above precedent that imposes Article 2 liability on auctioneers in certain circumstances.

Of course, Amazon will argue that it does indeed disclose the identity of the true owner/seller of the goods in its online marketplace. When Amazon sells goods on behalf of third parties, it includes a small notation on its website that those goods are "sold by [X]." Whether Amazon's disclosure fulfills the requirements of disclosing the identity of the principal is an open question and is discussed in more detail below.[259] The point here is simply that there is authority under Article 2 for imposing liability on Amazon as an auctioneer of third-party goods who has not fully disclosed the identity of the true seller.

* * *

Courts have been willing to hold sellers liable under the implied warranty of merchantability even in circumstances where the seller did not transfer title directly to the buyer. In a number of these cases, courts do not even reference title as being remotely significant to whether someone is a "seller" or whether a "sale" had occurred. Thus, the case law demonstrates that a seller holding title to the goods in question is not the *sine qua non* of "seller" status under Article 2, or even determinative of whether a "sale" has occurred.

IV
FROM THE LEGAL TO THE FACTUAL: LOCATING TITLE FOR THIRD-PARTY GOODS SOLD ON AMAZON

Amazon's legal argument hinges entirely on the fact that is it not a "seller" of goods under Article 2 because it does not have title to those goods.[260] With respect to goods that are sold and shipped directly by third parties, it is true that Amazon does not have title to those goods.[261] Amazon never has possession of those goods prior to the sale, and the goods are shipped directly by the third-party seller. With respect to goods that are sold by a third-party seller and fulfilled by Amazon, Amazon maintains that under the Amazon Services Business Solutions Agreement, which governs Amazon's relationship

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259 *See infra* subpart VI.A.

260 *See, e.g.*, State Farm Fire & Cas. Co. v. Amazon.com Servs., Inc., 137 N.Y.S.3d 884, 887 (Sup. Ct. 2020) ("Amazon argues the question of *title* is dispositive. They argue they have temporary possession of a particular item, but never take title.").

261 Though as I argue in Part VI, Amazon should be estopped from arguing that it is not the seller of all goods on its platform.

with third-party sellers, title remains vested in the third-party seller, even though Amazon has physical possession of the goods and delivers them to the buyer.

Courts have largely accepted Amazon's arguments about title.[262] The court in *Erie Insurance Co. v. Amazon.com*, for instance, concluded that Amazon never had title to the goods and therefore could not be a seller of the defective headlamp in question.[263] The court provided two reasons for its conclusion. First, it indicated that the seller's transfer of possession of the headlamp to Amazon's warehouse, without Amazon's payment of the headlamp's price or an agreement to transfer title, would not "by that simple transfer" result in Amazon taking title.[264] Second, the court pointed to the fact that the agreement between the third-party seller and Amazon "repeatedly specifies and contemplates that [the third-party seller], not Amazon, retained title to the goods it stored in Amazon's warehouses as part of the fulfillment program."[265] The court noted, for instance, that if the third-party seller were to request that Amazon dispose of the headlamps that it stored in Amazon's warehouse, then, upon receipt of the seller's request, "title to each disposed unit [would] transfer to [Amazon]."[266] The court pronounced, "Of course, this indicates that title otherwise remained with [the third-party seller]."[267]

It may be the case that Amazon never had title to the goods in question in *Erie* and the multiple other cases where plaintiffs have sought to hold Amazon liable for injuries caused by third-party goods sold through the Fulfillment by Amazon program. Nonetheless, it is helpful to examine both Amazon's contract with third-party sellers and Amazon's contract with buyers to get a more fulsome picture of the title issue and to question Amazon's unequivocal assertion that it does not hold title to third-party goods under its Fulfillment by Amazon program. It is also necessary to examine a wholly under-the-radar provi-

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262 Most courts simply make the statement with little, if any, factual support. *See, e.g.*, Papataros v. Amazon.com, Inc., No. 2:17-cv-9836 (KM)(MAH), 2019 WL 4011502, at *4 (D.N.J. Aug. 26, 2019) ("Coolreall retained legal title to the scooter until it was sold to Papataros. Amazon never held legal title to the scooter." (citations omitted)).

263 *See* Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 144 (4th Cir. 2019) ("At bottom, we conclude that Amazon was not, in this particular transaction, a seller—one who transfers ownership of property for a price—and therefore does not have the liability under Maryland law that sellers of goods have.").

264 *Id.* at 141–42.

265 *Id.* at 142.

266 *Id.* (alterations in original).

267 *Id.*

sion in Amazon's contract with third-party sellers that has significant bearing on Amazon's title argument. As we proceed through this mass of fine print, it is important to bear in mind Karl Llewellyn's admonition regarding title: "Nobody ever saw a chattel's Title. Its location in Sales cases is not discovered, but created, often *ad hoc*."[268]

A. Title and Amazon's Contract with Third-Party Sellers

Amazon's relationship with third-party sellers who fulfil orders through Amazon is governed by the Amazon Services Business Solutions Agreement.[269] This document is over 17,000 words in length. To get more of a reference point, this amounts to approximately thirty-four single-spaced or sixty-eight double-spaced pages.[270] The word "title" appears a mere eight times in this agreement, only five of which are relevant for our purposes.[271] And it is never clearly laid out anywhere in the document that the third-party seller retains title at all times and/or that Amazon does not take title to the goods in question. Instead, this conclusion is reached by working backwards, as the court did in *Erie Insurance*.[272] Given how easy it is to explicitly designate who has title to goods, it is surprising that Amazon's circuitous title argument has been so readily accepted by courts.

The references to title in the Amazon Services Business Solutions Agreement are more than a little confusing. The first mention of title is the following:

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268 3 K. N. LLEWELLYN, LAW, A CENTURY OF PROGRESS 80 (1937), *corrected and reprinted in* K. N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. REV. 159, 165 (1938).

269 *See Amazon Services Business Solutions Agreement*, AMAZON, https://sellercentral.amazon.com/gp/help/external/G1791?language=EN_US [https://perma.cc/W5A5-32VZ] (last visited Feb. 14, 2021). This agreement is a collection of different terms and conditions used to govern a party's access to and use of Amazon's many services. *Id.*

270 *How Many Pages Is 17,000 Words?*, CAPITALIZE MY TITLE, https://capitalizemytitle.com/page-count/17000-words/#:~:text=the%20answer%20is%2017%2C000%20words,1%E2%80%B3)%20and%2012%20pt [https://perma.cc/57MT-WS8X] (last visited Feb. 14, 2021).

271 *Amazon Services Business Solutions Agreement*, *supra* note 269. The three references to title that are not relevant are the following: 1) Under the "Selling on Amazon Definitions," one definition refers to the title of a book, not the property concept of title; 2) In section F-15, the third-party seller warrants that he is the legal owner of the goods (i.e., he has valid legal title to all units he is selling); 3) In Section API-2.1, the seller provides a license in Confidential Information and allows Amazon and its licensors "all right, title, and interest in" the Confidential Information.

272 *See Erie Ins. Co.*, 925 F.3d at 142.

> We may, at our option, allow you to ship Units at your expense (as described in Section F-9.2) to fulfillment centers using discounted shipping rates that we may make available to you for certain carriers. . . . Title and risk of loss for any Unit shipped using discounted rates provided by us under this Section will remain with you . . . .[273]

The section seems to imply that the third-party seller retains title *only* in cases where it has used Amazon's discounted shipping rate. Additionally, the last sentence appears to be incomplete: "Title and risk of loss for any Unit shipped using discounted rates provided by us under this Section *will remain with you*."[274] Based on the context—and the reference to risk of loss—this could be read to mean that title will remain with the third-party seller during shipping and that it will transfer thereafter to Amazon.[275]

The next section which references title provides, "Except as provided in Section F-7, you will retake title of all Units that are returned by customers."[276] This section does not directly speak to whether Amazon has title to the goods at the time of the sale to a buyer. It simply provides that the third-party seller will "retake" title with returns—implying, perhaps, that it had title to begin with.

The next reference to title deals with the disposal of third-party seller goods. The section reads,

> You may, at any time, request that we dispose of Units. In this case, we may dispose of these Units as appropriate based on the inventory (e.g., by selling, recycling, donating, or destroying it) and retain any proceeds we may receive from the disposal. Title to each disposed Unit will transfer to us (or a third party we select such as a charity) at no cost, free and clear of any liens, claims, security interests or other encumbrances to the extent required to dispose of the Unit, and we may retain any proceeds, [sic] we may receive from the disposal.[277]

This is probably the most compelling contractual basis upon which to argue that Amazon never had title to the goods in question—but again, it is indirect. This section provides that if the third-party seller requests that Amazon dispose of the units, title will transfer to Amazon. This obviously suggests that Amazon did not otherwise have title. We should be some-

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273 *Amazon Services Business Solutions Agreement*, *supra* note 269, at F-3.3.
274 *Id.* (emphasis added).
275 *See* U.C.C. § 2-509 (AM. L. INST. & UNIF. L. COMM'N 1977).
276 *Amazon Services Business Solutions Agreement*, *supra* note 269, at F-6.2.
277 *Id.* at F-7.3.

what careful about reading too much into this contractual provision since it is possible for the section to be redundant (i.e., it could be the case that Amazon already had title, making this provision unnecessary).[278] In any event, the section is more than a little bewildering since it first provides that Amazon may "dispose of these Units" as it deems appropriate, and *then* it provides that "[t]itle to each *disposed* [*u*]*nit* will transfer to [Amazon]."[279] Presumably, to be empowered to dispose of an item, Amazon must have title—it does not make much sense to refer to title to an already disposed item.

