

E-Commerce Platforms as Product Merchants and Sellers

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Abstract This chapter examines the extent to which e-commerce platforms may be held liable for problematic goods sold by third-party sellers on their websites. Several courts have hesitated to find e-commerce platforms liable under products liability and warranty law for products sold on their marketplaces by third-party sellers. This chapter argues that the increasing shift from in-person sales of goods to online sales necessitates a shift in current interpretations of key principles under state products liability and warranty law under Article 2 of the Uniform Commercial Code to better protect consumer interests. E-commerce platforms should, upon meeting certain criteria, be viewed as sellers and merchants for purposes of Article 2 warranties and products liability law. This chapter also highlights the role of state consumer law mandating product warnings and the federal Communications Decency Act, which, in some cases, may pose a hurdle to successful consumer claims against e-commerce platforms. The chapter concludes by offering a path forward.

INTRODUCTION

Increasingly, a large segment of consumers purchase goods and services via e-commerce marketplaces. Leading this growing transition from in-person to online shopping are large e-commerce platforms, such as Amazon. These online marketplaces are the modern-day version of the large shopping malls and centers that historically dominated the U.S. shopping experience for decades.¹ In 2023, the U.S.

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¹ Natasha Geiling, *The Death and Rebirth of the American Mall*, SMITHSONIAN MAG. (Nov. 25, 2014), www.smithsonianmag.com/arts-culture/death-and-rebirth-american-mall-180953444/ [https://perma.cc/T8DF-LW6N].

e-commerce market was projected to accrue, by one estimate, more than “\$1.1 trillion in sales.”² The e-commerce market may “total over \$8.1 trillion” in market share by 2026.³ Consider a study involving 2,000 consumers that found that 89 percent of individuals were “more likely to” purchase goods online from Amazon over other e-commerce marketplaces.⁴ One estimate suggests that 37 percent of all e-commerce sales occur on Amazon’s online platform.⁵ Reports estimate that sales of goods by third-party sellers comprise more than 50 percent of all transactions on Amazon’s platform.⁶ A significant number of third-party sellers on Amazon are based in non-U.S. countries.⁷

As one commentator has observed, Amazon’s successful use of the e-commerce business model “is a big part of the reason why [Amazon’s] marketplace model is being widely applied across commerce.”⁸ Even traditional brick-and-mortar stores – such as Walmart and Macys – have opened their online marketplaces to third-party sellers.⁹ Social media companies have quickly followed suit by providing a platform

² Anna Baluch, *38 E-Commerce Statistics of 2023*, FORBES (Feb. 8, 2023) www.forbes.com/advisor/business/ecommerce-statistics/ [<https://perma.cc/W8DE-DJGT>].

³ *Id.*

⁴ Kiri Masters, *89% of Consumers Are More Likely to Buy Products from Amazon than Other E-Commerce Sites: Study*, FORBES (Mar. 20, 2019), www.forbes.com/sites/kirimasters/2019/03/20/study-89-of-consumers-are-more-likely-to-buy-products-from-amazon-than-other-e-commerce-sites/?sh=5058b094af1 [<https://perma.cc/N84C-S7ZP>].

⁵ Baluch, *supra* note 2.

⁶ Stephen Babcock, *60% of Amazon Sales Are Generated by Third-Party Sellers*, THE CURRENT (May 25, 2023), thecurrent.media/amazon-third-party-sellers [<https://perma.cc/23Kq-HYNP>]; Thomas Murphy III, *Is Amazon Liable for Third-Party Sellers’ Products? To Date, The Answer for E-Commerce Retailers May Depend on Where They Are*, JD SUPRA (Aug. 10, 2021), www.jdsupra.com/legalnews/is-amazon-liable-for-third-party-6783896/ [<https://perma.cc/ZG38-5RPZ>] (noting that “[o]ver 50% of Amazon’s sales are generated by third-party sellers.”).

⁷ See Stephanie Chevalier, *Number of Active Amazon Marketplace Sellers in 2019, By Country*, STATISTA (July 27, 2022), www.statista.com/statistics/1086664/amazon-3p-seller-by-country/ [<https://perma.cc/C2qL-TLF5>]; see also Eric Chaffin & Steven Cohn, *A Stream of Liability*, 57 TRIAL 20 (2021) (“Since the start of 2017, about 3.3 million third-party sellers have joined Amazon marketplaces, with a growing number of these sellers from China. Currently, approximately 50% of all sales on Amazon come from third-party sellers.”); Annie Palmer, *Amazon Courts Sellers at China Summit as Temu and Shein Gain Momentum*, CNBC (Dec. 14, 2023), www.cnbc.com/2023/12/14/amazon-courts-sellers-at-china-summit-as-temu-and-shein-gain-momentum.html [<https://perma.cc/Q4BQ-SZRL>] (“Amazon said in 2023 the number of items sold by Chinese sellers on its site grew more than 20% year over year, while the number of Chinese sellers with sales over \$10 million increased 30%.”).

⁸ Babcock, *supra* note 6.

⁹ *Id.*; Vidhi Choudhary, *Macy’s Is the Latest Department Store Chain to Test Out a Third-Party Marketplace*, MODERN RETAIL (Oct. 3, 2022), www.modernretail.co/technology/macy-s-is-the-latest-department-store-chain-to-test-out-a-third-party-marketplace/ [<https://perma.cc/H5DQ-D436>]; Daphne Howland, *Macy’s Launches Third-Party Marketplace in Time for the Holidays*, RETAIL DIVE (Sept. 28, 2022), www.retaildive.com/news/macy-s-launches-third-party-marketplace-holidays/632857/ [<https://perma.cc/JL8N-9A5C>]; Hope King, *Macy’s Launches Marketplace for Sellers*, Axios (Sept. 28, 2022), wwwaxios.com/2022/09/28/macy-s-launches-marketplace-for-sellers [<https://perma.cc/X7VK-SSG4>].

