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3-23-2023

## The "Catch-22" of Amazon's Argument to Function as an Auctioneer: The Implied Warranty of Merchantability

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### Recommended Citation

Kyle A. Batson, *The "Catch-22" of Amazon's Argument to Function as an Auctioneer: The Implied Warranty of Merchantability*, 54 ST. MARY'S L.J. 545 (2023).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol54/iss2/7>

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## COMMENT

# THE “CATCH-22” OF AMAZON’S ARGUMENT TO FUNCTION AS AN AUCTIONEER: THE IMPLIED WARRANTY OF MERCHANTABILITY

KYLE A. BATSON\*

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\*Candidate for Juris Doctorate, St. Mary’s University School of Law 2023. As the saying goes, anything worth doing, is worth doing well; however, this often requires the gracious help of others. I cannot thank my mentors enough for their time and guidance. Thank you Kyle T. Lowe, Dean Colin P. Marks, and Ben Cantu Jr.

## I. INTRODUCTION

Christmas is just around the corner. To surprise your children, you want to buy them the hoverboard they have been asking for all year.<sup>1</sup> Attempting to avoid the inconvenience of traveling to a traditional brick-and-mortar, you search the internet for hoverboards.<sup>2</sup> You see an advertisement to buy it through Amazon Marketplace,<sup>3</sup> quickly add it to your cart, and enter your payment and shipping information. Within a few weeks, the hoverboard arrives just in time for Christmas.<sup>4</sup> Tragically, it is defective and starts a fire, causing severe injuries.<sup>5</sup> To recover, you sue Amazon, claiming it is liable.<sup>6</sup> However, you discover a third-party seller<sup>7</sup> sold it through Amazon Marketplace, and now Amazon refuses to accept liability.<sup>8</sup> Unfortunately, similar incidents are happening to consumers across the United States.<sup>9</sup>

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1. See *Loomis v. Amazon.com LLC*, 277 Cal. Rptr. 3d 769, 772–73 (Cal. Ct. App. 2021) (involving a legal dispute between Amazon and a consumer injured by a defective good purchased through Amazon Marketplace).

2. See *id.* at 772 (discussing the process a consumer underwent to purchase a hoverboard).

3. See *id.* at 773–74 (explaining the relationship between Amazon, Amazon Marketplace, and third-party sellers); see also Sophia Spiridakis, *What Is Amazon Marketplace? Everything You Need to Know About the Platform*, SELLER'S CHOICE: BLOG (Mar. 20, 2020), <https://www.sellerschoice.digital/blog/what-amazon-marketplace> [<https://perma.cc/F2H7-YKKP>] (“When you shop from Amazon.com, you are buying directly from Amazon’s complete product inventory and individual sellers. Amazon Marketplace is the third-party retailer market integrated into the same platform.”).

4. See *Loomis*, 277 Cal. Rptr. 3d at 772 (dictating the events leading to the consumer’s injuries from a defective hoverboard).

5. See *id.* at 772–73 (recalling the burns “Loomis suffered . . . as a result of fighting the fire” caused by a defective hoverboard sold through Amazon Marketplace).

6. *Id.* at 772.

7. See Emily Dayton, *Amazon Statistics You Should Know: Opportunities to Make the Most of America’s Top Online Marketplace*, BIGCOMMERCE: BLOG, <https://www.bigcommerce.com/blog/amazon-statistics/#10-fascinating-amazon-statistics-sellers-need-to-know-in-2020> [<https://perma.cc/XJ8Q-EQX5>] (“[S]ellers are operating on Amazon as direct-to-consumer businesses, instead of handing the reins over to Amazon as first-party sellers.”); Stephanie Chevalier, *Amazon Third-Party Seller Share 2007–2021*, STATISTA (Aug. 11, 2021), <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/> [<https://perma.cc/P5RG-ZAML>] (“In 2020, [Amazon] generated approximately 80.5 billion dollars in third-party seller services, an increase of nearly 50[%] over the previous year.”).

8. See *Loomis*, 277 Cal. Rptr. 3d at 775 (“Amazon disclaims any liability on the ground it is neither a manufacturer nor seller of the hoverboard.”).

9. See *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 144 (4th Cir. 2019) (holding Amazon exempt from damages caused by a defective third-party product). *But see* *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 625 (Cal. Ct. App. 2020) (deciding Amazon may be held liable for damages caused by some defective third-party products); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 966 (W.D. Wis. 2019) (denying Amazon’s motion for summary judgment in a products liability suit for a defective third-party product).

From the consumer's perspective, the ongoing legal battles between Amazon, third-party sellers, and injured consumers leaves much to be desired.<sup>10</sup> A clear resolution on who holds liability for damages caused by defective third-party products has yet to be discovered.<sup>11</sup> Recently, the Fourth Circuit, Ninth Circuit, and Texas Supreme Court ruled in Amazon's favor, allowing the retail giant to escape liability for damages caused by third-party sellers' defective products.<sup>12</sup> However, a split of authority has developed, as the California Courts of Appeals for the Second and Fourth Districts and the United States District Court for the Western District of Wisconsin have ruled against Amazon.<sup>13</sup>

In recent years, state and federal courts have decided several cases involving consumers' claims against Amazon to recover damages caused by defective products.<sup>14</sup> Focusing on tort law and products liability principles,<sup>15</sup> many of these courts permit Amazon to escape liability by finding it is not a seller within their jurisdiction's version of the Uniform Commercial Code (UCC).<sup>16</sup> These decisions create a dangerous precedent

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10. See, e.g., Aaron Doyer, Note, *Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond*, 28 J.L. & POL'Y 719, 721 (2020) (discussing the frustration many consumers feel regarding Amazon intentionally distancing itself from liability in defective third-party product suits).

11. Compare *Bolger*, 267 Cal. Rptr. 3d at 625 (ruling against Amazon when a consumer was damaged by a defective third-party product sold through Amazon Marketplace), with *Erie Ins. Co.*, 925 F.3d at 141–42 (ruling in Amazon's favor, finding it was not liable for a consumer's damages caused by a defective third-party product).

12. See *Erie Ins. Co.*, 925 F.3d at 141–42 (holding Amazon was not liable for damages resulting from a defective third-party product sold through the Amazon Marketplace); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213, 216 (9th Cir. 2020) (rejecting the notion that Amazon was a seller of the defective goods and thus not liable for a consumer injury); *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 112 (Tex. 2021) (refusing to hold Amazon liable for defective third-party products sold through the FBA Program).

13. See *Loomis*, 277 Cal. Rptr. 3d at 780–82 (rejecting Amazon's argument that it is not a "seller"); *Bolger*, 267 Cal. Rptr. 3d at 617–18, 627–28 (holding Amazon may be liable for damages caused by a defective third-party product sold through the Amazon Marketplace); *State Farm Fire & Cas. Co.*, 390 F. Supp. 3d at 966 (denying Amazon's motion for summary judgment in a products liability suit for a defective third-party product).

14. Colin Lecher, *How Amazon Escapes Liability for the Riskiest Products on Its Site*, THE VERGE (Jan. 28, 2020, 8:00 AM), <https://www.theverge.com/2020/1/28/21080720/amazon-product-liability-lawsuits-marketplace-damage-third-party> [<https://perma.cc/RB9V-GKXA>].

15. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (AM. L. INST. 1998) ("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.")

16. U.C.C. § 2-103(1)(d) (AM. L. INST. & UNIF. L. COMM'N 2022) ("Seller means a person who sells or contracts to sell goods.")

for consumers.<sup>17</sup> As one court noted, if Amazon can circumvent liability for defective third-party products, it will leave many consumers without recourse.<sup>18</sup> This primarily occurs when third-party vendors and manufacturers are located in foreign countries.<sup>19</sup> Yet, despite contrary holdings, Amazon's defense is flawed under Article II of the UCC.<sup>20</sup> Specifically, Amazon functions as an auctioneer for an undisclosed principal and may be held liable for injuries stemming from defective third-party products.<sup>21</sup> This argument could resolve the split of authority, imposing liability on Amazon.

This Comment aims to expose a definitive avenue for holding Amazon liable for defective third-party products under agency and contract law principles.<sup>22</sup> Part II explains how Amazon and Amazon Marketplace function and lays out their fundamental differences. Part III discusses recent cases where courts have ruled in Amazon's favor, allowing it to escape liability, while Part IV examines recent precedents where courts have ruled against Amazon, creating a split in authority. Part V explains the elements necessary to succeed in a breach of implied warranty of merchantability action and details the unique features required to hold an auctioneer liable for bringing it. Finally, Part VI argues Amazon may be held liable as an auctioneer for defective third-party products sold through its marketplace. First, it discusses why Amazon is an auctioneer under the

17. See Lecher, *supra* note 14 (“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.”).

18. See *State Farm Fire & Cas. Co.*, 390 F. Supp. 3d at 974 (“But what recourse does a Wisconsin buyer have if one of these third-party products is defective and causes injury or damage?”).

19. See, e.g., *id.* (“If, as in this case, the manufacturer and the third-party seller are foreign entities that cannot be sued in Wisconsin courts, Amazon's answer is that there is no recourse.”).

20. See Tanya J. Monestier, *Amazon as a Seller of Marketplace Goods Under Article 2*, 107 CORNELL L. REV. 705, 728 (2022) (arguing courts have inappropriately “bought Amazon's Article 2 title argument hook, line, and sinker”).