The next reference to title provides, "We may as appropriate keep part of or all proceeds of any Units that we are entitled to dispose of pursuant to F-7 above, or to which title transfers, including returned, damaged, or abandoned Units."[280] The reference to title transfers here refers to title transferring from a buyer to Amazon when a buyer returns a product; it does not speak to whether Amazon has title to the goods when it fulfils third-party seller orders.

The final section mentioning title reads:

> [Y]ou also agree to indemnify, defend, and hold [us] harmless . . . against any Claim that arises from or relates to: (a) the Units (whether or not title has transferred to us, and including any Unit that we identify as yours pursuant to Section F-4), including any personal injury, death, or property damage . . . .[281]

This section, like several others, is confusing. Amazon's position is that it does not *ever* take title to the goods in question prior to selling them to a buyer. The only time it takes title to the goods is to dispose of units or to facilitate customer returns. If this is the case, it is odd to demand indemnity against any claim that arises from or relates to the third-party seller's goods, "whether or not" Amazon had title to them. This, of course, suggests that there are scenarios where third-party goods are sold to buyers and Amazon has title to those goods.

Amazon never clearly spells out in its contracts with third-party sellers who has title to goods in Amazon's possession. One would think that the biggest retailer in the world would be able to clearly draft a provision specifying that, except as otherwise provided in the contract, Amazon does not take title to third-party goods in its possession. The fact that Amazon has

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278 *Id.*
279 *Id.* (emphasis added).
280 *Id.* at F-9.3.
281 *Id.* at F-10.

to rely on negative inferences to argue that title is allocated to the third-party seller by contract is concerning, particularly when Amazon's legal argument for avoiding Article 2 liability hinges entirely on title.

B. Title and Amazon's Contract with Buyers

It is also instructive to examine Amazon's Conditions of Use which govern its relationship with buyers who purchase products from or through Amazon.[282] There are two sections in Amazon's Conditions of Use that refer to title. First, under the "Returns, Refunds and Title" section, Amazon provides that "Amazon does not take title to returned items until the item arrives at our fulfillment center."[283] It is not clear why Amazon, who claims simply to be an intermediary, would need to take title to the goods in question in order to then revest title in the third-party seller. Given that Amazon maintains that title transfers directly from the third-party seller to the buyer in the first place, an arrangement that Amazon would retake title from the buyer—to then immediately pass it along to the third-party seller—is a little odd.

The other provision in the Conditions of Use that references title is the section dealing with "Risk of Loss." That section provides that "All purchases of physical items from Amazon are made pursuant to a shipment contract. This means that the risk of loss and title for such items pass to you upon our delivery to the carrier."[284] The expression "from Amazon" is unfortunate. It is not clear if this section was intended to apply to all goods transactions that are made *through* Amazon (including those made by third-party sellers) or if it was intended to apply only to those goods *sold by* Amazon. At various points in its terms, Amazon refers to items "offered by Amazon," "from Amazon," "sold by Amazon," "through Amazon," etc.[285] Certainly, with respect to goods already in Amazon's possession, it is a plausible read of the Conditions of Use to say that they constitute a purchase of physical goods from Amazon. If this provision applies to contracts under the Fulfillment by Amazon program, then this could imply that Amazon had title to the goods in question. Of course, it could also mean that the third-party seller's title transferred to the buyer upon Amazon's delivery to the carrier. Accordingly, references to title

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282 *Conditions of Use*, *supra* note 34.
283 *Id.*
284 *Id.*
285 *Id.*

in Amazon's contract with a buyer are more than a little nebulous.

The bottom line is that who has title to the goods in question is never clearly spelled out in Amazon's contractual arrangements either with the third-party seller or with a buyer. Since Amazon's entire argument rests on the premise that it never had title to goods sold on its platform, even though it had physical possession of those goods (at least with respect to Fulfillment by Amazon orders), it would seem that a little more scrutiny of who has title to goods sold on Amazon is warranted.

C. Title and Amazon's Right to Commingle

A separate, non-title focused, contractual provision is worth looking at because it seriously undercuts Amazon's reliance on title as the be-all and end-all of liability for defective third-party goods. Section F-4, Storage, of the Amazon Services Business Solutions Agreement provides:

> We will not be required to physically mark or segregate Units from other inventory units (e.g., products with the same Amazon standard identification number) owned by us, our Affiliates or third parties in the applicable fulfillment center(s). If we elect to commingle Units with such other inventory units, both parties agree that our records will be sufficient to identify which products are Units.[286]

What this means is that Amazon is entitled to maintain inventory on a per item basis, not a per seller basis.[287] If ten different sellers sell the same item, say a coffee machine, all those coffee machines can be stored together without distinguishing one seller's coffee machine from the next. In other words, hundreds or thousands of coffee machines from multiple sellers will be stored together with no way to tell which coffee machine came from which seller. Importantly, since Amazon also sells goods in its own right, Amazon's coffee machines are also lumped into the mix. One third-party seller, who has sued Amazon, describes the situation as follows: "[Goods are] being

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286 *Amazon Services Business Solutions Agreement*, *supra* note 269, at F-4.

287 Amazon's website indicates that commingling is "used by default for eligible products." *See Using FBA Virtual Tracking*, AMAZON, https://sellercentral.amazon.com/gp/help/external/G200141480?language=EN_US [https://perma.cc/ZP8L-VBPZ] ("Used by default for eligible products, virtual tracking relies on the manufacturer barcode already on each unit, such as the UPC or EAN, instead of the Amazon barcode sticker. Virtual tracking is sometimes referred to as 'commingling' and the inventory that uses it as 'stickerless inventory.'").

thrown into a single bin in Amazon's warehouse, real and fake."[288]

The impact of this provision is huge.[289] It means that even though I think I purchased a coffee machine from Amazon (the seller), I could in fact get a coffee machine from CoffeeGet, a third-party seller.[290] Conversely, I could think I purchased a coffee machine from CoffeeGet, but am actually getting a coffee machine owned by Amazon.[291] That is to say "a product or-

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288 Pierson, *supra* note 26.

289 It is hard to imagine that this provision has thus far escaped legal scrutiny, given all the potential ramifications beyond the title argument explored here. One online blog reads: "You have a legitimate product, either from your own brand or one you are permitted to sell. One day, you start to receive complaints from your customers that you are selling counterfeits. You don't sell fakes, and you only sell through channels you believe to be secure, i.e. Amazon. Yet the claims of counterfeits continue, and not only are you forced to pay these customers back, but you're left with a slew of highly critical, one-star reviews, crushing your seller account. So, what exactly went wrong? . . . For many sellers, the answer to their seemingly cursed account lies in the commingled bins within Amazon's inventory management system." Ryan Williams, *Amazon Inventory Management Causes Authentic Vendors to Sell Fakes*, RED POINTS, https://www.redpoints.com/blog/amazon-commingled-inventory-management/ [https://perma.cc/6PSM-626U] (last visited Feb. 14, 2021). Dozens of online sources discuss the hidden dangers of product commingling, both from the seller and customer perspective. *See also* Pierson, *supra* note 26 ("The goods may look real online, but there is no guarantee of authenticity— whether sold by a brand, a third-party seller or Amazon's direct-sales arm."); Jeff Bercovici, *Small Businesses Say Amazon Has a Huge Counterfeiting Problem. This 'Shark Tank' Company Is Fighting Back*, INC., https://www.inc.com/magazine/201904/jeff-bercovici/amazon-fake-copycat-knockoff-products-small-business.html [https://perma.cc/AD5D-CUX4] (last visited Feb. 10, 2022) ("No one knows for certain what proportion of the billions of items retailed through Amazon every year are counterfeit."); Khadeeja Safdar, Shane Shifflett & Denise Blostein, *You Might Be Buying Trash on Amazon— Literally*, WALL STREET J. (Dec. 18, 2019), https://www.wsj.com/articles/you-might-be-buying-trash-on-amazonliterally-11576599910 [https://perma.cc/4ZLT-KU6S] ("Amazon customers don't always have total control over whom they buy from. A default setting in an Amazon account known as 'commingling' can mean customers think they are buying from one merchant but end up getting the product from another . . . .").

290 This was the name of the company that sold the coffee machine to Jacob Eberhart. *See* Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 396 (S.D.N.Y. 2018). *See also* Pierson, *supra* note 26 ("E-commerce . . . [gave] Chinese factories and merchants direct access to the U.S., the biggest consumer economy in the world. Amazon, which had failed to penetrate China's tightly guarded domestic e-commerce market, instead focused on wooing Chinese exporters to fuel its Marketplace . . . .").

291 *See, e.g.*, Daniel C.K. Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the Internet*, 40 NW. J. INT'L L. & BUS. 157, 185 (2020) ("In order to have sufficient inventory on hand to satisfy customer orders expeditiously, Amazon's warehouses will co-mingle products from the brand owner and from other third-party vendors into a single source of supply. If a third-party vendor ships a counterfeit product to Amazon, it becomes co-mingled with genuine products in Amazon's warehouse. When a customer orders a product online, the customer may receive a product from the warehouse from either the brand owner or a third-

dered from a third-party seller may not have originated from that particular seller. If the bar code matches, any [product] that is on the shelf will do."[292]

Amazon's title argument falls apart here. Amazon holds steadfast to the argument that because it does not take title to third-party goods, it cannot be a "seller" of those goods. But, truly, who even knows *what* goods Amazon is sending to buyers?[293] Amazon could select an Amazon-owned coffee machine to send to a buyer who has ostensibly placed an order with a third-party seller. Or vice versa—it could be that Amazon ships a third party-owned coffee machine to a buyer even though the buyer believed he was purchasing the coffee machine from Amazon.