for consumers to sell and purchase goods. Approximately ninety-seven million U.S. consumers make “online purchases on social media platforms, such as Facebook,” and 55 percent of 18–24 year-olds “have made a purchase on social media.”¹⁰

Consider that in 2019 the U.S. Consumer Product Safety Commission (CPSC) issued a notice regarding the recall of an infant sleeper linked to the death of thirty-two babies, yet sales for the recalled product continued on Facebook’s marketplace with at least seventy more children dying even after the 2019 recall.¹¹ The CPSC has encouraged Facebook to stop the sale of the recalled product.¹² Separately, between 2022 and 2023, the CPSC issued almost four thousand “takedown requests” for the recalled infant sleeper product “with most of those requests being submitted to Facebook Marketplace.”¹³

Online marketplaces may provide consumers with several benefits, including ease of access to a larger segment of sellers and speedy delivery of goods.¹⁴ However, consumers’ increasing use of e-commerce marketplaces to enter contracts for the purchase and sale of goods complicates questions about liability and responsibility for problematic goods.

The question of liability for defective goods purchased on e-commerce platforms is an important one for buyers. When third-party sellers of goods on e-commerce platforms can be identified, are located in the U.S., or are financially sound, it may

¹⁰ Baluch, *supra* note 2. (“nowadays, making online purchases on social media platforms such as Facebook and Instagram is the norm in the U.S. While 96.9 million people currently do it, this figure is expected to grow to 114.3 million social buyers – an 18% increase... 55% of people aged 18 to 24 in the United States have made a purchase on social media”); Mintel Group, *Nearly Half of US Consumers Say They Have Made a Purchase Through Social Media*, PR NEWSWIRE (Apr. 20, 2023), www.prnewswire.com/news-releases/nearly-half-of-us-consumers-say-they-have-made-a-purchase-through-social-media-301802414.html [https://perma.cc/45ET-CBFU].

¹¹ U.S. Consumer Product Safety Commission, *Fisher-Price Recalls Rock 'n Play Sleepers Due to Reports of Deaths*, CPSC (Apr. 12, 2019), www.cpsc.gov/Recalls/2019/Fisher-Price-Recalls-Rock-n-Play-Sleepers-Due-to-Reports-of-Deaths [https://perma.cc/3PHT-W2VH]; U.S. Consumer Product Safety Commission, *Fisher-Price Reannounces Recall of 4.7 Million Rock 'n Play Sleepers; At Least Eight Deaths Occurred After Recall*, CPSC, www.cpsc.gov/Recalls/2023/Fisher-Price-Reannounces-Recall-of-4-7-Million-Rock-n-Play-Sleepers-At-Least-Eight-Deaths-Occurred-After-Recall [https://perma.cc/CJ62-LGM9]; see also Jenny Gross, *100 Infant Deaths Linked to Recalled Fisher-Price Sleeper* (Jan. 10, 2023), www.nytimes.com/2023/01/10/business/fisher-price-rocker-recall.html#:~:text=About%20100%20infant%20deaths%20over,to%20stop%20using%20the%20product [https://perma.cc/9LBC-MGWK]; Danielle Smith, *Fisher-Price Sleeper Linked to Children Deaths Is Still Being Sold on Social Media Despite Recall*, NBC NEWS BAY AREA (Apr. 14, 2023), www.nbcbayarea.com/news/national-international/recalled-sleeper-sold-facebook-marketplace/3205572/ [https://perma.cc/XCB6-ZSGF].

¹² Letter from Alexander Hoehn-Saric, U.S. Consumer Prod. Safety Chair, to Mark Zuckerberg, Meta CEO, *Urging Action on Banned & Recalled Products on Facebook Marketplace* (Apr. 12, 2023) (hereinafter CPSC Letter to Zuckerberg).

¹³ *Id.*

¹⁴ Srikant Gupta, Pooja S. Kushwaha, Usha Badherac, Prasenjit Chatterjee & Ernesto D. R. Santibanez Gonzalez, *Identification of Benefits, Challenges and Pathways in E-commerce Industries: An Integrated Two-Phase Decision-Making Model*, 4 SUSTAINABLE OPERATIONS & COMPUTS. 201, 201 (2023).

be easier for buyers to obtain a remedy for defective goods.¹⁵ On the other hand, when such sellers are located abroad, cannot be identified, or the third-party seller is judgment proof, buyers may have a much more difficult time obtaining a remedy from the seller and enforcing any potential judgments.¹⁶ Not surprisingly, buyers may turn to U.S.-based e-commerce platforms for recovery.

This chapter examines the extent to which e-commerce platforms may be held liable for problematic goods sold by third-party sellers on their online marketplaces. For instance, if a consumer purchases a skin cream from a third-party seller on an e-commerce website that is later found to be contaminated with a known toxic substance, can the e-commerce platform be held liable under products liability or warranty law for harm suffered by the consumer?¹⁷ Similarly, should the consumer have a cause of action against the e-commerce platform for violation of state consumer law mandating warnings for products containing toxic substances?¹⁸ This chapter seeks to answer these questions.¹⁹

¹⁵ See CPSC Letter to Zuckerberg (“If CPSC staff can identify these illegal listings using your site, Meta indisputably can prevent them from appearing in the first place.”).

¹⁶ See *id.*

¹⁷ E.g., *Lee v. Amazon.com, Inc.*, 76 Cal. App. 5th 200 (2022).