21. See *Powers v. Coffeyville Livestock Sales Co.*, 665 F.2d 311, 312–13 (10th Cir. 1981) (holding auctioneers who sell defective products and fail to disclose the identity of the principal are liable under the implied warranty of merchantability); *Bradford v. Nw. Ala. Livestock Ass'n*, 379 So. 2d 609, 611 (Ala. Civ. App. 1980) (classifying auctioneers as merchants with goods subject to the implied warranty of merchantability).

22. See *Ala. Powersport Auction, LLC v. Wiese*, 143 So. 3d 713, 720 (Ala. 2013) (holding an auctioneer, as a “merchant-seller,” could be found liable for defective products under the UCC's implied warranty of merchantability); see also U.C.C. § 2-314(1) (AM. L. INST. & UNIF. L. COMM'N 2022) (“[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.”).

UCC. Second, it argues that Amazon fails to disclose its principal. And ultimately, it concludes that Amazon may be held liable for defective third-party products sold through its Fulfillment by Amazon program (FBA Program) under the implied warranty of merchantability.

## II. AMAZON AND AMAZON MARKETPLACE

Since its inception in 1994, Amazon has grown to become the largest online retailer, with an annual net income of \$21.33 billion in 2020.<sup>23</sup> Amazon derived this figure from over \$386 billion in net revenue, including revenue from products like Amazon Web Services and Amazon Prime.<sup>24</sup> As of 2020, Amazon generated approximately \$80.5 billion through third-party sales, accounting for more than 50% of its revenue.<sup>25</sup> In the United States alone, nearly 100 million people use Amazon Prime, with the average subscriber purchasing \$1,400 worth of goods annually.<sup>26</sup> Because Amazon has such a large consumer base, it is unsurprising that third-party sellers have flocked to its platform.<sup>27</sup> Understanding the differences between key terms like Amazon Marketplace, third-party sellers, third-party vendors, the FBA Program, and the Fulfillment by Merchant program (FBM Program) are imperative to apprehending how Amazon exerts control over third-party goods.<sup>28</sup>

First, transactions on Amazon Marketplace differ substantially from those on Amazon.com.<sup>29</sup> Amazon owns the goods sold directly through Amazon.com and derives all the corresponding revenue.<sup>30</sup> Its vendor

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23. Daniela Coppola, *Amazon: Annual Net Income 2004–2020*, STATISTA (July 7, 2021), <https://www.statista.com/statistics/266288/annual-et-income-of-amazoncom/> [<https://perma.cc/CJ9K-C6YH>].

24. Stephanie Chevalier, *Annual Net Sales of Amazon 2004–2020*, STATISTA (July 7, 2021), <https://www.statista.com/statistics/266282/annual-net-revenue-of-amazoncom/> [<https://perma.cc/D298-LBXY>].

25. Chevalier, *supra* note 7; Dayton, *supra* note 7.

26. Dayton, *supra* note 7.

27. *See id.* (finding third-party sellers experience increased sales under the FBA Program).

28. *See* Spiridakis, *supra* note 3 (contrasting Amazon fulfillment programs for third-party sellers); *Amazon Services Business Solutions Agreement*, AMAZON: SELLER CENT., [https://sellercentral.amazon.com/gp/help/external/G1791?language=en\\_US](https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US) [<https://perma.cc/9P7P-5SRE>] (defining terms in the agreement).

29. *See* Spiridakis, *supra* note 3 (outlining the differences between purchasing goods through Amazon.com and the Amazon Marketplace).

30. Lane Burns, *What Is the Difference Between Amazon and Amazon Marketplace*, YOUR MKTG. PEOPLE: BLOG (Feb. 23, 2021), <https://yourmarketingpeople.com/blog/what-is-the-difference-between-amazon-and-amazon-marketplace/> [<https://perma.cc/LYL8-GJGZ>].

program often obtains these goods directly from manufacturers or wholesalers.<sup>31</sup> In comparison, goods purchased through Amazon Marketplace are sold by third parties, from which Amazon only receives a portion of the revenue.<sup>32</sup> In essence, Amazon Marketplace is a platform where third parties sell their goods.<sup>33</sup> However, Amazon has commingled Amazon Marketplace and Amazon.com such that consumers will likely see Amazon and third-party goods on the same page.<sup>34</sup> Additionally, third-party sellers must register and be approved by Amazon.<sup>35</sup>

Second, Amazon gives third-party sellers two options for selling their goods: the FBA Program or the FBM Program.<sup>36</sup> However, this Comment restricts its scope to third-party goods sold through the FBA Program.<sup>37</sup> Under the FBA Program, third-party sellers ship their goods to an Amazon fulfillment center, where Amazon handles the packing, storing, shipping, and communicating with customers.<sup>38</sup> This allows sellers to avoid the majority of the groundwork required to fulfill orders and increase the marketability of their products, as Amazon gives them search priority.<sup>39</sup> Under this system, Amazon is not “required to physically mark or segregate [u]nits from other inventory units . . . owned by [Amazon], [its] [a]ffiliates[,] or third parties in the applicable fulfillment center(s).”<sup>40</sup> Further, Amazon reserves the right to “commingle [u]nits with . . . other inventory units” and “may move [u]nits among [the] facilities.”<sup>41</sup> Finally, third-party sellers must agree to the Amazon Services Business Solutions Agreement—without modification—if they want to sell through the FBA Program.<sup>42</sup>

31. Spiridakis, *supra* note 3.

32. *See id.* (discussing how Amazon derives profits from goods sold through Amazon Marketplace).

33. *Id.*

34. *See* Burns, *supra* note 30 (explaining how the average consumer is unlikely to differentiate between Amazon-owned goods and third-party goods).

35. *Amazon Services Business Solutions Agreement*, *supra* note 28.

36. *Id.*

37. For further discussion of the FBM Program, see *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 145 (3d Cir. 2019) (ruling on Amazon’s liability for defective third-party products sold through the FBM Program), *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); Spiridakis, *supra* note 3 (explaining and contrasting the FBM Program with the FBA Program).

38. *Amazon Services Business Solutions Agreement*, *supra* note 28.

39. *See* Spiridakis, *supra* note 3 (highlighting the advantages third-party sellers derive under the FBA Program).

40. *Amazon Services Business Solutions Agreement*, *supra* note 28.

41. *Id.*

42. *See id.* (requiring third-party sellers to agree and comply with all terms of the agreement).

### III. PRECEDENT FAVORING AMAZON

Despite exerting significant control over FBA Program participants, Amazon often avoids liability for injuries caused by defective products.<sup>43</sup> Notably, there is a significant split of authority over whether to hold Amazon liable under these circumstances; however, most courts side with Amazon because they have found that it is not a seller under the UCC.<sup>44</sup> To avoid this categorization, Amazon argues that it does not hold title to third-party goods.<sup>45</sup> Rather, it contends that it merely provides a platform through which title passes directly from third-party sellers to consumers.<sup>46</sup> The Ninth Circuit's holding in *State Farm Fire & Casualty Co. v. Amazon.com, Inc.*<sup>47</sup> is instructive.<sup>48</sup> There, the court ruled in favor of Amazon, finding it was not a seller within the meaning of Arizona's strict liability law for third-party sales.<sup>49</sup> The court reached its decision using a seven-factor

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43. See, e.g., *Erie Ins. Co. v. Amazon*, 925 F.3d 135, 141 (4th Cir. 2019) (holding Amazon was not liable for damages resulting from a defective third-party product sold through Amazon Marketplace). See generally 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 (2021) (analyzing Amazon's ability to avoid liability for defective third-party products).

44. See *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213, 216–17 (9th Cir. 2020) (rejecting the notion that Amazon was a seller of the defective goods and finding it not liable for a consumer injury); *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 112 (Tex. 2021) ("Because 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."); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 400 (S.D.N.Y. 2018) (holding Amazon is not a seller of third-party goods, entitling it to summary judgment on the plaintiff's strict liability claim).

45. See, e.g., *Eberhart*, 325 F. Supp. 3d at 398 ("First, regardless of what attributes are necessary to place an entity within the chain of distribution, the failure to take title to a product places that entity on the outside.")

46. See, e.g., *id.* (finding Amazon was outside the chain of distribution because it did not take title to the goods, meaning it could not be held liable for the defective product).

47. *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213 (9th Cir. 2020).

48. See *id.* at 216 (ruling Amazon was not a seller because, *inter alia*, it did not "take title to the hoverboards" (citing *Antone v. Greater Ariz. Auto Auction, Inc.*, 155 P.3d 1074, 1079 (Ariz. Ct. App. 2007))).