This commingling provision[294] magically enables Amazon to create title that it otherwise claims not to have had, and to disclaim title that it otherwise actually had. With respect to the former, Amazon can claim a third-party good as its own and somehow obtain title it did not otherwise possess. If it selects a CoffeeGet machine to fulfill an order from Amazon, Amazon miraculously obtains title to that coffee machine even though CoffeeGet actually owns the machine. And with respect to the latter, Amazon can foist title of goods on a third-party seller even though the third-party seller does not own those goods.[295]

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party vendor, which might be a counterfeit. The source of the product is not clear to the customer when he or she makes a purchase, but the customer will generally assume that it was manufactured by the brand owner." (footnotes omitted)).

292 Serena Ng and Greg Bensinger, *Do You Know What's Going in Your Amazon Shopping Cart?*, WALL ST. J. (May 11, 2014), https://www.wsj.com/articles/on-amazon-pooled-merchandise-opens-door-to-knockoffs-1399852852 [https://perma.cc/BTM3-PWX2].

293 Janger & Twerski, *supra* note 171, at 269 ("To make matters even worse, when a sale is fulfilled by Amazon for a nominal seller, it is not even clear whose goods are actually being sold. . . . Therefore, when, for example, Amazon sells a food processor, the nominal seller may be Williams Sonoma, Cost Brothers, or Amazon. In reality, unless the seller opts out, all of the food processors are stored together in a common bin identified by product code, not by seller. A buyer who purchases from 'Williams Sonoma' may receive a food processor that was actually supplied to Amazon by 'Cuisinart' or somebody else, possibly 'Cost Brothers.'").

294 Amazon prefers not to use the term commingling, even though that is exactly what the company is doing. *See FBA Virtual Tracking FAQ*, AMAZON, *h*ttps://sellercentral.amazon.com/gp/help/external/EFKUGES6NSE7CBP [https://perma.cc/EC9C-KC6W] (last visited Nov. 5, 2021) ("Commingling is a term that is sometimes used to refer to virtual tracking. Virtual tracking is a more indicative term, since we trace the source of eligible products throughout the fulfillment process so that identical items from different suppliers do not need to be physically stored together within a fulfillment center.").

295 Amazon's website expressly acknowledges that it fulfills orders with goods "owned by" other sellers—i.e., the nominal seller does not actually own (have title to) the goods that are sold. *See id.* ("Could I be penalized for products sourced

That is, if Amazon selects an Amazon-owned coffee machine to fulfill an order placed with CoffeeGet, Amazon somehow vests title to Amazon-owned goods in the third-party seller.[296]

This all obviously has ramifications for Amazon's purported "disclosure" of the identity of the "true seller." What Amazon discloses to a buyer in its Buy Box is not necessarily the true seller of the goods.[297] It is simply who Amazon *has unilaterally decided* will be deemed to be the seller in this transaction—and thus, potentially liable for a defect in the goods.[298] To the extent that Amazon attempts to evade liability by claiming that is has disclosed the identity of the true seller, this is patently untrue. It does not know who the true seller is in many cases, and therefore is not able to accurately disclose the true seller's identity.

This issue arose in *Powers v. Coffeyville Livestock Sales Co.*, where an auctioneer commingled goods (cattle) and then sold them to a buyer.[299] The cattle turned out to be diseased and the buyer sued the auctioneer for breaching the implied warranty of merchantability.[300] The court held that the auctioneer was the "seller" of the cattle under § 2-314, even though it was acting as an agent for another seller.[301] The court noted that "more than 130 different persons were the owners of the 312 head of cattle the [buyers] purchased in this particular sale."[302] Because of this commingling of the cattle, "[t]he record . . . suggests that [the auctioneer] did not disclose the

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from a different supplier? No. We do not deactivate listings or seller accounts based on defects with units *owned by other suppliers*." (emphasis added)).

296 Amazon unabashedly acknowledges this magical transfer of title between sellers:

> Suppose a customer in Florida orders a product and there are only two units of that exact product available. One unit is in California, one unit is in New York, and the seller who owns the California unit is the one who makes the sale. To provide the customer with faster delivery, we will send the customer the unit in New York, credit the seller who made the sale, and *virtually transfer ownership* of the identical unit in California to the seller who did not make the sale.

Using FBA Virtual Tracking, supra note 287 (emphasis added).

297 I am specifically speaking here of goods sold through Amazon's Fulfillment by Amazon program where the merchant has not opted out of commingling. This represents a large swath of Amazon's third-party sales.

298 *Amazon Services Business Solutions Agreement*, *supra* note 269, at F-10 ("[Y]ou also agree to indemnify, defend, and hold [us] harmless . . . against any Claim that arises from or relates to . . . any Unit that *we identify as yours* pursuant to Section F-4 . . . ." (emphasis added)).

299 Powers v. Coffeyville Livestock Sales Co., Inc., 665 F.2d 311, 313 (10th Cir. 1981).

300 *Id.* at 311–12.

301 *Id.* at 313.

302 *Id.*

owners' identities to the [buyer] . . . ."[303] So too, Amazon takes goods from multiple sellers and commingles them. Thus, by definition, Amazon is not actually capable of disclosing the "owners' identities to the [buyer] . . . ."[304]

The commingling provision truly illustrates the lunacy of Amazon's title argument, and relatedly, its disclosure argument. Amazon claims it is not liable for goods it does not own (i.e., have title to), but no one actually knows which goods Amazon owns and which goods it doesn't own. And Amazon claims that it discloses the identity of the true seller—but it doesn't actually know who the true seller is. The commingling provision reveals Amazon's title argument for what it is: a disingenuous attempt to use a legal technicality to avoid responsibility for injuries caused by its sale of goods.

V
TESTING THE LIMITS OF TITLE UNDER ARTICLE 2: A THOUGHT EXPERIMENT

This Article has suggested that Article 2 may not require that a party hold title to goods in order to qualify as a "seller" under § 2-314. Courts have held as much in several different settings.[305] If this is true, then Amazon may be liable for injuries caused by third-party goods sold on its platform— certainly in cases where Amazon actively participated in selling those goods.[306] In this next Section, I engage in a thought experiment where I explore how ludicrous it is to insist on title as the sole determinant of whether a party is a seller under Article 2. This is not a policy-based argument; rather, I explore the absurdity of making so much hinge on an ephemeral notion like title.

It is generally accepted that a retailer such as Wal-Mart, Target or Home Depot is considered a merchant seller that is liable under Article 2 if it sells unmerchantable goods.[307] Such a retailer is a "seller" (using Amazon's logic) because it takes

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303 *Id.*

304 *Id.*

305 *See supra* subpart III.D.

306 *See infra* subpart VI.

307 Morrison v. Sears, Roebuck & Co., 354 S.E.2d 495, 495 (N.C. 1987) (Sears is a merchant of ladies' high heeled shoes); Egbebike v. Wal-Mart Stores E., LP, No. 3:13-cv-865-J-34MCR, 2014 WL 3053184, at *6 (M.D. Fla. July 7, 2014) (Wal-Mart is a merchant of air mattresses); Trobaugh Constr., Inc. v. Home Depot, USA, Inc., No. 01-02-00340-CV, 2003 WL 23000025, at *3 (Tex. App. Dec. 23, 2003) (Home Depot is a merchant of water supply hoses); Walker v. Macy's Merch. Grp., Inc., 288 F. Supp. 3d 840, 869 (N.D. Ill. 2017) (Macy's is a merchant of jackets).

title to goods that it later re-sells to buyers. For instance, Home Depot may purchase barbeques from Weber, paying for them and taking title to them.[308] When Home Depot sells those barbeques to a customer, the customer can sue Home Depot for breach of the warranty of merchantability because Home Depot had title to the goods in question and is therefore, a "seller" of those goods.

Imagine this though: Home Depot orders certain barbeques from Weber on consignment.[309] In other words, Weber gives possession of the barbeques to Home Depot for re-sale, but Home Depot never takes title to them. If Home Depot sells one of these barbeques, it remits some of the proceeds of that sale to Weber. From the perspective of the buyer, he has no idea whether he is buying a Home Depot-owned barbeque (where Home Depot has title) or a consigned barbeque (where Home Depot does not have title). These barbeques might be located right next to each other in the store. Following the title-based logic that Amazon advances, the customer would have an Article 2 based remedy for the Home Depot-owned goods but would not have an Article 2 based remedy for consigned goods. Because Home Depot never took title to the consigned barbeques, this is not a "sale" of goods under Article 2 and Home Depot is not a "seller" under § 2-314.