¹⁸ *Id.*

¹⁹ Several scholars including myself, commentators, and experts have previously evaluated the liability of e-commerce platforms for third-party sales of goods and the role of the CDA’s immunity provisions, but this chapter builds on existing scholarship by simultaneously evaluating liability under both express and implied warranties under the UCC, tort law liability, and liability under California’s Proposition 65. E.g., STACY-ANN ELVY, A COMMERCIAL LAW OF PRIVACY AND SECURITY FOR THE INTERNET OF THINGS 160–195 (Cambridge Univ. Press 2021); Gregory M. Dickinson, *Rebooting Internet Immunity*, 89 GEO. WASH. L. REV. 347 (2021); Kenneth A. Jacobsen, *Navigating [The] Amazon: Liability of E-Commerce Companies for Defective Products Sold Through Their Internet Websites*, 71 DEPAUL L. REV. 87 (2021); Agnieszka McPeak, *Platform Immunity Redefined*, 62 WM. & MARY L. REV. 1557 (2021); Tanya J. Monestier, *Amazon As a Seller of Marketplace Goods Under Article 2*, 107 CORNELL L. REV. 705 (2022); Catherine M. Sharkey, *Products Liability in the Digital Age: Online Platforms As “Cheapest Cost Avoiders”*, 73 HASTINGS L.J. 1327 (2022); Robert Sprague, *It’s a Jungle Out There: Public Policy Considerations Arising from a Liability-Free Amazon.com*, 60 SANTA CLARA L. REV. 253 (2020); Kyle A. Batson, Comment, *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); Christopher Boyd, Comment, *One Click Liability: Section 230 and the Online Marketplace*, 70 DEPAUL L. REV. 597 (2021); Aaron Doyer, Note, *Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond*, 28 J.L. & POL’Y 719 (2020); Zoë Gillies, Comment, *Amazon Marketplace and Third-Party Sellers: The Battle over Strict Product Liability*, 54 SUFFOLK U. L. REV. 87 (2021); Austin Martin, Comment, *A Gatekeeper Approach to Product Liability for Amazon*, 89 GEO. WASH. L. REV. 768 (2021); Danny O’Connor, Note, *All of the Products, None of the Liability: Examining the Supreme Court of Ohio’s Decision in Stiner v. Amazon.com, Inc.*, 90 U. CIN. L. REV. 1344 (2022); Isaac Rounseville, Comment, *Drawing a Line: Legislative Proposals to Clarify the CDA, Reinforce Consumer Rights, and Establish a Uniform Policy for Online Marketplaces*, 60 JURIMETRICS J. 463 (2020); Amy Elizabeth Shehan, Comment, *Amazon’s Invincibility: The Effect of Defective Third-Party Vendors’ Products on Amazon*, 53 GA. L. REV. 1215 (2019); Derek S. Rajavuori, *A Link in the Chain? “E-Tailer” Liability for Defective Products Sold by Third-Party Vendors*, AM. BAR ASS’N (Aug. 25, 2021), www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2020-21/summer/link-chain-e-tailer-liability-defective-products-sold-third-party-vendors/ [https://perma.cc/RD5J-QCN3].

As this chapter will show, several courts have hesitated to find e-commerce platforms liable under products liability and warranty law for goods sold on their marketplaces by third-party sellers.²⁰ This chapter argues that the increasing shift from in-person sales of goods to online sales necessitates a shift in current interpretations of key principles under products liability and warranty law to better protect consumer interests.

Liability claims related to products often involve “a mixture of tort law” and contract law as well as common law and statutory law.²¹ This chapter examines Article 2 of the Uniform Commercial Code (UCC) and state products liability law. It also highlights the role of state consumer law mandating product warnings and the federal Communications Decency Act (CDA), which, in some cases, may pose a hurdle to successful consumer claims against e-commerce platforms.

The remainder of this chapter proceeds as follows: Section 8.1 explores e-commerce platform liability under Article 2 of the UCC and argues that narrow interpretations of key principles necessary for warranty liability, such as the definition of a seller and a seller’s knowledge of a buyer’s needs, may allow e-commerce platforms to avoid warranty liability in some cases. This section critically analyzes the implied warranty of merchantability, the implied warranty of fitness for a particular purpose, and express warranties under Article 2. I contend that e-commerce platforms could qualify as sellers and merchants for purposes of Article 2 warranties. I also posit that companies’ extensive collection of data about consumers can, in certain instances, satisfy the knowledge requirements of the fitness warranty; moreover, in some cases, I contend that e-commerce platforms may have adopted the statements of third-party sellers for purposes of express warranty claims.

Section 8.2 evaluates the extent to which e-commerce platforms are liable under strict products liability and negligence claims involving defective goods sold on their platforms. This section exposes shortcomings in courts’ interpretations of state products liability law, including restrictive interpretations of the term “seller” that turn on the passage of title.

Section 8.3 considers the role of the CDA in potentially immunizing e-commerce platforms from certain products liability claims for defective goods and highlights the potential impact of California’s Safe Drinking Water and Toxic Enforcement Act of 1986, also known as Proposition 65. This section contends that courts’ application of the CDA may immunize e-commerce platforms from certain products liability claims. Section 8.4 proposes additional alternative routes to address the shortcomings in existing law discussed in Sections 8.1 and 8.2 of this chapter, including closing loopholes in Article 2 of the UCC and products liability law.

²⁰ See ELVY, *supra* note 19, at 164–65.

²¹ DAVID G. OWEN, *PRODUCTS LIABILITY LAW* 4 (3d ed. 2015).

8.1 WARRANTY LIABILITY

The UCC is a core source of commercial law in the U.S. Article 2 of the UCC “applies to transactions in goods.”²² While some courts have applied or cited Article 2 by analogy to non-goods transactions, Article 2’s core focus is on the sale of goods.²³ Article 2 defines “goods,” in part, as “all things (including specially manufactured goods) which are movable.”²⁴ Article 2 provides important warranty liability rules grounded in contract law that can be helpful for buyers of problematic goods. Namely, Article 2 provides buyers with a potential cause action for breach of the implied warranty of merchantability,²⁵ the implied warranty of fitness for a particular purpose,²⁶ and express warranties.²⁷

8.1.1 *The Implied Merchantability Warranty*

To establish a claim for breach of the implied warranty of merchantability, a buyer must prove, among other things, that the goods sold were unmerchantable and that the seller of the goods was a merchant.²⁸ Article 2 provides non-exhaustive guidance to assess merchantability, including that the goods must be “fit for [their] ordinary purpose.”²⁹ A merchant seller can escape liability under the merchantability warranty by contending that it effectively disclaimed the warranty.³⁰ The UCC defines a “sale” as the passage of “title from the seller to the buyer” and a seller as “a person who sells or contracts to sell goods unless the context otherwise requires.”³¹ It also recognizes a party can become a merchant if the party deals in the kind of goods at issue.³²

While e-commerce platforms may arguably qualify as merchants who deal in goods sold on their websites, it is not entirely clear whether such entities qualify as sellers for purposes of the merchantability warranty. When e-commerce platform companies sell products directly to consumers, they certainly qualify as sellers under

²² U.C.C. § 2-102 (AM. L. INST. & UNIF. L. COMM’N 2023).