49. *Id.* Arizona follows Section 402 of the *Second Restatement of Torts* when imposing "strict liability o[n] manufacturers and sellers of defective products that were unreasonably dangerous and caused physical harm to the consumer or his property." *Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939, 942 (Ariz. 1990) (citing *O.S. Stapley Co. v. Miller*, 447 P.2d 248, 251–52 (Ariz. 1968) (en banc)). However, Arizona avoids technical limitations on the terms "seller" and "manufacturer" by limiting strict liability to "entit[ies] [which are] an 'integral part of an enterprise' that resulted in the defective product being placed in the stream of commerce." *State Farm Fire & Cas. Co.*, 835 F. App'x at 215 (quoting *Dillard Dep't Stores, Inc. v. Associated Merch. Corp.*, 782 P.2d 1187, 1193 (Ariz. Ct. App. 1989) (Claborne, J., dissenting)).



balancing test and a contextual analysis focused on “whether [Amazon] participated significantly in the stream of commerce.”<sup>50</sup> The court reasoned that “[w]hile Amazon provides a website for third-party sellers and facilitates sales for those sellers, it [was] not a ‘seller.’”<sup>51</sup>

The Fourth Circuit reached a similar conclusion in *Erie Insurance Co. v. Amazon.com, Inc.*<sup>52</sup> There, a Maryland resident purchased an LED headlamp through Amazon Marketplace as a gift for his friends.<sup>53</sup> Two weeks later, the headlamp caught fire in the consumer’s home, allegedly due to defective batteries, resulting in over \$300,000 in damages.<sup>54</sup> A third-party seller sold the defective headlamp and Amazon fulfilled the order.<sup>55</sup> Under the FBA Program, Amazon received the headlamp from the third-party seller at one of its distribution warehouses, stored it until a consumer ordered it, and retrieved it for packaging and shipping.<sup>56</sup> Notably, Amazon collected payments directly from the consumer and remitted fee-reduced payments to the third-party seller.<sup>57</sup> The Fourth Circuit ruled in Amazon’s favor, allowing the online retail giant to escape liability despite its overwhelming control over the sale.<sup>58</sup> The court reasoned that Amazon was not liable because it was not a seller under state law.<sup>59</sup> It premised this finding on the fact that Amazon never held title to the defective good, as it did not pay the third-party seller upon delivery to its warehouse, nor did it

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50. *State Farm Fire & Cas. Co.*, 835 F. App’x at 216.

51. *Id.*

52. *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019).

53. *Id.* at 138.

54. *Id.*

55. *Id.*

56. *See id.* (detailing the degree of control Amazon exerted over the defective product prior to the consumer receiving it); *see also Amazon Services Business Solutions Agreement*, *supra* note 28 (describing Amazon’s policy for receiving, storing, and distributing third-party goods).

57. *See Erie Ins. Co.*, 925 F.3d at 138 (discussing how payment for the defective item was handled under the parties’ contractual agreement); *see also Amazon Services Business Solutions Agreement*, *supra* note 28 (outlining Amazon’s procedure of paying third-party sellers after receiving payment from buyers).

58. *See Erie Ins. Co.*, 925 F.3d at 141–42 (finding Amazon was not liable for the defective third-party product because Amazon was not a seller under Maryland law); *see also* MD. CODE ANN., COM. LAW § 2-314 (West 2022) (“[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.”); *id.* § 2-103(1)(d) (defining a seller as “a person who sells or contracts to sell goods”).

59. *See Erie Ins. Co.*, 925 F.3d at 143 (“Section 2-403 does not make Amazon a seller. To the contrary, it authorizes Amazon, as an entrustee—*i.e.*, as a bailee or consignee—to pass [the seller’s] rights to the buyer . . .” (emphasis omitted)).

have an agreement to transfer title from the third-party seller.<sup>60</sup> In fact, the agreement stated that the third-party seller was to retain title, even under the FBA Program.<sup>61</sup> While the court acknowledged that Amazon would be liable for selling products that it owns, it determined Amazon only facilitates the sale of third-party products and, therefore, is not the seller under Maryland law.<sup>62</sup>

The Supreme Court of Texas ruled similarly in *Amazon.com, Inc. v. McMillan*.<sup>63</sup> There, a Texas consumer purchased a television remote through Amazon Marketplace.<sup>64</sup> After a year, the consumer's infant child opened the remote and consumed the batteries.<sup>65</sup> The child underwent surgery to remove them, but the chemicals permanently damaged the baby's esophagus.<sup>66</sup> The consumer sued Amazon and the Chinese seller, which was counterintuitively listed as "USA Shopping 7693."<sup>67</sup> While she could not serve process on the Chinese seller, the consumer argued Amazon was a "non-manufacturing seller that could be held liable under the Texas Products Liability Act."<sup>68</sup> The Texas Supreme Court held Amazon was not a seller and thus not liable for the defective product "even though it controlled the process of the transaction and the delivery of the product."<sup>69</sup> The court reasoned Amazon was not a seller by answering two questions: (1) whether Amazon "made the ultimate sale to [the consumer]"; and (2) whether Amazon "relinquished title at some point upstream in the distribution chain."<sup>70</sup> The court answered each question in the negative, concluding Amazon was not a seller

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60. *Id.* at 142 (Jones v. State, 498 A.2d 622, 623 (Md. 1985)).

61. *Id.* (first citing Huettner v. Sav. Bank of Balt., 219 A.2d 559, 561–62 (Md. 1966); and then citing COM. LAW § 2-401(1)).

62. *Id.* The court explicitly distinguished "sellers" from "shippers, warehousemen, brokers, marketers, auctioneers, other bailees or consignees," and found the latter group "do[es] not take title to property during the course of a distribution but rather render[s] services to facilitate that distribution or sale, are not sellers." *Id.* at 141 (citing Musser v. Vilsmeier Auction Co., 562 A.2d 279, 283 (Pa. 1989)).

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

64. *Id.* at 105.

65. *Id.*

66. *Id.*

67. *Id.* (internal quotation marks omitted).

68. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 82.003).

69. *Id.* at 112.

70. *Id.*

of the defective goods under Texas law.<sup>71</sup> The Texas Supreme Court interpreted Section 82.003<sup>72</sup> as a “liability-restricting statute,” meaning that to impose liability on a non-manufacturing seller, such as Amazon, it must have “altered, helped design, or created instructions for the defective product.”<sup>73</sup>

While the Fourth Circuit, Ninth Circuit, and Texas Supreme Court reached their holdings through different analyses, each makes one thing clear: Amazon has a viable defense against liability claims stemming from defective third-party products sold through Amazon Marketplace. Ultimately, Amazon has evaded liability by asserting it is not a seller. The courts in these jurisdictions have accepted Amazon’s argument “hook, line, and sinker,”<sup>74</sup> reasoning that Amazon never held or relinquished title to the defective goods.<sup>75</sup>

#### IV. PRECEDENT DISFAVORING AMAZON

Contrary to the preceding cases, some jurisdictions hold that Amazon may be held liable in third-party defective product cases.<sup>76</sup> For example, in *Bolger v. Amazon.com, LLC*,<sup>77</sup> the California Court of Appeals for the Fourth District reversed a lower court ruling that excluded Amazon from liability.<sup>78</sup> There, a consumer searched for and purchased a replacement laptop battery from a third-party seller on Amazon Marketplace.<sup>79</sup> Amazon shipped the battery to her in “an Amazon-branded box with

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71. *See id.* (“Because 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.”).

72. *See generally* CIV. PRAC. & REM. § 82.003 (defining the scope of liability for non-manufacturing sellers).

73. *McMillan*, 625 S.W.3d at 109 (citing CIV. PRAC. & REM. § 82.003).

74. *Monestier*, *supra* note 20, at 728.

75. *E.g.*, *McMillan*, 625 S.W.3d at 112 (concluding Amazon is not a seller because it “did not hold or relinquish title at any point in the . . . distribution chain”).

76. *See Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 627 (Cal. Ct. App. 2020) (denying Amazon’s motion for summary judgment because it may be held strictly liable for damages caused by defective third-party products); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 974 (W.D. Wis. 2019) (“Amazon is properly considered a seller for purposes of Wisconsin strict product liability law for products sold by third parties through Amazon.com.”); *Loomis v. Amazon*, 277 Cal. Rptr. 3d 769, 785–86 (Cal. Ct. App. 2021) (holding Amazon may be subject to strict liability as a distributor).

77. *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020).

78. *Id.* at 627–28.

79. *Id.* at 609.

Amazon-branded shipping tape.”<sup>80</sup> Throughout the consumer’s transaction, she only had contact with Amazon, furthering her belief that the battery came directly from Amazon.<sup>81</sup> A month after the purchase, Amazon suspended the third-party seller because it failed to respond to its request for safety documentation.<sup>82</sup> Several weeks later, the consumer’s laptop battery exploded, causing extensive physical injuries.<sup>83</sup> The consumer brought suit against Amazon “for strict products liability, negligent products liability, breach of implied warranty, breach of express warranty, and ‘negligence/negligent undertaking.’”<sup>84</sup> The trial court granted Amazon’s motion for summary judgment because strict liability principles did not apply as Amazon did not “distribute, manufacture, or sell the product in question.”<sup>85</sup> On appeal, the court reversed and remanded, holding Amazon could be found strictly liable for damages caused by the defective battery.<sup>86</sup> It reasoned, “Amazon is an ‘integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.’”<sup>87</sup> The court supported this conclusion by finding:

Amazon enabled [the third-party seller] to offer the replacement battery for sale, inventoried and stored the replacement battery, accepted Bolger’s order for the battery, billed Bolger the purchase price for the battery, received her payment, retrieved the battery from its inventory, and shipped the battery to her in Amazon-branded packaging.<sup>88</sup>

The court also noted that Amazon was in the best position to enforce product safety, as foreign sellers are difficult to hold accountable.<sup>89</sup> Finally, it concluded that strict liability might appropriately be applied based on its

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80. *Id.*

81. *See id.* (“Throughout the process, Bolger had no contact with [the seller] or anyone other than Amazon.”).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 604.

86. *See id.* at 625, 627–28 (concluding the case should be reversed and remanded because “[t]he record does not demonstrate as a matter of law that Amazon cannot be held strictly liable for defects in third-party products sold through its website”).