This is the impact of Amazon's logic. Whether an entity qualifies as a "seller" turns on its private and undisclosed relationship with *its seller*. Because the use of the words "seller" and "buyer" here are a little confusing—owing to the fact that one party is both a seller and a buyer—it may be helpful to map this out more clearly. A supplies B with goods on consignment. B, in turn, sells these goods, along with goods that it has title to, to C. C will receive the benefit of the warranty of merchantability only with respect to goods that B owned, even though C had no idea (and no way of knowing) whether B actually had title to the goods it was selling. C will not receive the benefit of the warranty of merchantability if B did not have

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308 Even where retailers purchase on a sale-or-return basis, they nonetheless take title to the goods in question.

309 1 AM. JUR. PROOF OF FACTS 2D *Consignment* § 2, Westlaw (database updated April 2021) ("When goods are delivered to another as an agent to sell, the transaction is that of a consignment, also called a bailment for sale. Delivery is made with the understanding that the recipient (consignee) either will sell the property for the supplier (consignor) and remit to him the proceeds or will return the goods if a sale cannot be consummated. Title to the goods remains in the consignor until a sale is made to a third party, and the consignee never becomes personally liable for the purchase price except in the sense that he must account for the proceeds of any sales made by him." (footnotes omitted)).

title to the goods it sold to C. If sellers can avoid Article 2 liability simply by structuring their relationships to avoid taking title to goods—something that can be done by the stroke of a pen—then this would largely defeat the purpose of Article 2.[310]

It is worth emphasizing that nothing turns on whether the buyer *knew* the seller had title or did not have title. What matters is simply whether the seller had title, which is something the seller is able to avoid taking by contract. The consequences of this in the online world are significant. While Amazon currently purports to distinguish its sales from those of third-party sellers (albeit in an entirely inconspicuous way), it would not have to do so in order to take advantage of this title argument.[311] Amazon could simply sell third-party goods—without disclosing that they are from a third party— and avoid being characterized as a "seller" if a seller necessarily has to have title to the goods in question. In other words, Amazon's title argument rests exclusively on the fact that Amazon does not have title to third-party seller goods. It does not matter that the buyer *knew* when it was purchasing on Amazon that it was purchasing third-party seller goods. If Amazon's title argument is carried to its logical conclusion, any retailer of goods (brick-and-mortar or online) could evade Article 2 liability by avoiding taking title to goods and not disclosing this fact to the ultimate buyer.[312]

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310 The Supreme Court recently decided a case involving a similar attempt by a large multinational, Apple, to avoid liability—in that case, under U.S. antitrust laws. In *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520, 1523 (2019), the Court considered whether the plaintiffs were "direct purchasers" from Apple, the defendant, who sold them apps for their iPhones. Apple had tried arguing (much like Amazon does) that Apple is not the true seller of the apps because the app developers set the prices. *Id.* at 1523. The Court was not persuaded. *Id.* It noted that it "fail[ed] to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer . . . ." *Id.* The Court noted that "if accepted, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement." *Id.*

311 For the purpose of this discussion, I am setting aside the implications of the commingling provisions which render it impossible for Amazon to actually disclose the identity of the seller of the actual goods the buyer receives under the Fulfillment by Amazon program.

312 *See*, *e.g.*, Janger & Twerski, *supra* note 161, at 14 ("In the non-virtual world, it would be odd if a purchaser were to walk into a store and the remedies against the merchant were to change depending, not on what the buyer could see, but on the title arrangement between the merchant and their supplier.").

It is not clear that courts have realized this implication of Amazon's argument. For instance, in *Erie Ins. Co. v. Amazon.com, Inc.*, the court emphasized on three separate occasions that Amazon had disclosed to the buyer who the true seller was: 1) "In these circumstances, as Amazon *explicitly posted on its site*, Dream Light was the seller";[313] 2) "We thus conclude that Dream Light was the seller, as [the buyer] *was so informed on the site* . . .";[314] 3) "And again, Amazon recognized this by *noting on the webpage* that the headlamp was 'sold by Dream Light.'"[315] The *Erie* court is clearly under the impression (or, more accurately, misimpression) that Amazon's purported disclosure of the identity of the true seller somehow matters. Under Amazon's title argument, it does not. If Amazon does not have title to the goods in question, it cannot consummate a sale or be a "seller" under § 2-314. Whether the ultimate buyer knows that is neither here nor there. This consequence has thus far escaped scrutiny—but must be grappled with if courts continue to accept Amazon's "no title, no sale" argument.

VI
AMAZON IS A SELLER OF THIRD-PARTY GOODS UNDER ARTICLE 2

Amazon's success in the courts has largely rested on its argument that because it does not have title to the goods in question, it is simply not a "seller" under Article 2 and therefore cannot be liable for breach of the implied warranty of merchantability. Above, I discussed the title argument in detail, both from a legal and from a factual perspective. I argued that it may be possible under existing Article 2 law to apply § 2-314 to Amazon, regardless of whether it held title to the goods in question. I also noted that from a factual perspective, courts should not simply accept Amazon's claim that it does not have title to third-party goods at face value. I then engaged in a thought experiment where I highlighted the consequences of Amazon's title argument, if carried to its logical conclusion.

In this Section, I broaden the lens to argue that Amazon casts itself in the role of seller with respect to all of its transactions. From a customer's perspective, *everything* about the Amazon experience suggests that Amazon is the seller of the

313 Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 142 (4th Cir. 2019) (emphasis added).
314 *Id.* (emphasis added).
315 *Id.* at 143 (emphasis added).

goods being purchased. This is a result of a deliberate decision by Amazon to position itself as the seller of all goods on its platform, and to profit from its status as a worldwide retail behemoth. Given Amazon's choice to step into the role of seller for all goods on its platform, and its related decision to obscure the identity of who it claims is the true seller, Amazon should be estopped from arguing that it is not a "seller" under Article 2—regardless of who has title to the goods in question.

A. Amazon Deliberately Obscures the Identity of Who It Claims Is the Actual Seller

Let us start by looking at the very few indicia that a buyer has that Amazon is *not* the seller of all goods on its platform. There is really only one clue provided to buyers that Amazon is not the seller of certain goods available on its website. Underneath the "Add to Cart" and "Buy Now" notations used to complete a sale, the website states, in fairly fine print, "Ships from" and "Sold by." Where third-party sellers directly sell products, that seller's name will be filled in for both "Ships from" and "Sold by." In cases where the third-party seller is part of the Fulfillment by Amazon program, the "Ships from" line will be filled in with Amazon's name and the "Sold by" line will be filled in with the third-party seller's name.[316] In either case, the third-party seller's name is hyperlinked, allowing a buyer to be brought to a new page. This new page also purports to provide "Detailed Seller information."

The only other place a customer could go to understand that Amazon is not the seller of all goods on its website would be to the Conditions of Use, a nearly 3,400 word densely written document available via a hyperlink at the very bottom of Amazon's home page.[317] There, more than halfway through the document, Amazon has one sentence that "discloses" to buyers that they are buying directly from third-party sellers in some cases.[318] The heading for this section is "Other Businesses" and the section reads, in part:

> Parties other than Amazon operate stores, provide services or software, or sell product lines through the Amazon Services. In addition, we provide links to the sites of affiliated companies and certain other businesses. If you purchase any of the products or services offered by these businesses or individu-

316 This continues to appear on the screen where the actual purchase is completed.

317 *Conditions of Use*, *supra* note 34.

318 *Id.*

> als, you are purchasing directly from those third parties, not from Amazon.[319]

There is literally no more than this that would alert a prospective buyer to the fact that they are apparently purchasing goods, not from Amazon, but from a third party. This is evidenced by Amazon's appellate brief in *Fox* where it identifies the above as the only way that a buyer would know he was not purchasing goods from Amazon. Amazon writes:

> When a prospective purchaser navigates to a product detail page on the Amazon marketplace, the seller is identified in the "sold by" line next to the product's price and shipping information. The seller is again identified on the order confirmation page before the purchaser clicks the "place your order" button. In setting up an account, and again when placing an order, purchasers assent to Amazon's Conditions of Use . . . .[320]

Amazon has clung to the fact that, through the aforementioned, it has disclosed to buyers the true seller of goods purchased through Amazon.[321] The argument is laughable.

Everything about the Amazon experience is designed to disguise the identity of the true seller.[322] It is safe to assume that the vast majority of buyers believe that when they are purchasing goods *on* Amazon, they are purchasing goods *from* Amazon—i.e., they believe Amazon is the seller of those goods.[323] Most people likely do not even realize that Amazon is

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319 *Id.*

320 Brief for Appellee Amazon.com, Inc. at *4, Fox v. Amazon.com, Inc., 930 F.3d 415 (6th Cir. 2019) (No. 18-5661) (citations omitted).

321 Memorandum in Support of Amazon's Motion for Summary Judgment at 3, Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766 (N.D. Ill. 2019) (No. 17-cv-00673) ("Amazon makes clear in the *Conditions of Use* that govern use of its website that third-party sellers sell products on the marketplace, and that those sellers, not Amazon, are responsible for the products . . . .").

322 Janger & Twerski, *supra* note <*CITE* _Ref86344525">, at 267–68 ("For a buyer, the identity of the nominal seller is often unclear. Indeed, through its manipulation of the so-called 'Buy Box,' Amazon does everything it can to maximize that confusion. A buyer may go to the Amazon website and search on a particular product, say a food processor, then click on it with the intention to buy it. So far, the buyer has interacted with two known parties: Amazon and the manufacturer. When the buyer clicks on the product, Amazon takes them to a screen which includes additional product details, and in the top right-hand corner, two buttons: 'buy now' and 'add to cart.' This location on the screen is referred to in Amazon parlance as the 'Buy Box.' Near these buttons, there is additional information. It is likely to say one of three things: (1) sold by XXX and shipped by XXX; (2) Sold by XXX and fulfilled by Amazon; or (3) sold and shipped by Amazon. This is the only indication the buyer gets of who is nominally selling the product. The buyer may never even notice it.").