²³ *Id.*; see Monestier, *supra* note 19, at 735; see also Nancy S. Kim, *Beyond Section 230 Liability for Facebook*, 96 ST. JOHN’S L. REV. 353, 384 n.146 (2022).

²⁴ U.C.C. § 2-105(1) (AM. L. INST. & UNIF. L. COMM’N 2023).

²⁵ *Id.* § 2-314.

²⁶ *Id.* § 2-315.

²⁷ *Id.* § 2-313.

²⁸ *Id.* § 2-314 (“[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.”); see also James J. White & Robert S. Summers, *UNIFORM COMMERCIAL CODE 480-81* (6th ed. 2010) (“Under 2-314, a plaintiff must prove that (1) a merchant sold goods, (2) which were not ‘merchantable’ at the time of sale, (3) there was damage to the plaintiff or its property (4) caused proximately and in fact by the defective nature of the goods, and (5) notice to seller of injury.”).

²⁹ U.C.C. § 2-314(2) (AM. L. INST. & UNIF. L. COMM’N 2023).

³⁰ *Id.* § 2-316.

³¹ *Id.* § 2-106(1); 2-103.

³² *Id.* § 2-104.

Article 2. In contrast, when goods are sold by third parties on e-commerce platforms, determining which party should bear liability becomes complicated.³³

At least one scholar has suggested that “Article 2 was intended to largely do away with title as being dispositive of the rights and liabilities of the parties.”³⁴ However, e-commerce companies may argue that, to qualify as a seller under Article 2, they must hold title to the goods at issue.³⁵ After all, while Article 2’s definition of “seller” is not expressly linked to title,³⁶ its definition of the term “sale” relies on the passage of title.³⁷ E-commerce platforms may posit they possess only temporary possession of the goods, and not title, to the goods sold by third-party sellers, and, therefore, cannot be subject to liability for a breach of the implied warranty of merchantability.³⁸

In *McDonald v. LG Electronics*, which involved a defective battery, the court dismissed a breach of the implied merchantability warranty claim brought against Amazon under Maryland’s UCC.³⁹ The court reasoned that, since Amazon provided a “‘platform’ for the third-party sales,” the company did not qualify as a merchant or seller and, as a result, did not make the implied warranty of merchantability.⁴⁰

Agreements between e-commerce platforms and third-party sellers may expressly state that the platform disclaims all title to the goods and that the third-party seller is responsible for all defective goods, pricing, and producing website summaries and descriptions of the goods.⁴¹ While e-commerce platforms may not technically have title to the goods in the traditional sense, some platforms are so heavily involved in the transaction between the third-party seller and the consumer that they could qualify as a seller under Article 2. In some third-party seller transactions, the e-commerce platform may pack, dispatch, and deliver the goods and may also play a significant role in the payment process. For example, Amazon’s supply chain program offers end to end “fully automated supply chain services” for third-party sellers, including

³³ See *ELVY*, *supra* note 19, at 160–195. See generally Monestier, *supra* note 19 (discussing whether Amazon should qualify as a seller and the challenges associated with making that determination).

³⁴ Monestier, *supra* note 19, at 740–41; see also William L. Tabac, *The Unbearable Lightness of Title under the Uniform Commercial Code*, 50 Md. L. Rev. 408, 408–10 (1991) (discussing how, although the drafters rejected the title analysis, they neglected to excise it from the framework of the UCC).

³⁵ See, e.g., *State Farm Fire & Cas. Co.*, 390 F. Supp. 3d 964, 969 (W.D. Wis. 2019) (“The key dispute is whether Amazon qualifies as a ‘seller’ or ‘distributor.’ Amazon says that ‘seller’ means one who holds title to property and transfers that title to another. And because Amazon never takes title to the goods sold by third parties, it cannot be a seller.”).

³⁶ U.C.C. § 2–103.

³⁷ *Id.* § 2–106.

³⁸ *State Farm Fire & Cas. Co. v. Amazon.com Servs. Inc.*, 137 N.Y.S.3d 884, 886–87 (Sup. Ct. 2020) (“defendant argues in reply that New York law establishes bright-line rules which clearly establish that the [third party seller] was the seller in the instant transaction and not Amazon (see U.C.C. 2–106 which defines ‘sale’ as ‘the passing of title from the seller to the buyer for a price.’)”).

³⁹ 219 F. Supp. 3d 533, 542 (D. Md. 2016).

⁴⁰ *Id.*

⁴¹ See, e.g., *State Farm Fire & Cas. Co. v. Amazon.com Servs., Inc.*, 137 N.Y.S. 3D at 887–89 (discussing Amazon’s service agreement, namely its “Fulfillment by Amazon” agreement with third-party sellers and noting that “Amazon has disclaimed title.”); see also Murphy III, *supra* note 6.

“picking up items” directly from a seller’s manufacturing plant and dealing with customs issues.⁴²

Additionally, reports suggest that Amazon exercises some degree of control over the pricing of third-party products on its website by restricting the ability of third-party sellers to offer similar products at lower prices on other platforms.⁴³ Amazon also reportedly retains “more than 50% [of third-party] sellers’ revenue” for goods sold.⁴⁴ The FTC has pursued Amazon for allegedly punishing “sellers for offering lower prices elsewhere” and for forcing sellers to use the company’s “logistics services to gain access” to the company’s platform.⁴⁵ An e-commerce platform’s heavy involvement in the transaction between the third-party seller and the consumer indicates that the company has played a critical role in a transaction in goods subject to the UCC.