87. *Id.* at 616 (quoting *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171 (Cal. 1964) (en banc)).

88. *Id.* at 617.

89. *Id.* (citing *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 424 (6th Cir. 2019)).

analysis of Amazon's substantial involvement in the FBA Program.<sup>90</sup> In an action involving significant factual similarities, the California Court of Appeals for the Second District rendered an almost identical holding.<sup>91</sup> Moreover, other jurisdictions have reached similar conclusions.

In 2019, the United States District Court for the Western District of Wisconsin denied Amazon's principal legal argument that it did not qualify as a seller.<sup>92</sup> In *State Farm Fire & Casualty Co. v. Amazon.com, Inc.*,<sup>93</sup> a consumer purchased a bathtub faucet adapter through Amazon Marketplace, which was fulfilled through the FBA Program.<sup>94</sup> The faucet adapter malfunctioned, causing the home to flood.<sup>95</sup> The consumer's insurer sued Amazon under Wisconsin's strict products liability statute.<sup>96</sup> Amazon moved for summary judgment, arguing that it was not a seller.<sup>97</sup> The court denied Amazon's motion, holding it was "so deeply involved in the transaction . . . that Wisconsin law" may impose strict liability for defective products when the manufacturer could not be sued within the state.<sup>98</sup> The court found Amazon was not only "an integral part of the chain of distribution" but also "well-positioned to allocate the risks of defective products."<sup>99</sup>

Further, it highlighted that the only way the foreign manufacturer's defective product reached a Wisconsin resident was through Amazon.<sup>100</sup> Accordingly, the court concluded that its involvement with the FBA Program was so pervasive that "the only thing Amazon did not do was take ownership of [the third-party's] goods."<sup>101</sup> As a result, the court dismissed

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90. *Id.* at 617–18 (explaining how Amazon's involvement in the product's sale warrants strict liability).

91. *See Loomis v. Amazon.com LLC*, 277 Cal. Rptr. 3d 769, 780–81 (Cal. Ct. App. 2021) (applying the same strict product liability policies and analysis to reach the same decision as *Bolger*).

92. *See State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 974 (W.D. Wis. 2019) (denying Amazon's motion for summary judgment in a strict products liability suit for a defective third-party product).

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

94. *Id.* at 967–68.

95. *Id.* at 968.

96. *Id.* at 966 (citing WIS. STAT. § 895.047 (2020)).

97. *Id.*

98. *Id.*

99. *Id.* at 972.

100. *Id.*

101. *Id.*

Amazon's no-title argument as a "mere technicality" that could not—by itself—preclude liability.<sup>102</sup>

The previous cases highlight a major split in authority.<sup>103</sup> Those that impose liability have rejected Amazon's argument that it never held title.<sup>104</sup> These jurisdictions find that Amazon may be held liable due to its substantial involvement in placing defective goods in the stream of commerce and because finding otherwise would leave many consumers without a legal remedy for their injuries.<sup>105</sup>

#### V. THE IMPLIED WARRANTY OF MERCHANTABILITY

This Comment's main argument is that Amazon may be held liable as an auctioneer under the implied warranty of merchantability. On this point, the UCC provides:

- (1) Unless 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. . . .
- (2) Goods to be merchantable must be at least such as
  - (a) pass without objection in the trade under the contract description; and
  - (b) in the case of fungible goods, are of fair average quality within the description; and
  - (c) are fit for the ordinary purposes for which such goods are used; and
  - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  - (e) are adequately contained, packaged, and labeled as the agreement may require; and
  - (f) conform to the promises or affirmations of fact made on the container or label if any.

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102. *Id.* at 973.

103. Compare *supra* Part III (laying out jurisdictions that side with Amazon), with *supra* Part IV (setting forth jurisdictions that impose liability on Amazon).

104. See, e.g., *State Farm Fire & Cas. Co.*, 390 F. Supp. 3d at 973 (explaining how, while Amazon never held title, it may be categorized as a seller due to its substantial involvement with the consumer).

105. See *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 617 (Cal. Ct. App. 2020) ("Because imposing strict liability on Amazon would help compensate some injured plaintiffs who would otherwise go uncompensated, Amazon's inclusion within the rule would promote its purposes."); *State Farm Fire & Cas. Co.*, 390 F. Supp. 3d at 972 (noting the importance of affording injured consumers a legal remedy against those promulgating defective products to consumers); *Loomis v. Amazon.com LLC*, 277 Cal. Rptr. 3d 769, 779 (Cal. Ct. App. 2021) (finding Amazon to be "a direct link in the vertical chain of distribution under California's strict liability doctrine").

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.<sup>106</sup>

In essence, the implied warranty of merchantability strengthens a buyer's confidence in the goods by holding the seller to its promise of how they will function.<sup>107</sup> As used in Section 2-314(1) of the UCC, the term "seller" means "a person who sells or contracts to sell goods."<sup>108</sup> Furthermore, the term "merchant" is defined as:

[A] person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.<sup>109</sup>

For an implied warranty to exist, there must be a sale of goods by a person or entity who sells and "deals in goods of the kind or otherwise by his occupation,"<sup>110</sup> such as a "manufacturer, supplier, wholesaler, or seller."<sup>111</sup> Additionally, to bring a successful action, there must be "proof of a defect."<sup>112</sup> The term "defect" carries a different meaning under the implied warranty of merchantability than it would in the context of strict products liability.<sup>113</sup> Under the implied warranty of merchantability, "defect" means a condition of the goods that renders them unfit for the ordinary purposes for which they are used because of a lack of something necessary for adequacy."<sup>114</sup>

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106. U.C.C. § 2-314 (AM. L. INST. & UNIF. L. COMM'N 2022); *see also id.* § 2-316 (defining the elements necessary for exclusion or modification of warranties).

107. *See, e.g.,* Man Engines & Components, Inc. v. Shows, 434 S.W.3d 132, 135 (Tex. 2014) ("[T]he implied warranty of merchantability . . . assures buyers that goods are, among other things, 'fit for the ordinary purposes for which such goods are used.'" (quoting TEX. BUS. & COM. CODE ANN. § 2.314(b)(3))).

108. U.C.C. § 2-103(1)(d).

109. *Id.* § 2-104(1).

110. Ala. Powersport Auction, L.L.C. v. Wiese, 143 So. 3d 713, 721 (Ala. 2013) (quoting ALA. CODE § 7-2-104(1) (1975)).

111. Jones v. CGU Ins. Co., 78 S.W.3d 626, 629 (Tex. App.—Austin 2002, no pet.); *see* U.C.C. §§ 2-104(1), 2-314 (defining the scope of the implied warranty of merchantability); *see also id.* § 1-103(b) (framing the applicability of common law principles to the UCC).

112. Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 444 (Tex. 1989); *see also* BUS. & COM. § 2.314(b) (defining the implied warranty of merchantability under Texas's version of the UCC).

113. *Plas-Tex*, 772 S.W.2d at 444.

114. *Id.*

Next, the UCC defines an auctioneer as “a person whom the seller engages to direct, conduct, control, or be responsible for a sale by auction.”<sup>115</sup> However, it does not explicitly address an auctioneer’s liability under the implied warranty of merchantability.<sup>116</sup> In *Powers v. Coffeyville Livestock Sales Co.*,<sup>117</sup> the Tenth Circuit does.<sup>118</sup>

There, a buyer purchased 312 heads of cattle at a weekly livestock auction from an auctioneer who “regularly auction[ed] off” merchandise of that type.<sup>119</sup> Several months after purchasing the cattle, many began dying of disease.<sup>120</sup> The buyer sued the auctioneer, alleging it was a seller of the defective goods and that selling the diseased cattle was a breach of the implied warranty of merchantability.<sup>121</sup> The Tenth Circuit found the appropriate question contained two prongs: (1) whether the auctioneer was a merchant of livestock; and (2) whether the auctioneer was a seller of cattle, as “only merchants who are ‘sellers’ are liable for breach of the implied warranty.”<sup>122</sup> The court answered both questions in the affirmative, holding that the auctioneer could be liable under the implied warranty as a merchant-seller of defective goods.<sup>123</sup> In answering the first prong, the court contended the auctioneer was a merchant because it was in the “business of selling cattle to prospective buyers and held itself out as having the knowledge and skill to conduct such sales.”<sup>124</sup> In answering the second

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115. U.C.C. § 6-102(1)(b).

116. See *Powers v. Coffeyville Livestock Sales Co.*, 665 F.2d 311, 312 (10th Cir. 1981) (“The statute provides no explicit guidance on whether an auctioneer acting as agent for another is a seller under the statute.”); see also 2A C.J.S. *Agency* § 216, Westlaw (database updated Oct. 2022) (discussing an agent’s authority to sell goods on behalf of a principal).

117. *Powers v. Coffeyville Livestock Sales Co.*, 665 F.2d 311 (10th Cir. 1981).

118. See *id.* at 313 (addressing whether purchasers can hold auctioneers liable for damages under the implied warranty of merchantability as merchant-sellers).

119. *Id.* at 312.

120. *Id.*

121. *Id.*

122. See *id.* (“[T]hat section requires that Coffeyville be both a ‘seller’ and a cattle ‘merchant’ . . .”).

123. See *id.* at 312–13 (finding auctioneers, in narrowly circumscribed circumstances, may be held liability under the implied warranty of merchantability).