323 Lecher, *supra* note 36 ("For most people, buying through Amazon means buying from Amazon."). *See also* Bolger v. Amazon.com, LLC, 267 Cal. Rptr. 3d

both a seller and a marketplace platform. Its very interface makes it exceedingly difficult for a user to understand that Amazon is sometimes a seller and sometimes not a seller.[324] As Professor Twerski notes, "You'd have to be a genius to figure out what's going on."[325]

Nonetheless, Amazon insists that two words on its website make it clear to a buyer that they are purchasing goods from a third party: "Sold by."[326] These words appear on the screen only *after* a potential buyer has searched for a product and then clicked on it. It is critical to deconstruct the illusion that a "Sold by" hyperlink would disclose to a buyer that they are purchasing goods directly from a third party and not from Amazon.[327] In Appendix I, I reproduce listings for the same goods—sold by Amazon; sold directly by a third-party seller through the Fulfillment by Merchant program; and sold by a third-party seller through the Fulfillment by Amazon program. The listings are almost identical.[328] The pictures are the same; the product options are the same; the descriptions are the same; the ratings are the same. Virtually nothing other than the hyperlink, written in the smallest print on the page, distin-

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601, 609 (Cal. Ct. App. 2020), *review denied*, No. S264607, 2020 BL 455500 (Cal. Nov. 18, 2020) ("[Bolger] received the battery . . . in Amazon packaging, including an Amazon-branded box with Amazon-branded shipping tape. Throughout the process, Bolger had no contact with Lenoge [the third-party seller] or anyone other than Amazon. *She believed Amazon sold her the battery.* Amazon's total fee for the transaction was $4.87, or approximately 40 percent of the purchase price.") (emphasis added); Fox v. Amazon.com, Inc., 930 F.3d 415, 418 (6th Cir. 2019) ("On November 3, 2015, Plaintiff Megan Fox accessed the webpage and purchased a FITURBO F1 hoverboard. At that time, *Plaintiff believed that Defendant owned the hoverboard, and that she purchased the hoverboard from Defendant.*" (emphasis added)).

324 Berzon, Shifflett, & Scheck, *supra* note 64 ("Amazon doesn't make it easy for customers to see that many products aren't sold by the company. Many third-party items the Journal examined were listed as Amazon Prime eligible and sold through the Fulfillment by Amazon program, which generally ships items from Amazon warehouses in Amazon-branded boxes. The actual seller's name appeared only in small print on the listing page.").

325 Lecher, *supra* note 36.

326 The court in *State Farm Fire & Casualty Co. v. Amazon.com, Inc.* astutely observes, "[w]hile Amazon claims the fine print shows the third-party sells the product, in this instance HoneyMony . . . the packaging the consumer receives is emblazoned with Amazon's logo." 137 N.Y.S.3d 884, 884 (Sup. Ct. 2020) (citations omitted).

327 The "Sold by" notation appears in what is referred to as Amazon's "Buy Box."

328 *See Ten Things You Need to Know to Sell Online with Amazon*, AMAZON, https://sell.amazon.com/sell-online.html?ref_=SDus_soa_so_fnav [https://perma.cc/E2PX-REWH] ("When multiple sellers offer the same product, Amazon combines data from all the offers into one product detail page so we can present customers with the best experience.") (last visited Feb. 16, 2021).

guishes the listings from one another.[329] With the avalanche of other information on the webpage, including the multiple references to "Amazon" or "Prime,"[330] a buyer could be forgiven for not noticing the "Sold by" line.

Even if a buyer did notice the "Sold by" line, he is not likely to understand its meaning or significance. In a number of cases, buyers are likely to assume that "Sold by" simply refers to the manufacturer of the product. For instance, if a buyer purchases a dog collar "Sold by" "The Furry Gang" with "Fulfillment by Amazon,"[331] that buyer is likely to assume that a company called "The Furry Gang" makes the dog collar, and Amazon sells the dog collar. The buyer's reference point would be the physical marketplace; if a buyer goes into Petco (the equivalent of Amazon), it can buy a number of dog collars from different manufacturers (the equivalent of "The Furry Gang") but those dog collars are sold at and by Petco.[332]

If a buyer were to click on the "Sold by" hyperlink, he would be brought to a page with some minimal information on the third-party seller. This information would include the address on file for the seller, other products sold by the seller, and ratings for the seller. Most of the other hyperlinks on that page refer back to Amazon's policies. Nothing about this page suggests that a buyer is buying directly from the third-party seller when it makes a purchase on Amazon. In fact, the opposite is true. There is a link that buyers can click to "Ask a Question." When a buyer does so, he is brought to an Amazon-branded "messaging assistant" for Amazon's selling partners. Rather than disclosing to a buyer that the buyer is buying directly from a third party, this set-up suggests that the buyer is purchasing directly from Amazon.

Things are even more opaque once a purchaser adds an item to his cart. At this point, only orders that are placed with

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329 *See* Bolger v. Amazon.com, LLC, 267 Cal. Rptr. 3d 601, 616 (Cal. Ct. App. 2020), *review denied*, No. S264607, 2020 BL 455500 (Cal. Nov. 18, 2020) ("[T]he listing does not conspicuously inform the consumer of the identity of the third-party seller or the nature of Amazon's relationship to the sale.").

330 Janger & Twerski, *supra* note 171, at 268 ("If one looks at the image in Figure 1 below, the page banner says boldly 'Amazon Prime.' The words 'Amazon', or 'Prime' appear a total of thirteen times on the page. The name of the seller, 'Cost Brothers,' appears once. It is hard to find.").

331 Oberdorf v. Amazon.com, Inc., 930 F.3d 136, 142 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019), *certifying questions to Pa. Sup. Ct.*, 818 Fed. Appx. 138 (3d Cir. June 2, 2020) (en banc).

332 Alternatively, a buyer may believe that Amazon has purchased the product from the entity in the "Sold by" line and that Amazon is now the seller of the product.

a Fulfillment by Merchant seller have any notation on them that Amazon might not be the seller. Instead of saying "Sold by" the third-party seller, the notation changes to "Shipped by" the third-party seller. Where the order is from a Fulfillment by Amazon seller, there is no designation in the cart that the items are not sold by Amazon. As is made clear in Appendix II, an Amazon-sold Keurig machine looks identical in the cart to a third-party Keurig machine that is sold under the Fulfillment by Amazon program.

The only other thing Amazon points to as making it clear to a buyer that the buyer is purchasing goods directly from a third party are Amazon's Conditions of Use. The Conditions of Use link is difficult to find on the website, appearing only at the very bottom of the screen, after extensive scrolling. It appears immediately next to "Privacy Policy," "Interest-Based Ads," and a copyright notice. There is nothing to indicate its importance to a buyer, and there is nothing that would cause a buyer to actually read the Conditions of Use.[333] Moreover, the moniker "Conditions of Use" is somewhat misleading in that it suggests that the terms govern the use of the Amazon website, rather than providing the terms and conditions of contracts entered into between a buyer and Amazon. It is widely understood that no rational buyer would read the Conditions of Use.[334] Even if they did read them, it is exceedingly unlikely that a buyer would understand their significance.[335] As stated above, the one sentence about the distinction between buying from Amazon versus through Amazon is buried in the middle of a lengthy and dense legal document.

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333 Amazon preposterously clings to the notion that buyers are expected to read and understand the hard-to-find, densely written, and exceedingly lengthy Conditions of Use prior to purchase. Respondent's Brief at 14, Bolger v. Amazon.com, LLC, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020) (No. D075738) ("When Bolger set up her Amazon.com account, and again when she bought the battery from E-life, *she assented to the Conditions of Use* that govern the use of Amazon's services. The Conditions *tell users* that 'Parties other than Amazon operate stores, provide services, or sell product lines through the Amazon Services,' and *explain* that Amazon is 'not responsible for examining or evaluating, and we do not warrant the offerings of, any of these businesses or individuals or the content of their Web sites.'") (emphases added).

334 James Gibson, *Boilerplate's False Dichotomy*, 106 GEO. L.J. 249, 256 (2018) ("The failure to find and read boilerplate is not proof of laziness or moral failing. It is a reflection of individuals' bounded rationality. Consumers simply do not have the time or expertise to absorb all of the boilerplate they encounter and factor it into their purchasing decisions.").