8.1.2 *The Implied Fitness Warranty*

In addition to the merchantability warranty, Article 2 also establishes an implied warranty of fitness for a particular purpose.⁴⁶ A successful fitness warranty claim requires that a party show that the buyer had a specific purpose for using the goods, the seller had reason to know of, at the time of contracting, that “particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or

⁴² Lauren Rosenblatt, *Amazon Launches End-to-End Supply Chain Service for Third-Party Sellers*, SEATTLE TIMES (Sept. 12, 2023), www.seattletimes.com/business/amazon/amazon-launches-end-to-end-supply-chain-service-for-third-party-sellers/ [https://perma.cc/44F5-LBLB].

⁴³ Pamela N. Danziger, *Amazon’s Third-Party Marketplace Is Its Cash Cow, Not AWS*, FORBES (Feb. 5, 2021, 9:55 AM EST), www.forbes.com/sites/pamdanziger/2021/02/05/amazons-third-party-marketplace-is-its-cash-cow-not-aws/?sh=4454c7d621c0 [https://perma.cc/U2U2-6JLJ] (quoting Jason Boyce, co-author the Amazon Jungle, who said: “In the Marketplace, Amazon writes the rules and changes them at will. Third-party sellers give up their rights to sue Amazon. Sellers basically have no rights. For example, if I as a seller offer a product for \$5 less on Walmart, Amazon will do something called buybox suppression. They’ll basically kill my listing and I will lose all of my digital real estate until I raise my price on Walmart. That isn’t good for consumers or for sellers.”).

⁴⁴ Juozas Kaziukėnas, *Amazon Takes a 50% Cut of Sellers’ Revenue*, MARKETPLACE PULSE (Feb. 13, 2023), www.marketplacepulse.com/articles/amazon-takes-a-50-cut-of-sellers-revenue [https://perma.cc/8YDM-ZXNH].

⁴⁵ Complaint, Fed. Trade Comm’n, et al v. Amazon, Inc., No. 2:23-cv-01495-JHC (W.D. Wash. Nov. 2, 2023), ECF No. 114 (“When Amazon detects elsewhere online a product that is cheaper than a seller’s offer for the same product on Amazon, Amazon punishes that seller... Amazon knocks these sellers out of the all-important “Buy Box,” the display from which a shopper can “Add to Cart” or “Buy Now” an Amazon-selected offer for a product); *see also* Ali Sullivan, *FTC Says Amazon Used Secret Algorithm to Drive Up Prices*, LAW 360 (Nov. 2, 2023, 9:42 PM EDT), www.law360.com/articles/1740142?e_id=1b4d1f65-e33a-4c55-b187-5e7c882ca03d&utm_source=engagement-alerts&utm_medium=email&utm_campaign=case_updates [https://perma.cc/TG6L-MB8U].

⁴⁶ U.C.C. § 2-315 (“Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.”).

judgment to select or furnish suitable goods.”⁴⁷ Like the implied merchantability warranty, a party must qualify as a seller under the UCC for the warranty to arise; moreover, it too can be disclaimed.⁴⁸ Thus, a company may also escape fitness warranty liability by contending that it does not qualify as a seller under the UCC.

The fitness warranty also requires a buyer to establish that it has a particular purpose for the goods that goes beyond the ordinary purpose for the goods, whereas the merchantability warranty considers the ordinary purpose.⁴⁹ For example, the comments to Section 2-315 indicate that, although a buyer of shoes may ordinarily use the goods to engage in “walking upon ordinary ground,” the “seller may know that” the buyer intends to select a specific pair of shoes for hiking or climbing.⁵⁰

Indeed, a seller’s knowledge of both the buyer’s specific purpose for the goods and the buyer’s reliance on the seller’s expertise are critical elements of the fitness warranty. Thus, as Professor David Owen observes, “the fitness warranty will not apply to the sale of a stove, if the distributor is unaware of the buyer’s particular heating needs.”⁵¹ A buyer may have an easier time proving this knowledge element in in-person transactions in which the buyer communicates his or her specific needs to a company’s salesperson or where the goods must be “specially selected or particularly manufactured and assembled for its business.”⁵² In contrast, in the online context, e-commerce platforms may successfully contend that they have no specific knowledge of a consumer’s specific requirements and that it is impossible for the company to know every consumer’s particular needs when purchasing goods online; this may be particularly true if the consumer does not ask for assistance from the e-commerce representatives via telephone or online prior to purchasing the goods.⁵³

In the online context, an e-commerce platform’s collection of data about specific buyers could, when applicable, make for a sufficient showing that the platform had reason to know of a buyer’s specific purpose for purchasing the goods.⁵⁴ By extension,

⁴⁷ *Id.*; OWEN, *supra* note 21, at 176 (discussing the fitness warranty and noting that to establish a breach of the warranty a plaintiff must show “buyers’ particular purpose ... buyer’s reliance, ... seller’s knowledge, unfit purpose ...[and]. causation and harm.”).

⁴⁸ U.C.C. § 2-315; § 2-316 (providing the ability to disclaim the warranty of fitness for a particular purpose upon meeting certain conditions, including sufficiently “conspicuous” disclaiming language).

⁴⁹ *Id.* § 2-315 cmt. 2 (“A ‘particular purpose’ differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer that is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.”).

⁵⁰ *Id.*

⁵¹ OWEN, *supra* note 21, at 180.

⁵² WHITE & SUMMERS, *supra* note 28, at 496.

⁵³ See *id.* (discussing the fitness warranty and noting that cases where “buyer’s reliance is disclosed by its request for assistance... fit neatly within 2-315; most 2-315 cases are business versus business not consumer versus business.”).