124. *Id.* at 312 (citing *Bradford v. Nw. Ala. Livestock Ass’n*, 379 So. 2d 609, 611 (Ala. Civ. App. 1980)); see KAN. STAT. ANN. § 84-2-104(1) (2021) (defining “merchant” under Kansas’s statute, which mirrors the UCC); see also *id.* § 84-1-103 (clarifying the underlying purposes and policies of Kansas’s statute, which mirrors the UCC).



prong, the court reasoned that auctioneers inevitably sell goods.<sup>125</sup> However, the Tenth Circuit acknowledged that an auctioneer usually sells goods as an agent on behalf of another party.<sup>126</sup> The court resolved this incongruity by turning to “traditional agency law.”<sup>127</sup> Through common law interpretation, it reasoned that an agent is liable to an injured party “when the agent acts for an undisclosed principal.”<sup>128</sup> The court concluded that if the auctioneer did not adequately disclose the principal’s identity, it should be held liable under the implied warranty of merchantability.<sup>129</sup>

In 2013, the Supreme Court of Alabama addressed the same question.<sup>130</sup> In *Alabama Powersport Auction, LLC v. Wiese*,<sup>131</sup> a consumer purchased a go-cart for his children from an auctioneer who regularly auctioned recreational vehicles.<sup>132</sup> While one of the consumer’s children operated the go-cart, he suffered a fatal accident.<sup>133</sup> The consumer brought suit against the auctioneer for breaching the implied warranty of merchantability, alleging “the go-cart ‘failed[] and . . . was not fit for its intended use and/or was not merchantable.’”<sup>134</sup> The Supreme Court of Alabama ruled similarly to the Tenth Circuit, holding an auctioneer that regularly sells that type of goods on behalf of an undisclosed principal is a merchant-seller under the UCC and may be held liable for breaching the implied warranty of merchantability.<sup>135</sup>

The court reached its conclusion through a common law analysis, beginning with *Abercrombie v. Nashville Auto Auction, Inc.*<sup>136</sup> In that case, the Supreme Court of Alabama decided whether an auctioneer was liable for a

125. See *Powers*, 665 F.2d at 312 (“Certainly an auctioneer sells goods . . . .”); see also KAN. STAT. ANN. § 84-2-103(1)(d) (defining seller as “a person who sells or contracts to sell goods,” identically matching the UCC).

126. *Powers*, 665 F.2d at 312.

127. *Id.*

128. *Id.*

129. *Id.* at 313.

130. See *Ala. Powersport Auction, LLC v. Wiese*, 143 So. 3d 713, 720 (Ala. 2013) (addressing whether an auctioneer can be held liable under the UCC as a “merchant-seller for a breach of an implied warranty of merchantability”).

131. *Ala. Powersport Auction, LLC v. Wiese*, 143 So. 3d 713 (Ala. 2013).

132. *Id.* at 714.

133. *Id.* at 715.

134. *Id.*

135. *Id.* at 723–24. Alabama adopted the UCC verbatim, at least in this area of law. See ALA. CODE § 7-2-314(1) (2021) (providing the elements of the implied warranty of merchantability); *id.* § 7-2-103(1)(d) (defining seller); *id.* § 7-2-104(1) (defining merchant).

136. *Abercrombie v. Nashville Auto Auction, Inc.*, 541 So. 2d 516 (Ala. 1989); *Wiese*, 143 So. 3d at 723 (quoting *Abercrombie*, 541 So. 2d at 518).

title defect created by a surreptitiously altered odometer.<sup>137</sup> The court held that, under the presented facts, the auctioneer was not liable.<sup>138</sup> In reaching its conclusion, it applied the agency principles established in *Welch v. Mitchell*.<sup>139</sup> There, the Court of Civil Appeals of Alabama stated that an auctioneer functioning as an agent for a disclosed principal was generally free from liability for defective title to auctioned goods.<sup>140</sup> However, it also reasoned that an auctioneer would be liable if they were to “personally contract with the buyer” to ensure title validity.<sup>141</sup> In *Abercrombie*, the Supreme Court of Alabama agreed, noting that an auctioneer functioning as an agent for an undisclosed principal is liable for title defects.<sup>142</sup> The court supported its holding by reasoning that when the principle is undisclosed, the auctioneer is the vendor of the goods “in the eyes of the law.”<sup>143</sup>

Applied in *Wiese*, the Supreme Court of Alabama reasoned that “an auctioneer may be held liable as a merchant-seller for the implied warranty of merchantability . . . if [it] fails to disclose the principal for whom [it] is selling the goods.”<sup>144</sup> Thus, like the Tenth Circuit, it extended liability under the implied warranty of merchantability to auctioneers operating on behalf of undisclosed principals.

#### VI. HOLDING AMAZON LIABLE

Parts III and IV clarify that Amazon is profiting from selling defective products to consumers. Yet, when these products cause injuries, Amazon shirks responsibility.<sup>145</sup> Its continued evasion of liability severely impacts

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137. *Abercrombie*, 541 So. 2d at 517–18.

138. *See id.* at 518–19 (affirming summary judgment for Nashville Auto Auction).

139. *Welch v. Mitchell*, 351 So. 2d 911 (Ala. Civ. App. 1977); *Abercrombie*, 541 So. 2d at 518 (citing *Welch*, 351 So. 2d at 911).

140. *Welch*, 351 So. 2d at 915; *see also* 3 AM. JUR. 2D *Agency* § 306, Westlaw (database updated Aug. 2022) (discussing an agent’s liability for loss or damages).

141. *Welch*, 351 So. 2d at 915 (first citing *Pasley v. Ropp*, 334 S.W.2d 254 (Mo. Ct. App. 1960); then citing *Farmers & Merchs. State Bank of Tracy v. Folmer*, 15 N.W.2d 13 (Minn. 1944); then citing *Gessler v. Winton*, 145 S.W.2d 789 (Tenn. Ct. App. 1940); and then citing *Ingram v. Canal Bank & Trust Co.*, 127 So. 462 (La. Ct. App. 1930)).

142. *Abercrombie*, 541 So. 2d at 518 (citing *Welch*, 351 So. 2d at 911).

143. *Id.* (citing 7 AM. JUR. 2D *Auctions and Auctioneers* § 67 (1980)).

144. *Ala. Powersport Auction, LLC v. Wiese*, 143 So. 3d 713, 723–24 (Ala. 2013) (citation omitted).

145. *See, e.g., Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 112 (Tex. 2021) (declining to hold Amazon strictly liable for damages caused by a defective remote, as Amazon was not a seller). *But see* Jay M. Zitter, Annotation, *Liability of Online Marketplace Operator for Defective Product*, 60 A.L.R. 7th Art. 3 § 20 (2021) (discussing several cases where online marketplaces, aside from Amazon, have attempted to avoid liability but were found liable for damages caused by defective products).

consumers, leaving them without legal remedy and with medical bills and property damage.<sup>146</sup> Because of divergent state laws, jurisdictional fortuity determines whether injured consumers recover.<sup>147</sup> With Amazon's prevalence in consumers' lives,<sup>148</sup> such essential questions should not be left to chance.

Addressing this injustice, the following discussion details a potential avenue for holding Amazon liable under the implied warranty of merchantability as an auctioneer functioning on behalf of an undisclosed or partially disclosed principal.<sup>149</sup> To reach this conclusion, it combines facts regarding Amazon's operations under the FBA Program, discussed in Parts II, III, and IV, with elements of the implied warranty of merchantability and principles of agency law discussed in Part V. First, it outlines how Amazon qualifies as an auctioneer.<sup>150</sup> Second, it analyzes how Amazon, as an auctioneer, may be liable for failing to fully disclose its

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146. See *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213, 216 (9th Cir. 2020) (rejecting the notion that Amazon was a seller of the defective goods, meaning it was not liable for a consumer's injury); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 141–42 (4th Cir. 2019) (concluding Amazon was not liable for a defective third-party product). *But see Loomis v. Amazon.com LLC*, 277 Cal. Rptr. 3d 769, 779–80 (Cal. Ct. App. 2021) (finding Amazon's substantial involvement in the supply chain warranted liability).

147. Compare *McMillan*, 625 S.W.3d at 112 (refusing to hold Amazon liable for a defective third-party product), with *Loomis*, 277 Cal. Rptr. 3d at 769, 787 (Wiley, J., concurring) (“Amazon therefore has a duty in strict liability to the buyers from its site . . .”).

148. See Shira Ovide, *How Big Is Amazon, Really?*, N.Y. TIMES (Mar. 30, 2021), <https://www.nytimes.com/2021/03/30/technology/amazon-market-size.html> [<https://perma.cc/GRQ2-4N4E>] (“Amazon will be responsible for more than 40[%] of Americans' e-commerce spending this year. The second-largest internet store, Walmart, is far behind at about 7[%].”).

149. See Monestier, *supra* note 20, at 745 (arguing a “non-title holding seller can be liable for breach of the implied warranty of merchantability”); *Orient Mid-East Lines v. Albert E. Bowen, Inc.*, 458 F.2d 572, 575 (2d Cir. 1972) (imposing liability because the agent partially disclosed its principal); see also RESTATEMENT (SECOND) OF AGENCY § 4(1)–(3) (AM. L. INST. 1958) (defining disclosed principal, partially disclosed principal, and undisclosed principal).