335 Peter S. Vogel, *Internet Jurisdiction Makes Life Interesting*, 73 TEX. B.J. 208, 210 (2010).

Now that I have examined the ways that Amazon claims it has disclosed to buyers that certain sales through Amazon are made directly by third-party sellers, I would like to transition to all the ways that Amazon works to convince buyers that Amazon is the seller of all products on its website. First, and most importantly, Amazon commingles the listings where *it* is the seller and listings where third parties are the sellers. Other than the "Sold by" line, which is only displayed *after* the item is selected for potential purchase,[336] there is nothing to distinguish Amazon goods from third-party goods. Goods sold by Amazon do not show up with a different background than third-party goods; nor do they appear on a different section of the page from goods sold by third parties. Instead, a buyer is often shown hundreds (or thousands) of goods, with absolutely no distinction between Amazon goods and third-party goods.[337] A buyer does not have the ability to search only for goods sold by Amazon without pulling up third-party goods.[338] After a buyer has conducted a search, there is no ability for a buyer to filter the results so that a buyer only sees goods sold by Amazon; this is despite the fact that Amazon utilizes dozens of different filtering mechanisms.[339]

Make no mistake: these choices by Amazon are deliberate. Amazon could easily operate two different websites—one website where it sells goods and one website where it operates as a marketplace for third-party goods (much like Ebay or Etsy). This would avoid any confusion over who is selling what on Amazon.[340] Or, it could even operate one website and clearly delineate between goods that it is selling and goods that third parties are selling. This would not be difficult to do. Instead,

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336 Janger & Twerski, *supra* note 171, at 269 ("When a buyer goes to Amazon and searches a product, it generally will list the product but not the seller. When the buyer clicks through, only then does an identified merchant appear[ ] . . . .").

337 AMAZON, https://www.amazon.com/ [https://perma.cc/T38G-EM4E] (last visited Feb. 16, 2021).

338 Walmart.com, by contrast, allows a buyer to search only for goods sold by "Walmart.com." WALMART, http://walmart.com/ [https://perma.cc/Q8Q6-L76Z] (last visited Nov. 6, 2021).

339 For example, a search for "HDMI Cables" generates a list of approximately one dozen filters, including by rating, color, length, shipping, packaging, and certification. *Search for 'HDMI Cables'*, AMAZON, https://www.amazon.com/s?k=HDMI+Cables&ref=NB_sb_noss_2 [https://perma.cc/Y5RW-NL5X] (last visited Feb. 16, 2021). Note, however, that Amazon does permit a buyer to limit search results to AmazonBasics items, Amazon's in-house brand.

340 Jorge Espinosa & Peter Quinter, *The Wild West of Online Commerce: Counterfeits and Fake Reviews*, 32 INTELL. PROP. & TECH. L.J. 10, 10 (2020) ("The consumer often cannot easily distinguish between a product sold by the online marketplace or a third-party reseller.").

Amazon deliberately blurs the lines between which products it sells and which products third parties sell.[341]

Below is a list of just a few of the ways that Amazon purposely creates equivalence between goods it sells and goods that third parties sell:

Visual Display: Both Amazon and third-party goods are displayed in the exact same way with the exact same information. This includes identical photos, product information, and reviews. From a display perspective, literally the only difference between the two is that the third-party goods will say "Sold by [X]" in small print after the purchase buttons.

Reviews: Amazon permits buyers to review both Amazon goods and third-party goods. The reviews appear in the same location, using the same rubric, and look identical. Moreover, reviews follow the goods, regardless of the seller (i.e., the reviews for the Keurig machine sold by Amazon are the exact same as the reviews for the Keurig machine sold by a third party).

Questions: Buyers have the ability to ask question about goods sold either by Amazon or by third-party sellers. The answers, just like the reviews, follow the goods.

Coupons: Both Amazon and third-party goods are eligible for discounts using automated coupons.[342] In both instances, the buyer simply needs to check a box to redeem the coupon.

Free shipping: Both Amazon and third-party goods are generally eligible for free shipping with a twenty-five dollar minimum purchase order.[343]

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341 *Id.* at 11 ("The user interface of some of these sites make it difficult to know the source of the goods[,] often aggregating offerings from different third-party vendors on a listing with the marketplace offering. On eBay, the consumer knows that the source is a third-party source. However, on Amazon, for example, it is not always so clear. Often, product offered as 'Amazon Prime' or 'Amazon's Choice' may not be product sold by Amazon but may, in fact, be sold and shipped by a third party.").

342 While Amazon coupons apply only to items sold and shipped by Amazon, third-party sellers have the ability to create their own coupons. *See* Barbara Riccardi, *Amazon Introduces Coupons to Third-Party Sellers*, CHANNELADVISOR (Dec. 12, 2017), Sellershttps://web.archive.org/web/20180505014155/https://www.channeladvisor.com/blog/marketplaces/amazon-coupons-to-third-party-sellers/ [https://perma.cc/37WN-UZ5H].

343 For Fulfillment by Merchant goods, Amazon states "*Some* sellers that fulfill and ship their own inventory charge shipping fees." *Order with Free Shipping by Amazon*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=GZXW7X6AKTHNUP6H [https://perma.cc/P8PT-CRSN] (last visited Feb. 16, 2021) (emphasis added).

Prime: Both Amazon and Fulfillment by Amazon third-party goods are generally eligible for free shipping with Prime.[344]

Targeted Ads: Both Amazon and third-party goods are promoted to buyers through targeted internet-based ads. These ads appear both within Amazon itself and on the user's digital devices.

Designations: Both Amazon and third-party goods are the subject of Amazon-created designations, such as "#1 Best Seller."

Suggestions: Amazon uses items that a user clicks on to suggest both Amazon goods and third-party goods.

By creating functional equivalence between Amazon goods and third-party goods, Amazon works to obfuscate the identity of the third party and to create the appearance that all the goods on its website are being sold by Amazon.[345] This is unabashedly designed to capitalize on the trust that customers have in the Amazon brand[346] and to lull buyers into a false sense of security in who they are purchasing from.

B. Amazon Functions as the Seller with Respect to Third-Party Goods Sold on its Platform

Amazon is in complete control of how it sells all products on its platform and to whom. Amazon does not simply provide a receptacle for third-party seller listings; instead, it actively markets, promotes, and pushes the sale of third-party seller goods on its platform. It does so through a variety of mechanisms. For instance, Amazon uses monikers such as "Sponsored Products," "Amazon's Choice" and "Bestseller" to telegraph certain information to a buyer.[347] All of these desig-

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344 This also applies to Seller Fulfilled Prime. In fact, Amazon uses the benefits of Prime to encourage sellers to use the Fulfillment by Amazon program rather than the Fulfillment by Merchant program. *See Getting Shoppers Their Stuff*, AMAZON, https://sell.amazon.com/fulfill.html [https://perma.cc/9JPX-5Q84] (last visited Feb. 16, 2021).

345 In the words of one publication, "because the Marketplace is so intertwined with Amazon's main 'retail' store, it's easy for customers to miss the difference." Lecher, *supra* note 36.

346 THE BEGINNER'S GUIDE TO SELLING ON AMAZON, *supra* note 40 ("And our customers want a trusted destination where they can purchase a wide variety of goods . . . .").

347 *See* Janger & Twerski, *supra* note 171, at 264. Amazon also offers "Sponsored Brands" and "Amazon Stores" to help promote third party goods. *See* THE BEGINNER'S GUIDE TO SELLING ON AMAZON, *supra* note 40. Amazon also uses a "Frequently Bought Together" tool to put third-party goods in front of the customer. *See, e.g.*, State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 967 (W.D. Wis. 2019) ("Cain had seen the product listing for the adapter [sold

nations connote to a buyer Amazon's stamp of approval. Additionally, Amazon makes certain products eligible for "Prime," Amazon's coveted two-day delivery service. Since some buyers will only buy goods that are Prime-eligible, this is another way that Amazon controls which goods a buyer will purchase. Amazon also allows third-party sellers to bid on keywords; if a third-party seller pays enough money, Amazon will display its goods when a buyer searches certain key words. Moreover, "Amazon offers tools to help . . . build, grow, and protect [third-party seller brands]."[348] By enrolling in "Brand Registry," third-party sellers can have Amazon help to "personalize [their] brand and product pages, protect [their] trademarks and intellectual property, and improve the brand experience for customers."[349] These are just a few of the many ways that Amazon exerts total control over third-party goods on its website and puts these goods front and center of a buyer's Amazon experience. The "Beginner's Guide" to selling on Amazon makes clear that the goal is to "[p]ut [third-party seller] products in front of the millions of customers who search Amazon.com every day."[350]

Additionally, Amazon takes on almost all of the functions of a traditional seller with respect to third-party goods, thus furthering the impression that buyers already have that they are buying *from* Amazon. This is particularly true with respect to goods sold through the Fulfillment by Amazon program.[351] Under this program, third parties ship goods to Amazon for Amazon to store in its warehouses.[352] When a customer places an order, an Amazon employee will take the goods from its warehouse, put them in an Amazon box, pack them up with

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by a third-party seller] on a section of Amazon's website that displayed items 'frequently bought together.'").

348 THE BEGINNER'S GUIDE TO SELLING ON AMAZON, *supra* note 40.

349 *Id.*

350 *Id.*

351 Even under the Fulfillment by Merchant program, Amazon exercises significant control over the third-party seller and the buyer's experience. *See id.* For instance, Amazon sets all the shipping rates and provides "great deals" to merchants through its trusted network of shippers. *See id.* ("Set shipping rates apply to all products sold with an Individual plan, so it's important to determine if you can still price items profitably. Amazon's Buy Shipping tool can help you get a great deal on shipping labels with Amazon's trusted network of shipping partners, ship and confirm your orders, and track your shipments.").

352 "Amazon has more than 175 fulfillment centers which contain more than 150 million square feet of storage space." *Id.* This amounts to over 5 square miles of storage space.