⁵⁴ See, e.g., Bryant Walker Smith, *Proximity-Driven Liability*, 102 GEO. L.J. 1777, 1798–99 (2014) (noting that an “online retailer arguably has reason to know of the buyer’s purpose in the case of an online shopper who has a child with celiac disease who runs a search for gluten-free soup on the retailer’s site”).

platforms' increasing data collection combined with the use of algorithms or artificial intelligence to mine consumer data and to recommend specific products to buyers could also constitute relevant evidence to demonstrate applicable elements of the fitness warranty.⁵⁵ Buyers may rely on specific product recommendations and designations from e-commerce platforms when purchasing goods from third-party sellers on platform companies' websites.⁵⁶

Indeed, buyers may view such designations as a "mark of quality" by the e-commerce platform.⁵⁷ For instance, an evaluation of the product recommendation badge offered by one e-commerce platform "found that four in ten" consumers believed that the badge's presence on an online product meant that the e-commerce platform had checked the product for quality and safety.⁵⁸ A buyer of a third-party seller's product via an e-commerce platform may similarly rely on the badge or product designation provided by the e-commerce platform to indicate that the product has characteristics distinct from those of similar products offered for sale on the company's website. For example, a consumer who purchases a product on Amazon, Walmart or Target that has a "Climate Pledge Friendly," "Built for Better-For the Planet" or "Target Zero" badge may rely on Amazon's, Walmart's or Target's recommendation that such products are, in fact, climate friendly.⁵⁹ These customers may also have a particular purpose for purchasing the goods that goes beyond the ordinary purpose for such products, such as making purchases that promote environmental sustainability.⁶⁰

⁵⁵ See John Villasenor, *Products Liability Law As a Way to Address AI Harms*, BROOKINGS INST. (Oct. 31, 2019), www.brookings.edu/articles/products-liability-law-as-a-way-to-address-ai-harms/ [https://perma.cc/9ENZ-9FCY].

⁵⁶ Chiara Longoni & Luca Cian, *When Do We Trust AI's Recommendations More Than People's?*, HARV. BUS. REV. (Oct. 14, 2020), <https://hbr.org/2020/10/when-do-we-trust-ais-recommendations-more-than-peoples> [https://perma.cc/Q9F4-EMNP] (discussing instances in which buyers "trust AI recommendations").

⁵⁷ Jack Horgan-Jones, *Amazon Choice System "Inherently Flawed", Says Consumer Site*, IRISH TIMES (Feb. 7, 2020), www.irishtimes.com/news/ireland/irish-news/amazon-choice-system-inherently-flawed-says-consumer-site-1.4165227 [https://perma.cc/F8SB-EHTV].

⁵⁸ *Id.*

⁵⁹ Amazon Staff, *Amazon Launches "Climate Pledge Friendly" Program*, AMAZON (Sept. 25, 2020), www.aboutamazon.com/news/sustainability/amazon-launches-climate-pledge-friendly-program [https://perma.cc/GFL2-G2D3]; see also Dan Berthiaume, *Amazon Certifies Eco-Friendly Products; Climate Pledge Gains Momentum*, CHAIN STORE AGE (Sept. 24, 2020), <https://chainstoreage.com/amazon-certifies-eco-friendly-products-climate-pledge-gains-momentum> [https://perma.cc/ZY2Y-GWBK]. Walmart's, "Built for Better," program also places icons on eco-friendly products. Jane Ewing, *Walmart Launches 'Built for Better' to Help Customers Shop with Purpose*, WALMART (Sept. 21, 2021), corporate.walmart.com/news/2021/09/20/walmart-launches-built-for-better-to-help-customers-shop-with-purpose [https://perma.cc/84D8-CVEG]. Target also launched its own initiative known as "Target Zero." Target Zero, TARGET, www.target.com/c/target-zero/-/N-hnosx (last visited December 31, 2023) [https://perma.cc/3NLE-4NWF]; see also Dan Berthiaume, *Target Identifies Eco-Friendly Products with New Icon*, CHAIN STORE AGE (Mar. 9, 2022), <https://chainstoreage.com/target-identifies-eco-friendly-products-new-icon> [https://perma.cc/4H65-GFCK].

⁶⁰ See Ewing, *supra* note 59 (noting that the "Built for Better" campaign will help "consumers shop with purpose," whether it "be healthy foods, clean living or sustainability.").

Admittedly, there may be instances in which a company collects data about an individual and uses its algorithm to make recommendations of specific products that the buyer ultimately purchases, but the buyer uses the product in a novel and unexpected manner. The company may lack the requisite knowledge (reason to know) of this particular purpose and that the buyer was relying on the seller's expertise to select the goods. In such cases, courts could consider shielding the company from a breach of warranty claim if the company proves this unless the buyer can demonstrate that the company could reasonably anticipate the buyer's particular purpose for purchasing the product.

8.1.3 Express Warranties

In addition to providing buyers with a cause of action for breach of implied warranties, Article 2 also does so for breach of express warranties. Article 2 sets forth several instances in which a seller can create an express warranty, including via an "affirmation of fact or promise" that "relates to the goods and becomes part of the basis of the bargain" and a "description of the goods which is made part of the basis of the bargain."⁶¹ On the issue of reliance, the relevant comments to Section 2-313 notes that "affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown."⁶² E-commerce platforms may expressly attempt to disclaim all warranties, including express warranties.⁶³ However, unlike implied warranties, express warranties generally cannot be disclaimed.⁶⁴

The creation of an express warranty also depends on a party qualifying as a seller under the UCC.⁶⁵ As such, the issue of e-commerce platforms' status as sellers under Article 2 for merchantability and fitness warranty purposes is also relevant

⁶¹ U.C.C. § 2-313(1).

⁶² *Id.* cmt. 3.

⁶³ See Robert A. Hillman & Ibrahim Barakat, *Warranties and Disclaimers in the Electronic Age*, 11 YALE J.L. & TECH. 1, 3 (2009) (an empirical study of online warranty disclaimers finding that "[i]n a sample of fifty-four software titles culled from the top one hundred bestselling software products in which the licensor made its End User License Agreement (EULA) available on its website without a purchase, fifty-three contain express warranties on the website and e-disclaimers in the EULAs that may erase all or much of this quality protection.").