150. See *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 145 (3d Cir. 2019) (describing the attributes of an auctioneer), *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); *Musser v. Vilsmeier Auction Co.*, 562 A.2d 279, 282 (Pa. 1989) (stating the auctioneer merely “provided a market as the agent of the seller”).

principal.<sup>151</sup> This argument could positively impact consumers by circumventing Amazon's no-title defense.<sup>152</sup>

#### A. *Classifying Amazon as an Auctioneer*

The UCC defines an auctioneer as “a person whom the seller engages to direct, conduct, control, or be responsible for a sale by auction.”<sup>153</sup> In a traditional auction, multiple prospective buyers bid against one another for a specific good “until the one willing to pay the highest price remains.”<sup>154</sup> The auction is complete when “the auctioneer so announces by the fall of the hammer.”<sup>155</sup> At first blush, this appears distinct from Amazon. However, non-traditional auctions, like “reverse auctions,” demonstrate the similarities.<sup>156</sup>

In reverse auctions, a single buyer seeks price quotes from multiple sellers.<sup>157</sup> The sellers bid against one another “until the one willing to sell at the lowest price remains.”<sup>158</sup> In the late 1990s, online reverse auctions took center stage.<sup>159</sup> They were initially performed by “third-party application service providers . . . , which are commercial service firms that deliver, manage, and remotely host software applications through centrally located servers.”<sup>160</sup> Over time, many organizations shifted away from this model, instead opting to “negotiat[e] software licensing agreements and develop[e]

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151. See *John Nagle Co. v. Anagnos*, No. 06-P-1852, 2007 WL 4374232, at \*1 (Mass. App. Ct. Dec. 14, 2007) (“To avoid personal liability, the agent should disclose that he is acting in a representative capacity[] and provide the identity of his principal. The test for adequate disclosure is whether the other party has actual knowledge of the principal or ‘that which to a reasonable man is equivalent to knowledge.’” (citation omitted) (quoting *Atl. Salmon A/S v. Curran*, 591 N.E.2d 206, 209 (Mass. App. Ct. 1992))); *Atl. Salmon A/S*, 591 N.E.2d at 209 (holding the agent must actually identify the principle, as merely providing “the means” for the purchaser to find the principle “is not sufficient”).

152. See Monestier, *supra* note 20, at 777 (arguing Amazon's continual evasion of liability is inequitable for consumers).

153. U.C.C. § 6-102(1)(b) (AM. L. INST. & UNIF. L. COMM'N 2022).

154. Ching-Chung Kuo et al., *Online Reverse Auctions: An Overview*, 13 J. INT'L TECH. & INFO. MGMT. 275, 276 (2004).

155. U.C.C. § 2-328(2).

156. See *Loomis v. Amazon.com LLC*, 277 Cal. Rptr. 3d 769, 773–74 (Cal. Ct. App. 2021) (detailing Amazon's operation under its business services agreement and FBA Program). See generally Kuo et al., *supra* note 154, at 275 (comparing traditional and reverse auctions).

157. Kuo et al., *supra* note 154, at 276.

158. *Id.*

159. *Id.* at 277.

160. *Id.*

necessary internal capabilities” to perform their own auctions.<sup>161</sup> From the buyer’s perspective, online reverse auctions are advantageous, as buyers have “an opportunity to obtain better pric[ing]” than traditional auctions.<sup>162</sup> Equally, sellers benefit from online reverse auctions, as they level the playing field by providing sellers an “equal opportunity to get [their] foot into the door.”<sup>163</sup> Specifically, online reverse auctions offer smaller businesses a chance to “boost their public exposure” and compete against their larger counterparts.<sup>164</sup>

In this sense, the similarities between Amazon Marketplace and online reverse auctions are apparent. First, Amazon Marketplace, like an online reverse auction, is “an online network of third-party sellers permitted to use Amazon.com as a platform to sell their products for a percentage of the [third-party’s] profits.”<sup>165</sup> Amazon Marketplace has numerous third-party vendors offering to sell the same or nearly identical products to a prospective buyer.<sup>166</sup> This format forces third-party sellers to lower their pricing to remain competitive.<sup>167</sup> Accordingly, Amazon permits third parties to adjust pricing, just as online reverse auctions allow sellers to adjust their bids.<sup>168</sup>

Second, Amazon Marketplace permits smaller third-party sellers to compete against larger entities.<sup>169</sup> Like online reverse auctions, Amazon Marketplace is a “relatively inexpensive approach to identifying new customers and expanding business since the seller does not need its own

161. *Id.*

162. *Id.* at 278.

163. *Id.* at 279.

164. *Id.*

165. Spiridakis, *supra* note 3. *See generally* Kuo et al., *supra* note 154 (providing background information on online reverse auctions).

166. *See* Spiridakis, *supra* note 3 (explaining how Amazon Marketplace hosts “thousands of external sellers and enables price comparison to keep the platform competitive”).

167. *Compare* Kuo et al., *supra* note 154, at 279 (“In an [online reverse auction] the seller is allowed to adjust the bid over and over again or even bow out of the process at any time, which is not possible in a traditional paper-based environment.”), *with* *Edit a Listing*, AMAZON: SELLER CENT., <https://sellercentral.amazon.com/help/hub/reference/external/SGKAPSNT53G5B2P> [<https://perma.cc/SPF7-V52N>] (allowing sellers to update “price and quantity” for already posted products).

168. *See* Kuo et al., *supra* note 154, at 278–79 (analyzing the advantages enjoyed by prospective buyers and sellers engaged in online reverse auctions).

169. *Id.* at 279; *see also* Pamela N. Danziger, *Thinking of Selling on Amazon Marketplace? Here are the Pros and Cons*, FORBES (Apr. 27, 2018, 1:55 PM), <https://www.forbes.com/sites/pamdanziger/2018/04/27/pros-and-cons-of-amazon-marketplace-for-small-and-mid-sized-businesses/?sh=3560a4f86867> [<https://perma.cc/2Q5F-WCG9>] (explaining the advantages smaller third-party sellers enjoy under the FBA Program).

website to take part in the [sale].<sup>170</sup> Specifically, through the FBA Program, third-party sellers experience a “30–50% increase in sales.”<sup>171</sup> Their success is partially attributable to sellers having lower overhead fees, as Amazon provides a trusted website for marketing, sales, and transactions, similar to online reverse auctions.<sup>172</sup>

Third, Amazon Marketplace, like online reverse auctions, allows prospective buyers to search for specific goods and compare the going offers from other sellers.<sup>173</sup> As several prospective buyers are likely seeking any particular good, third-party sellers compete for their business.<sup>174</sup> Often, Amazon Prime subscribers purchase through the FBA Program because they can take advantage of their subscription’s benefits, like free and fast shipping.<sup>175</sup> Accordingly, many third-party sellers make their goods eligible for Amazon Prime benefits.<sup>176</sup> This model presents another similarity: online reverse auctions typically charge buyers subscription fees.<sup>177</sup> Considering these points, Amazon Marketplace operates like online reverse auctions by incorporating their advantageous qualities to benefit its buyers and sellers, strengthening the comparison. Yet, the commonalities do not end here.

When a third-party seller opts to participate in the FBA Program, Amazon processes the goods like an auctioneer. First, it handles warehouse storage, item packing, item shipping, and customer communications.<sup>178</sup>

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170. Kuo et al., *supra* note 154, at 279; cf. Danziger, *supra* note 169 (“It’s fairly easy to get started on Amazon Marketplace . . .”).

171. Dayton, *supra* note 7.

172. Compare Kuo et al., *supra* note 154, at 280–85 (outlining the extensive steps to conduct online reverse auctions), with Spiridakis, *supra* note 3 (explaining how easy and cost effective it is to get started on Amazon Marketplace).

173. Compare Kuo et al., *supra* note 154, at 278 (“[Online reverse auctions] offer databases of evaluative information about various companies for similar purchases in the future and can provide quick identification of alternative and backup sources of supply.”), with Spiridakis, *supra* note 3 (“[Amazon Marketplace] offers customers a much wider product choice from thousands of external sellers and enables price comparison to keep the platform competitive.”).

174. See Spiridakis, *supra* note 3 (explaining how myriad sellers and price comparisons increase competition over buyers).

175. *Id.*

176. See *id.* (explaining how sellers elect to the use the FBA Program, enabling Amazon Prime exposure).

177. See, e.g., Kuo et al., *supra* note 154, at 279 (“Registration with a reverse auction house requires subscription fees . . .”).

178. See *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 138 (4th Cir. 2019) (summarizing Amazon’s substantial involvement in managing the sale of third-party products under the FBA

Second, it processes and collects payment for these purchases, deducts a fee, and remits the remaining balance to the third-party sellers.<sup>179</sup> Third, as Amazon has repeatedly argued, it does not own or hold title to the goods.<sup>180</sup> These striking similarities bolster the argument for classifying Amazon as an auctioneer.<sup>181</sup> Finally, the Third Circuit has partially addressed this very question.