Amazon-branded tape, and ship them out to the customer.[353] In many cases, Amazon packages its own goods together with third-party goods in the same Amazon box.[354] Amazon may even deliver the goods itself, since it now offers its own in-house delivery services.[355] After the order is placed, Amazon processes the buyer's payment, sends an email confirmation and provides shipping information. The receipt inside the box will be from Amazon. The buyer's credit card statement will show a charge from Amazon. In fact, it is Amazon itself, not the actual seller, that bears the risk of credit card fraud or non-payment.[356] If a customer wishes to return a product, he must return it to Amazon; he is not able to contact the "true seller" directly.[357] Amazon handles all complaints, returns, replacements, exchanges and refunds.[358] And, of course, for all of this, Amazon receives a hefty fee.[359] Finally, Amazon stands behind third-party products[360] through its "A to z" guarantee,

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353 Amazon now has its own delivery vehicles, so a third-party carrier may not even deliver the package—it may be delivered by Amazon itself. Warren Shoulberg, *5 Reasons Amazon May Be Going Too Far By Taking Over Its Own Deliveries*, FORBES (Sept. 25, 2019), https://www.forbes.com/sites/warrenshoulberg/2019/09/25/5-reasons-why-amazon-may-be-going-too-far-by-taking-over-its-own-deliveries/?sh=4b1760114870 [https://perma.cc/FHB3-4966].

354 State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 967–68 (W.D. Wis. 2019) ("Cain's purchase included the XMJ faucet adapter and another product sold by Amazon itself. Amazon shipped the products together in a single box.").

355 *See Own Your Success,* Amazon, https://logistics.amazon.com/ [https://perma.cc/MKR5-S4KA] (last visited June 11, 2021).

356 *Amazon Services Business Solutions Agreement*, *supra* note 269 at S-1.4 ("We will bear the risk of (a) credit card fraud.")

357 Amazon forbids third-party sellers from sending buyers confirmation emails directly. *Id.* at S-2.1 ("[Do] not send customers emails confirming orders or fulfillment of Your Products."). And Amazon has strict messaging policies for third-party sellers. *Id.* at F-8.1 ("You will ensure that all of your policies and messaging to your customers regarding shipping of Your Products and other fulfillment-related matters, reflect our policies and requirements, including with regard to shipping methods, returns, and customer service; and, you will conspicuously display on your website(s), in emails or in other media or communications any specific disclosures, messaging, notices, and policies we require."). *Id.* at F-8.1

358 Here, I am referring specifically to Fulfillment by Amazon. Also, regardless of the fulfillment option, Amazon will handle refunds. *See Fulfillment by Amazon*, *supra* note 47; Lincoln, *supra* note 45.

359 With Fulfillment by Amazon, there are additional fees. *Amazon Services Business Solutions Agreement*, *supra* note 269 at S-4 ("You will pay us: (a) the applicable Referral Fees; (b) any applicable Variable Closing Fee; (c) the non-refundable Selling on Amazon Subscription Fee in advance each month; and (d) any other applicable fees described in this Agreement (including any applicable Program Policies)").

360 The A-to-z guarantee only covers items fulfilled by a third-party seller (presumably Fulfillment by Merchant and Seller Fulfilled Prime). *See A-to-z Guarantee*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?

which further serves to bolster the impression that Amazon is the seller of the goods.[361]

The court in *Bolger v. Amazon.com, LLC* recently recognized that Amazon was "pivotal" in bringing the defective product at issue, a replacement battery, to the buyer. The court chronicled the ways that Amazon controlled all aspects of the sales transaction, and how the so-called "true seller," a company called Lenoge, played no part in the transaction:

> Amazon created the environment (its website) that allowed Lenoge to offer the replacement battery for sale. Amazon attracted customers through its own activities, including its direct offers for sales and its Amazon Prime membership program, which includes benefits for some products offered by third-party sellers (including the Lenoge replacement battery at issue here). Amazon set the terms of Lenoge's involvement, and it demanded fees in exchange for Lenoge's participation. Amazon required Lenoge to indemnify it and, assuming Lenoge met the sales threshold, to obtain general commercial liability insurance listing Amazon as an additional named insured. Because Lenoge participated in the FBA program, Amazon accepted possession of Lenoge's products, registered them in its inventory system, and stored them in an Amazon warehouse awaiting sale. Amazon created the format for Lenoge's offer for sale and allowed Lenoge to use a fictitious name in its product listing. The listing itself conforms to requirements set by Amazon. Even setting aside the use of a fictitious name, the listing does not conspicuously inform the consumer of the identity of the third-party seller or the nature of Amazon's relationship to the sale.
>
> To purchase the product, the consumer adds it to her Amazon cart, not her Lenoge or E-Life cart. The consumer pays Amazon for the product, not Lenoge or E-Life. And, in the

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nodeId=201889410 [https://perma.cc/P6F8-RQNE] (last visited June 11, 2021). There is some interesting language, though: "The A-to-z Guarantee only applies when you buy items sold and fulfilled by a third-party seller. For items sold by Amazon Global Store *and for Marketplace items delivered using Prime*, contact us. For items bought on third-party sites using Amazon Pay, go to Amazon Pay help." *Id.* (emphasis added). This suggests that the guarantee may apply more broadly to Fulfillment by Amazon sales as well.

361 *See* State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 967 (W.D. Wis. 2019). Amazon has even extended the A-to-z Guarantee to cover property damage or personal injury caused by a defective product. *A-to-Z Guarantee to Cover Property Damage and Personal Injury*, AMAZON, https://www.aboutamazon.com/news/how-amazon-works/new-a-to-z-guarantee-better-protects-amazon-customers-and-sellers [https://perma.cc/R49C-KBWA] (last visited Nov. 6, 2021). Normally, a guarantee of goods is not provided by a non-seller like a mall, a flea market, or an auctioneer (to use examples that Amazon frequently invokes).

> FBA program, Amazon personnel retrieve the product from its place in an Amazon warehouse and ship it to the consumer in Amazon-branded packaging. If convenient, Amazon will ship the product together with products sold by other third-party sellers or by Amazon itself.
>
> Lenoge is not involved in the sales transaction. It does not approve the sale before it is made. It may not even know a sale has occurred until it receives a report from Amazon. It does not receive payment until Amazon chooses to remit the proceeds. Its use of any customer or transaction information, if it even receives any from Amazon, is strictly limited. But it accepts the burden of substantial fees for Amazon's participation, approximately 40 percent here.
>
> If a customer wishes to return the product, she ships it back to Amazon under the FBA program. Amazon personnel inspect the product, determine whether it can be resold, and if so return it to inventory in the Amazon warehouse. Third-party sellers like Lenoge are prohibited from communicating with Amazon customers except through the Amazon website, where such interactions are anonymized.[362]

It is hard to imagine a "non-seller" (Amazon) being more involved in a sales transaction and a "true seller" (Lenoge) being less involved in a sales transaction. Under any reasonable construction, Amazon is the true seller here. All of the "attributes of ownership have been transferred to Amazon",[363] and Amazon has taken full advantage of those attributes of ownership.[364] The "true seller" plays absolutely no role in this transaction, other than passively collecting payment from Amazon at some point after the sale between Amazon and a buyer is consummated.

* * *

Amazon tries to cast itself as a mere "service provider"[365] or "facilitator" of sales.[366] It compares itself to an auctioneer, a

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362 Bolger v. Amazon.com, LLC, 267 Cal. Rptr. 3d 601, 616 (Cal. Ct. App. 2020), *review denied*, No. S264607, 2020 BL 455500 (Cal. Nov. 18, 2020).

363 With the exception of title, perhaps. Janger & Twerski, *supra* note 171, at 267.

364 *See id.*

365 Memorandum in Support of Amazon's Motion for Summary Judgment at 1, Garber v. Amazon.com Inc., 380 F. Supp. 3d 766 (N.D. Ill. 2019) (No. 1:17-CV-00673) ("Amazon's role in the transaction was merely a service provider.").

366 McMillan v. Amazon.com, Inc., 983 F.3d 194, 200 (5th Cir. 2020), *certified question answered*, 625 S.W.3d 101, 112 (Tex. 2021) ("Amazon's chief argument is that it simply facilitates online sales for third-party products, so it's more like

mall, a credit card company, or a flea market.[367] It seeks to convince courts that it is a passive agent that simply provides a "platform" for other sellers to sell their goods. It should be clear by now that Amazon's attempts to minimize its role in these sales transactions are wholly disingenuous.[368] Amazon is not simply a vehicle for third-party sellers to showcase their wares. Amazon is doing the showcasing for the third-party sellers. Amazon controls what a buyer sees, when a buyer sees it, who a buyer is permitted to purchase from and communicate with, and what the ultimate terms of purchase will be. In many cases, Amazon also does all the groundwork in terms of logistics (storing, selecting, packaging, shipping, returns, and payment processing). Amazon is the business equivalent of the helicopter parent.[369] It is involved in every aspect of the sale—from beginning to end.[370]

Moreover, everything about the Amazon experience is designed to trick a buyer into believing that Amazon is the seller of all the goods on its website. After Amazon has done everything it can to convince a buyer that *it* is the seller of goods on its website, it should not be able to turn around and say that it is not the seller. In short, Amazon should be equitably estopped from denying that it is the seller of *all goods* on its

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an auctioneer or a delivery service, like UPS, than a traditional seller. The auctioneer analogy seems off-kilter.").