⁶⁴ See U.C.C. § 2-316(1); *id.* cmt. 1; WHITE & SUMMERS, *supra* note 28, at 571-72 ("If the factfinder determines that a seller's statement created an express warranty, words purportedly disclaiming that warranty will still be 'inoperative' for the disclaiming language is inherently inconsistent"); *see also* OWEN, *supra* note 21, at 209 (contending that the second clause in 2-316(1) "invalidates attempts to limit or disclaim an express warranty where the disclaimer contradicts an essential aspect of the warranty, involving such basic features as a product's safety, or its express description as new, or the descriptions and pictures in advertisements and brochures.").

⁶⁵ U.C.C. § 2-313(1) (giving instances in which "express warranties by the seller are created"); *see also* WHITE & SUMMERS, *supra* note 28, at 453 (6th ed. 2010) (discussing the express warranty and noting that "the prospective defendant... must be a 'seller.'").

to express warranty claims. Express warranties generally require that a seller make statements about the specific product at issue,⁶⁶ but the seller need not “use formal words such as ‘warrant’ or ‘guarantee.’”⁶⁷ An express warranty breach occurs “because a manufacturer or other seller is deemed to have assumed responsibility for the harmful consequences of false representation made to consumers in an effort to sell a product.”⁶⁸

In some instances, an e-commerce platform may make material statements and affirmations of fact or promises about the performance and composition of goods, which could constitute express warranties.⁶⁹ The failure of the product to meet such statements may constitute a breach of the warranty.⁷⁰ For example, the Climate Pledge Friendly Badge designation on select products on Amazon’s website discussed earlier may constitute an express warranty to the extent the goods are “designed to reduce carbon emissions through increased efficiency and better packaging.”⁷¹ Indeed, such designations can extend to goods sold by third-party sellers.⁷²

An e-commerce platform may successfully attempt to avoid liability for breach of express warranty claims by contending that the manufacturer of the good or the third-party seller made the statements. Recall that e-commerce platforms may

⁶⁶ See e.g., *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 8 F. Supp. 3d 467, 482 (S.D.N.Y. 2014) (“To state a claim for breach of express warranty under New York law, a plaintiff must allege ... the existence of a material statement amounting to a warranty”); see also OWEN, *supra* note 21, at 149 (noting that express warranties flow “from a seller’s words or other form of communication rather than from any inherent characteristic of the product itself. Hence, as with tortious misrepresentation, claims for breach of express warranty rest on the falsity of such asserted information rather than on a deficiency in the product itself. Stated otherwise, a plaintiff need not prove that a product was ‘defective,’ or that the seller was at fault, to prove that the seller made and breached an express warranty.”).

⁶⁷ U.C.C. § 2-313(2); see also WHITE & SUMMERS, *supra* note 28, at 453–54.

⁶⁸ OWEN, *supra* note 21, at 149.

⁶⁹ See, e.g., *Brodie v. Green Spot Foods, LLC*, 503 F. Supp. 3d 1, 10 (S.D.N.Y. 2020) (In a case involving personal injuries resulting from a food with harmful ingredients sold on Amazon, the court noted that Amazon’s “Guarantee arguably does constitute an express warranty under New York Law” insofar as it allowed customers to receive a refund from “Amazon if an item sold by a third party seller was damaged, defective, materially different, or you changed your mind.” After all, New York courts recognize “this sort of guarantee—where a seller promises to repair or refund a product if defects are found by the purchaser—as constituting an express warranty.”).

⁷⁰ See *id.* (finding that the plaintiff failed to allege sufficient facts to establish such a breach, noting that, to do so, the plaintiff needed to establish that Amazon “refused to issue refund upon a valid request”). Notably, “an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.” U.C.C. § 2-313(2); see, e.g., *Brodie*, 503 F. Supp. at 10 (The court also discussed other relevant phrases on packaging and advertisements, such as “Premium Quality,” “Popular,” and “Most Dependable,” which it deemed “mere puffery and not express warranties, as no reasonable consumer could rely on them as statements of fact.”).

⁷¹ Amazon Staff, *supra* note 59; see also Berthiaume, *supra* note 59.

⁷² See, e.g., 8-Pack Organic Baby Bandana Drool Bibs – Stylish Unisex Bandana Bibs, Super Absorbent Bandana Drool Bibs, Gentle Teething Bibs for Infants, Organic Cotton Baby Bib (Daybreak), AMAZON, www.amazon.com/dp/B08G4SDDQC/ref=cm_gf_abne_d_po_eo_qdo_i3d8sbb9pj7SUM37Kkw4 [https://perma.cc/F3PE-DJEG].

require third-party sellers to supply online product descriptions. In *Eberhart v. Amazon.com*, a lawsuit involving the sale of a defective coffee pot by a third-party seller on Amazon's platform, the court granted summary judgment to Amazon on the plaintiff's breach of express warranty and misrepresentation claims by reasoning that "Amazon did not make any statement about the coffeemaker."⁷³

One potential strategy that plaintiffs could use to maintain a claim against an e-commerce platform is to contend that the platform adopted the statements of the manufacturer or the third-party seller regarding the description of the goods.⁷⁴ Some courts acknowledge that sellers, in certain instances, have, in fact, adopted the statements and express warranty made by third parties.⁷⁵ For instance, in *Hillcrest Country Club v. ND Judds Co.*, the court noted that, although mere sale will not constitute adoption of an express warranty, it may occur "where a seller makes an affirmation about the manufacturer's warranty by means of a statement of fact, promise or some action which tends to induce the buyer to purchase the goods."⁷⁶ Similarly, to the extent that an e-commerce platform engages in conduct or "some action" that affirms the product descriptions of third-party sellers, the platform may have, even if inadvertently, adopted the express warranty created by the third-party seller.

Conduct such as the use of algorithms or other methods to recommend and highlight products offered for sale by certain third-party sellers could constitute adoption of affirmations of fact or promises made by third-party sellers regarding the goods, particularly when buyers purchase goods based on a platform's

⁷³ *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 400 (S.D.N.Y. 2018).