In *Oberdorf v. Amazon.com Inc.*,<sup>182</sup> Judge Scirica, concurring in part and dissenting in part, compared Amazon to an auctioneer, arguing its role “in assisting sales . . . is ‘tangential’ to the actual exchange between customer and third-party seller”—just like an auctioneer.<sup>183</sup> Additionally, he found that, “[l]ike an auctioneer, Amazon Marketplace provides the ‘means of marketing’ to a third-party seller who accomplished the ‘fact of marketing’ when it ‘chose the products and exposed them for sale.’”<sup>184</sup> Finally, Judge Scirica completed his comparison by noting that Amazon Marketplace does not specifically select third-party sellers but provides services “on essentially similar terms to a large catalog[] of sellers.”<sup>185</sup>

While the preceding points compare Amazon’s role to that of an online reverse auctioneer, it is equally important to bring the categorization within the UCC’s definition. The UCC defines an auctioneer as “a person whom the seller engages to direct, conduct, control, or be responsible for a sale by auction.”<sup>186</sup> Under this definition, Amazon must be engaged by third-party sellers to sell their products through Amazon Marketplace.<sup>187</sup> Further, these sellers must relinquish control such that Amazon directs, conducts, controls,

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Program); *Amazon Services Business Solutions Agreement*, *supra* note 28 (detailing Amazon’s oversight of goods shipped to its fulfillment center under the FBA Program).

179. *Erie Ins. Co.*, 925 F.3d at 138.

180. *See, e.g.*, *Loomis v. Amazon.com LLC*, 277 Cal. Rptr. 3d 769, 778 (Cal. Ct. App. 2021) (analyzing Amazon’s argument that it cannot be a seller because it does not hold title to the defective goods).

181. *Cf.* *Monestier*, *supra* note 20, at 747 (pointing out that Amazon often argues “its role is akin to that of an auctioneer”).

182. *Oberdorf v. Amazon.com, Inc.*, 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).

183. *Id.* at 157–58 (Scirica, J., concurring in part and dissenting in part) (quoting *Musser v. Vilsmeier Auction Co.*, 562 A.2d 279, 282 (Pa. 1989)).

184. *Id.* at 158 (quoting *Musser*, 562 A.2d at 282).

185. *Id.* (citing *Musser*, 562 A.2d at 282 & n.3).

186. U.C.C. § 6-102(1)(b) (AM. L. INST. & UNIF. L. COMM’N 2022).

187. *See State ex rel. Danziger v. Recorder of Mortgs.*, 19 So. 2d 129, 132 (La. 1944) (categorizing an auctioneer as “one who sells goods at public auction for another on commission, or for a recompense; one who conducts a public sale or auction, whether th[e] goods sold are his own or those of another person who employs him”).

or otherwise is responsible for the sale.<sup>188</sup> Because Amazon exerts extensive control of products sold through the FBA Program,<sup>189</sup> it satisfies this requirement.

The similarities are striking, emphasizing that Amazon may be considered an auctioneer. While this categorization is important, Amazon must operate on behalf of undisclosed or partially disclosed principals to face liability.<sup>190</sup>

#### B. *Failing to Disclose Its Principals*

As discussed above, only merchant-sellers may be held liable under the implied warranty of merchantability.<sup>191</sup> Courts consider auctioneers merchant-sellers.<sup>192</sup> This means auctioneers, as agents of the principal-sellers, are liable under the implied warranty.<sup>193</sup> However, to be held liable, auctioneers must either fail to disclose or partially disclose their principals.<sup>194</sup> Accordingly, full disclosure precludes liability, provided they do not “personally warrant[] [the] good[s],” as the auctioneer would fall outside of the merchant-seller classification.<sup>195</sup> The reasoning behind these holdings is that “an agent is liable on a contract where he has acted ‘in his

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188. See U.C.C. § 6-102(1)(b) (listing the acts qualifying one as an auctioneer).

189. See *supra* Part II (detailing Amazon’s handling of third-party products sold through the FBA Program, specifically its unbridled control of merchandise); *Loomis v. Amazon.com LLC*, 277 Cal. Rptr. 3d 769, 780 (Cal. Ct. App. 2021) (detailing the steps Amazon takes during a typical sale through the FBA program, from “interacting with the customer” and “processing the order to the third party seller” to “collecting the money” and “being paid a percentage of the sale”).

190. *E.g.*, *Orient Mid-East Lines v. Albert E. Bowen, Inc.*, 458 F.2d 572, 577 (2d Cir. 1972) (holding an agent, like an auctioneer, may be held liable when operating on behalf “of an undisclosed or partially disclosed principal”).

191. *Powers v. Coffeyville Livestock Sales Co.*, 665 F.2d 311, 312 (10th Cir. 1981); *Ala. Powersport Auction, LLC v. Wiese*, 143 So. 3d 713, 721 (Ala. 2013) (quoting ALA. CODE §§ 7-2-103, 7-2-314(1) (2021)).

192. *Wiese*, 143 So. 3d at 721 (citing *Bradford v. Nw. Ala. Livestock Ass’n*, 379 So. 609, 611 (Ala. Civ. App. 1980)); *Powers*, 665 F.2d at 312.

193. See, *e.g.*, *Wiese*, 143 So. 3d at 723–24 (“[W]e hold 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.”).

194. *Id.*; see *Abercrombie v. Nashville Auto Auction, Inc.*, 541 So. 2d 516, 518 (Ala. 1989) (holding an auctioneer’s failure to disclose its principal subjects it to liability).

195. *Abercrombie*, 541 So. 2d at 518 (citing *Welch v. Mitchell*, 351 So. 2d 911, 915 (Ala. Civ. App. 1977)); see *Serv. Iron Foundry, Inc. v. M.A. Bell Co.*, 588 P.2d 463, 470–71 (Kan. Ct. App. 1978) (explicating how an agent may be held liable for personal representations); see also 2A C.J.S. *Agency* § 216, Westlaw (database updated Oct. 2022) (discussing the limits of an agent’s ability to extend personal warranties between a principal and a third party).



own name for an undisclosed principal.”<sup>196</sup> Because an auctioneer is considered an agent to a seller of goods at an auction, “an auctioneer who . . . sells property on behalf of a disclosed principal generally is not regarded as warranting [the] good[s].”<sup>197</sup> However, “an auctioneer who sells property without disclosing his principal is, in the eyes of the law, considered as the vendor himself and, as such, is responsible to the buyer for . . . defect[s].”<sup>198</sup> Further, courts have repeatedly held that “it is the agent’s duty to disclose the principal’s identity, not the third party’s duty to ascertain that identity.”<sup>199</sup> These findings impose a duty of disclosure on auctioneers, yet the contours of this requirement demand explication.

The *Second Restatement of Agency (Restatement)*, followed by many jurisdictions,<sup>200</sup> provides useful definitions of disclosed, partially disclosed, and undisclosed principals:

- (1) If, at the time of a transaction conducted by an agent, the other party thereto has notice that the agent is acting for a principal and of the principal’s identity, the principal is a disclosed principal.
- (2) If the other party has notice that the agent is or may be acting for a principal but has no notice of the principal’s identity, the principal for whom the agent is acting is a partially disclosed principal.

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196. John Nagle Co. v. Anagnos, No. 06-P-1852, 2007 WL 4374232, at \*1 (Mass. App. Ct. Dec. 14, 2007) (quoting Groce v. First Nat. Stores, Inc., 167 N.E. 308, 310 (Mass. 1929)).

197. *Abercrombie*, 541 So. 2d at 518; see *Ala. Powersport Auction, LLC*, 143 So. 3d at 722–23 (affirming an auctioneer is merely an agent of the seller); *Powers*, 665 F.2d at 312–13 (discussing how an auctioneer generally sells goods as an agent for someone else).

198. *Abercrombie*, 541 So. 2d at 518 (citing 7 AM. JUR. 2D *Auctions and Auctioneers* § 67 (1980)); *Ala. Powersport Auction, LLC*, 143 So. 3d at 723 (quoting *Abercrombie*, 541 So. 2d at 518); see *Powers*, 665 F.2d at 312–13 (“Under traditional agency law, an agent is liable as if it were the principal when the agent acts for an undisclosed principal.”); RESTATEMENT (SECOND) OF AGENCY § 321 (AM. L. INST. 1958) (“Unless otherwise agreed, a person purporting to make a contract with another for a partially disclosed principal is a party to the contract.”).

199. *Port Ship Serv. v. Int’l Ship Mgmt.*, 800 F.2d 1418, 1421 (5th Cir. 1986) (citing *Orient Mid-East Lines v. Albert E. Bowen, Inc.*, 458 F.2d 572 (2d Cir. 1972)); see also *Atl. Salmon A/S v. Curran*, 591 N.E.2d 206, 208 (Mass. App. Ct. 1992) (holding it is the “duty of the agent” to disclose “the identity of his principal” to the third-party to avoid liability (citing *Merriam v. Wolcott*, 3 Allen 258, 261 (Mass. 1861))).

200. See *Orient Mid-East Lines*, 458 F.2d at 575 (quoting RESTATEMENT (SECOND) OF AGENCY § 4(2)) (relying on the *Restatement’s* definition of a partially disclosed principal); *Atl. Salmon A/S*, 591 N.E.2d at 208 (“If the other party [to a transaction] has notice that the agent is or may be acting for a principal but has no notice of the principal’s identity, the principal for whom the agent is acting is a partially disclosed principal.” (alteration in original) (quoting RESTATEMENT (SECOND) OF AGENCY § 4(2))).