367 *See, e.g.*, Memorandum in Support of Amazon's Motion for Summary Judgment at 1, Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766 (N.D. Ill. 2019) (No. 1:17-CV-00673) ("[Amazon] is not materially different from physical spaces or other services that bring buyers and sellers together, like malls or newspaper classifieds."). Amazon's analogy is wholly misplaced for a number of reasons. Foremost among them, in all these contexts, it is reasonably apparent to a buyer *who* the buyer is buying from. If I enter the Apple Store in Mall of America, for instance, I know that I am not buying my new iPhone from Mall of America, but from Apple. Equally, traditional online auctioneer sites like Ebay, Craigslist and Facebook Marketplace, make it abundantly clear that the online platform itself is not the seller.

368 Bullard, *supra* note 48, at 207 ("The most troublesome mistake that the courts in *Allstate*, *Fox*, and *Eberhart* made when analyzing Amazon's potential liability is that they all cited to *Oberdorf* to support the assertion that Amazon is merely an online marketplace, playing a role analogous to that of a flea market, auctioneer, broker, or newspaper classified-ads section.").

369 *Helicopter Parent*, MERIAM-WEBSTER, https://www.merriam-webster.com/dictionary/helicopter%20parent [https://perma.cc/Q4NA-KX84] (last visited June 11, 2021) (Defining *helicopter parent* as "a parent who is overly involved in the life of his or her child."). Just as a helicopter parent is "overly involved" in every aspect of his or her child's life, so too is Amazon "overly involved" in every aspect of a sales transaction it claims is between a third-party seller and a buyer.

370 Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 144–45 (4th Cir. 2019) (concurring opinion) ("Amazon played an outsized role in the transaction at issue in this case. . . . Nearly the *only* thing Amazon did not do was hold title." (emphasis added)).

platform. The doctrine of equitable estoppel is described as follows:

> Equitable estoppel is a judicial remedy by which a party may be precluded by its own act or omission from asserting a right to which it otherwise would have been entitled or from pleading or proving an otherwise important fact. It is the principle by which a party is precluded from denying any material fact, induced by such party's words or conduct upon which a person relied, whereby the person changed their position in such a way that injury would be suffered if such denial or contrary assertion was allowed. . . .
>
> In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with the party's prior action or conduct. Under the doctrine of equitable estoppel, certain conduct by a party is viewed as being so offensive that it precludes the party from later asserting a claim or defense that would otherwise be meritorious; in other words, it serves to offset the benefit that the offending party would otherwise derive from the conduct. Equitable estoppel prevents a party from asserting rights when such party's own conduct renders that assertion contrary to equity and good conscience.[371]

§ 1-103(b) of the Uniform Commercial Code expressly preserves the doctrine of estoppel in Sales law. The section provides:

> Unless displaced by the particular provisions of [the Uniform Commercial Code], *the principles of law and equity, including* the law merchant and the law relative to capacity to contract, principal and agent, *estoppel*, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause *supplement its provisions*.[372]

This provision specifically envisions a role for estoppel to play in the interpretation of Sales law.

Amazon cannot be permitted to play a seller when it is convenient and then disclaim seller status when products sold on its platform cause injury to unsuspecting buyers. An age-old expression goes something like this: "If it looks like a duck, walks like a duck, and quacks like a duck, then it's probably a

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371 28 AM. JUR. 2D *Estoppel & Waiver* § 27, Westlaw (database updated Jan. 2022) (footnotes omitted).

372 U.C.C. § 1-103(b) (AM. LAW INST. & UNIF. LAW COMM'N 1977) (alteration in original) (emphases added).

duck."[373] Amazon looks like a seller, acts like a seller, and convinces buyers it is a seller. Amazon probably *is* a seller.

CONCLUSION

The drafters of Article 2 of the Uniform Commercial Code largely intended to do away with title as a determining factor in sale of goods cases. Despite this, Amazon has taken to disclaiming its status as a "seller" of certain goods sold on its platform on the basis that it never held title to the goods in question. If Amazon is not a "seller" of those goods, then it cannot be liable for breaching the implied warranty of merchantability imposed by Article 2. Amazon maintains that with respect to third parties, Amazon is merely a platform enabling *those sellers* to sell their goods. Amazon claims that it is not a seller of third-party goods, even though Amazon often warehouses those goods, promotes those goods, arranges the contract for the sale of those goods, ships those goods, provides a guarantee for those goods, and facilitates the return or replacement process for those goods.

Amazon purports to sell other sellers' goods, using its enormous market power and infrastructure, but it then seeks to avoid liability when something goes wrong with those goods—on what a layperson might consider a "technicality." The technicality is that Amazon cannot be a "seller" under Article 2 because it never took title to the goods.[374] The reason it never took title to the goods is because Amazon set the title terms in a contract of adhesion that it required third-party sellers to agree to as a condition of doing business with Amazon.

Courts should not continue to play this shell game with Amazon any longer. Article 2 provides an effective mechanism for grounding liability against Amazon. There are a host of interpretative tools available at courts' disposal to extend Article 2's warranty protection to Amazon buyers, despite Amazon's claimed lack of title to third-party seller goods. For instance, courts could take the position that § 2-314 is available for all "transactions" in goods (not just sales) and that Amazon's relationship with a buyer of third-party seller goods

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373 This expression may be traced back to poet James Whitcomb Riley (1849– 1916) when he wrote, "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck." MAX CRYER, COMMON PHRASES: AND THE AMAZING STORIES BEHIND THEM 139–40 (2010).

374 State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 973 (W.D. Wis. 2019) ("Amazon did not own the product that XMJ sold to Cain. But in light of the facts of this case, that is a mere technicality.").

constitutes such a transaction. Alternatively, courts could interpret the definition of "seller" under § 2-314 to not necessarily require a direct transfer of title. In either event, courts should be mindful of the deliberate decision of the drafters of Article 2 to move away from title in Sales law, since title is an "intangible something, the passing of which no man can prove by evidence."[375] Moreover, courts should be particularly skeptical of Amazon's title arguments in light of Amazon's decision to commingle the goods of multiple sellers. In this case, Amazon cannot be permitted to argue that title to goods it cannot actually trace to their source is dispositive.

Even if courts are not inclined to overtly abandon title as a pre-requisite to liability under § 2-314, there are compelling arguments that Amazon should be estopped from disclaiming seller status in light of the outsized role it plays in sales transactions conducted through its platform. A particularly convincing argument in this regard is that Amazon does everything it can to convince buyers that Amazon is the seller they are purchasing from. Amazon cannot continue to profit from its seller status, and then avoid liability by disclaiming seller status.

Amazon, and companies like it, pose a unique challenge in terms of consumer protection. Perhaps eventually we will need new rules to deal with these new challenges.[376] But perhaps old rules—like Article 2—can be repurposed in light of contemporary realities to ensure that buyers are not being sold a bill of goods.

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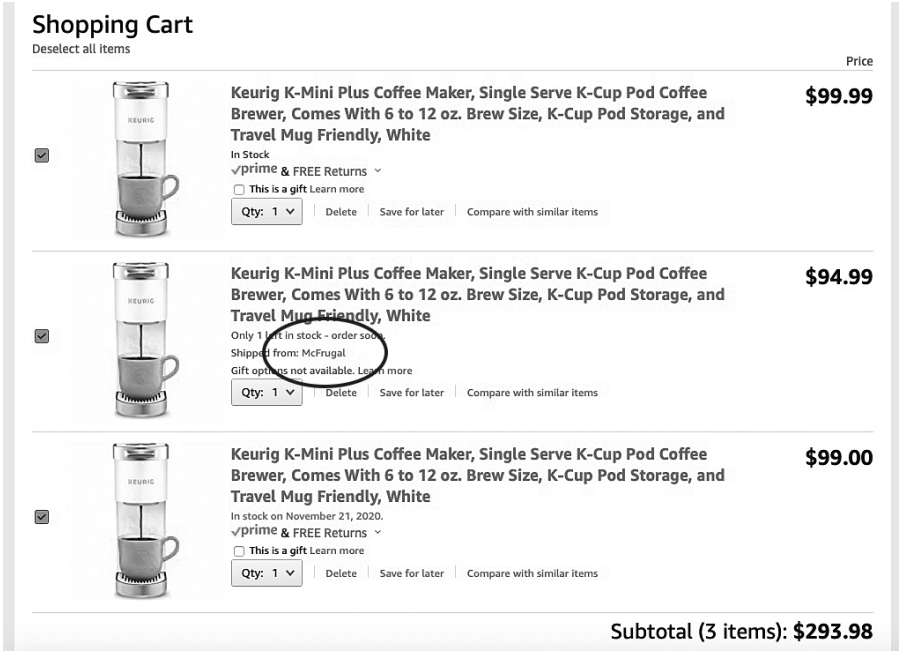
375 U.C.C. § 2-101 official cmt.

376 A.B. 3262, 2019–2020 Leg., Reg. Sess. (Cal. 2020) https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3262 [https://perma.cc/EX7B-FFD9] (last visited Nov. 6, 2021) ("This bill would require an electronic retail marketplace . . . to be held strictly liable, subject to certain exceptions, for all damages caused by defective products placed into the stream of commerce to the same extent as a retailer.").

APPENDICES

APPENDIX I

APPENDIX II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In Stock
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This is a gift Learn more
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Save for later
Compare with similar items
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Gift options not available. Learn more
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Compare with similar items
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