(3) If the other party has no notice that the agent is acting for a principal, the one for whom he acts is an undisclosed principal.<sup>201</sup>

Further, the *Restatement* states that “[t]he other party has notice of the existence or identity of the principal if he knows, has reason to know, or should know of it, or has been given a notification of the fact.”<sup>202</sup> Courts have applied the *Restatement’s* definitions based on the third party’s knowledge but have diverged on notice.<sup>203</sup> The Second Circuit held that the other party must have *actual knowledge*—not merely constructive—of the principal’s identity.<sup>204</sup> To meet this standard, the agent must divulge its name.<sup>205</sup> Otherwise, the agent functions for a partially disclosed or undisclosed principal, exposing it to liability.<sup>206</sup>

Applied to Amazon, the main question is whether it satisfactorily discloses its principals, the third-party sellers.<sup>207</sup> One must contemplate both the method in which Amazon fulfills third-party orders and the visual listing of those goods to determine the adequacy of disclosure.<sup>208</sup> First, Amazon exerts such substantial control over third-party goods sold through the FBA Program that many consumers believe they purchase directly from Amazon.<sup>209</sup> As the California Court of Appeals for the Fourth District noted:

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201. RESTATEMENT (SECOND) OF AGENCY § 4(1)–(3).

202. *Id.* § 4 cmt. a; *see also id.* § 9(1) (“A person has notice of a fact if he knows the fact, has reason to know it, should know it, or has been given notification of it.”).

203. *Compare id.* § 9(1) (permitting actual or constructive knowledge of the principal’s identity), *with Orient Mid-East Lines*, 458 F.2d at 576 (“Knowledge of the real principal is the test, and this means actual knowledge, not suspicion.” (quoting *Ell Dee Clothing Co. v. Marsh*, 160 N.E. 651, 653 (N.Y. 1928) (internal quotation marks omitted))).

204. *Orient Mid-East Lines*, 458 F.2d at 576 (quoting *Marsh*, 160 N.E. at 653).

205. *Id.* at 577.

206. *Id.* at 576.

207. *Powers v. Coffeyville Livestock Sales Co.*, 665 F.2d 311, 312–13 (10th Cir. 1981); *Port Ship Serv. v. Int’l Ship Mgmt.*, 800 F.2d 1418, 1421 (5th Cir. 1986); *Orient Mid-East Lines*, 458 F.2d at 575–76.

208. *See* RESTATEMENT (SECOND) OF AGENCY § 4 cmt. d (AM. L. INST. 1958) (“If the manifestations of the principal or agent are such as *reasonably* to indicate to the other party the identity or existence of the principal, the latter is disclosed or partially disclosed . . . .” (emphasis added)).

209. *See Loomis v. Amazon.com LLC*, 277 Cal. Rptr. 3d 769, 773–74, 778 (Cal. Ct. App. 2021) (describing the influence Amazon exerts over the third-party goods it sells); Zoë Gillies, *Amazon Marketplace and Third-Party Sellers: The Battle over Strict Product Liability*, 54 SUFFOLK U. L. REV. 87, 88 (2021) (“Many consumers, however, may not be aware of the difference between Amazon Retail and Amazon Marketplace.”).

Amazon placed itself between [the seller] and [the buyer] in the chain of distribution . . . . Amazon accepted possession of the product from [the seller], stored it in an Amazon warehouse, attracted [the buyer] to the Amazon website, provided [the buyer] with a product listing for [the seller's] product, received [the buyer's] payment for the product, and shipped the product in Amazon packaging to [the buyer]. Amazon set the terms of its relationship with [the seller], controlled the conditions of [the seller's] offer for sale on Amazon, limited [the seller's] access to Amazon's customer information, forced [the seller] to communicate with customers through Amazon, and demanded indemnification as well as substantial fees on each purchase.<sup>210</sup>

These actions demonstrate that Amazon is proactively minimizing the involvement and visibility of third-party sellers. Additionally, Amazon Marketplace is so tightly integrated with Amazon.com that many buyers are unaware of the distinction.<sup>211</sup> Taken together, Amazon—as an auctioneer—does not provide adequate disclosure because “the [buyer] has no notice that [Amazon] is acting for a principal.”<sup>212</sup> While Amazon will likely argue that it provides disclosure by listing the names of sellers, this does not necessarily preclude liability.

When viewing third-party products on Amazon Marketplace, the names of sellers are only found in one location and are in a smaller font than the surrounding text.<sup>213</sup> Also, Amazon has wreathed their names in terms like “Amazon” and “Prime.”<sup>214</sup> Finally, Amazon permits third-party sellers to use pseudonyms, further disguising their identities.<sup>215</sup> Thus, the mere fact that Amazon discloses the names of sellers does not eliminate its exposure. Indeed, in some jurisdictions, Amazon may face liability despite its purported disclosure because “[k]nowledge of the real principal is the test,

210. Bolger v. Amazon.com, LLC, 267 Cal. Rptr. 3d 601, 604–05 (Cal. Ct. App. 2020).

211. See Spiridakis, *supra* note 3 (“Because Amazon Marketplace is so well integrated into Amazon.com, a lot of customers don’t even realize they are purchasing from third-party sellers.”).

212. RESTATEMENT (SECOND) OF AGENCY § 4(3); see also Port Ship Serv. v. Int’l Ship Mgmt., 800 F.2d 1418, 1421 (5th Cir. 1986) (relying on the *Restatement’s* definitions to reach its conclusion).

213. Monestier, *supra* note 20, at 762.

214. *Id.* at 765 (internal quotation marks omitted).

215. See, e.g., Loomis v. Amazon.com LLC, 277 Cal. Rptr. 3d 769, 772 (Cal. Ct. App. 2021) (“The listing identified the seller to be TurnUpUp, a name used by SMILETO to sell its products on Amazon’s marketplace.”). See generally Dave Hamrick, *How to Sell on Amazon International Marketplaces*, JUNGLESCOUT: BLOG (Mar. 1, 2021), <https://www.junglescout.com/blog/amazon-marketplaces/> [<https://perma.cc/4NXQ-2HFT>] (describing the simple process required for international third-party sellers to reach domestic consumers).

and this means actual knowledge, not suspicion.”<sup>216</sup> In these jurisdictions, even if a buyer knows that Amazon is selling third-party goods, this knowledge is insufficient, as actual knowledge is the standard.<sup>217</sup>

Finally, whether Amazon is functioning on behalf of a partially disclosed or undisclosed principal is not of paramount importance. Under either classification, Amazon may be liable for breaching the implied warranty of merchantability.<sup>218</sup> Of critical importance, rather, is that Amazon’s actions preclude buyers from learning the identity of sellers.<sup>219</sup> To accomplish this, Amazon takes numerous physical steps, discussed above, and implements web-design layouts that disguise the identity of sellers.<sup>220</sup> Accordingly, in both the Second and Fifth Circuits, courts may find that Amazon fails to adequately disclose its principal, holding it liable for defective products as if it were the principal-seller.<sup>221</sup>

## VII. CONCLUSION

As an online reverse auctioneer functioning on behalf of partially disclosed or undisclosed principals, Amazon should be held liable for damages caused by defective third-party products sold on Amazon Marketplace and fulfilled under the FBA Program. Amazon may be considered a merchant-seller under the UCC’s implied warranty of merchantability because it fails to adequately disclose the identity of third-party sellers. By tactically concealing the identity of sellers, Amazon creates the false belief that it is the seller. This failure should preclude Amazon’s

216. *Orient Mid-East Lines v. Albert E. Bowen, Inc.*, 458 F.2d 572, 576 (2d Cir. 1972) (quoting *Ell Dee Clothing Co. v. Marsh*, 160 N.E. 651, 653 (N.Y. 1928) (internal quotation marks omitted); see also *Port Ship Serv.*, 800 F.2d at 1421 (holding “it is the agent’s duty to disclose the principal’s identity, not the third party’s duty to ascertain that identity” (citing *Orient Mid-East Lines*, 458 F.2d at 572)).

217. *Orient Mid-East Lines*, 458 F.2d at 576.

218. Compare *Port Ship Serv.*, 800 F.2d at 1422 n.2 (“[T]he agent is a party to the contract when the principal is partially disclosed, placing the risk of failure to inform the third party on the agent.”), with *Powers v. Coffeyville Livestock Sales Co.*, 665 F.2d 311, 312 (10th Cir. 1981) (“[A]n agent is liable as if it were the principal when the agent acts for an undisclosed principal.”).

219. See, e.g., *Loomis*, 277 Cal. Rptr. 3d at 777–78 (citing *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 604–05 (Cal. Ct. App. 2020)) (detailing the terms of Amazon’s business services agreement, which creates confusion over the true identity of sellers).

220. *Bolger*, 267 Cal. Rptr. 3d at 604–05; *Loomis*, 277 Cal. Rptr. 3d at 780; Monestier, *supra* note 20, at 764–65.

221. See *Mid-East Lines*, 458 F.2d at 575–76 (finding it is the agent’s duty to ensure the buyer is adequately informed of the principal’s identity); *Port Ship Serv.*, 800 F.2d at 1422 n.2 (finding an agent is a party to the sales contract if it partially discloses the identity of the principal); see also *Powers*, 665 F.2d at 312 (holding “an agent is liable as if it were the principal when the agent acts for an undisclosed principal”).

argument that it discloses the identity of sellers. It should be viewed as the seller “in the eyes of the law,” facing liability for defective products.<sup>222</sup> Allowing otherwise would permit Amazon to circumvent the UCC’s consumer protection provisions.

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222. See *Abercrombie v. Nashville Auto Auction, Inc.*, 541 So. 2d 516, 518 (Ala. 1989) (citing 7 AM. JUR. 2D *Auctions and Auctioneers* § 67 (1980)) (holding an auctioneer’s failure to disclose its principal warrants liability as a seller).