⁷⁴ OWEN, *supra* note 21, at 946. ("An alternative method for holding a retailer responsible for a manufacturer's express warranty is to establish that the retailer 'adopted' the manufacturer's warranty. It is reasonable, of course, to hold a retailer liable for the failure of another party's express warranty that the retailer has undertaken to support. But 'adoption' logically requires that the retailer affirmatively communicate to the purchaser the idea that the retailer stands behind the manufacturer's warranty, for otherwise the purchaser has no fair claim to hold the retailer to a warranty it did not make.").

⁷⁵ See, e.g., *Hillcrest Country Club v. N.D. Judds Co.*, 461 N.W.2d 55, 62–63 (Neb. 1990) (finding that the distributor entered into an agreement with the buyer that the goods would satisfy the manufacturer's warranty); *Scovil v. Chilcoat*, 424 P.2d 87, 91 (Okla. 1967) (finding sellers had adopted statements regarding a Volkswagen engine). *But see Orrison v. Ferrante*, 72 A.2d 771, 774 (D.C. 1950) ("We are of the opinion, furthermore, that the affixing of Orrison's name opposite the words 'sold by' on the express warranty was not an adoption of that warranty by Orrison. This was totally different in effect from the endorsement of a promissory note. It was clearly only the identification of the seller."); *Pemberton v. Dean*, 92 N.W. 478, 479 (Minn. 1902) ("Merely selling a wheel with a printed placard did not amount to an express warranty on the seller's part."); *Wallace v. McCampbell*, 156 S.W.2d 442, 445 (Tenn. 1941) ("There must be some affirmation of fact or promise by the seller, the tendency of which induced the buyer to purchase the machine in order to constitute him a warrantor. This record contains no such affirmation or promise."); *Cochran v. McDonald*, 161 P.2d 305, 307 (Wash. 1945) ("The respondent in this case did not sell the antifreeze to appellant and, having had no transaction with him, did not either adopt the warranty as to him or assign the warranty to him. It must follow, therefore, that the respondent is not liable to appellant upon the express warranty of the manufacturer.").

⁷⁶ *Hillcrest*, 461 N.W.2d. at 62.

product recommendation system. For instance, Amazon describes the Amazon Choice designation for third-party products as covering products that are “highly rated, well-priced and available to ship immediately” and uses the designation to recommend products that Amazon “thinks customers may like.”⁷⁷ Walmart’s “Built for Better-For You” icon similarly seeks to designate “more nutritious products or those that meet independent and authoritative standards that recognize products made without specific materials.”⁷⁸ Although one might contend that these designations are mere puffery or the seller’s opinion regarding the goods, these designations could constitute an adoption of express warranties made by third-party sellers or manufacturers of goods. For instance, if a manufacturer of a product notes that a product is “made without parabens” and the product also receives a separate “Built for Better For You” icon, a viable argument exists that the e-commerce platform has adopted this express warranty by giving the product the icon.

In *Riley v. Ken Wilson Ford, Inc.*, the court found that an express warranty arose when the dealer’s sales agent informed the buyer that the vehicle at issue had a “12 month 12,000 mile warranty” as the “plaintiffs had no way of determining that such [a] warranty [was] limited to the manufacturer.”⁷⁹ Similarly, some consumers may be unaware that production descriptions or affirmations of fact or promises about the goods are limited to or solely being made by third-party sellers rather than the e-commerce platform.

8.2 STRICT PRODUCTS LIABILITY AND NEGLIGENCE

In addition to warranty liability, e-commerce platforms may also expose themselves to products liability claims in tort for defective products sold by third-party sellers on their websites. The Restatement (Second) of Torts § 402A notes that

one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.⁸⁰

⁷⁷ *Amazon’s Choice – Frequently Asked Questions*, AMAZON, www.amazon.com/b?ie=UTF8&node=21449952011 (last visited Dec. 31, 2023) [<https://perma.cc/4874-NNEQ>]; see also Louise Matsakis, *What Does It Mean When a Product Is ‘Amazon’s Choice’?*, WIRED (June 4, 2019), www.wired.com/story/what-does-amazons-choice-mean/ [<https://perma.cc/E5QR-F66H>].

⁷⁸ See Ewing, *supra* note 59.

⁷⁹ 426 S.E.2d 717, 721 (N.C. Ct. App.); OWEN, *supra* note 21, at 947 n. 76 (discussing the Riley case and noting that “by telling buyers about manufacturer’s 12-month/12,000 mile warranty, dealer adopted the warranty”).

⁸⁰ RESTatement (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

Contemporary products liability law in a majority of “states was constructed squarely on” the Restatement.⁸¹ State products liability law may restrict products liability claims to entities that qualify as manufacturers, distributors, or sellers.⁸² This limitation can allow e-commerce platforms to escape liability for problematic products.

Admittedly, some courts have rejected e-commerce platforms’ attempt to escape products liability claims. In *Bolger v. Amazon.com*, a case involving the third-party sale of a battery that exploded and caused the plaintiff personal injury, a California court denied Amazon’s motion for summary judgment on the plaintiff’s claims of strict liability⁸³ and negligence.⁸⁴ As is the case with the UCC, the question of title can also be a relevant factor in determining whether an e-commerce platform is a seller for purposes of strict products liability.⁸⁵ Amazon argued that it was not a seller, distributor, or manufacturer of the battery and, therefore, could not bear strict products liability or “any similar tort theory” of liability.⁸⁶ In rejecting this argument, the court refused to endorse a narrow interpretation of the term “seller” or “distributor.”⁸⁷ The court reasoned that “Amazon had placed itself between” the third-party seller and the plaintiff “in the chain of distribution by accepting the product from the third-party seller, storing it in its warehouse, and controlling the conditions of [the third-party seller’s] offer for sale on Amazon.”⁸⁸ The court also supported its conclusion by highlighting the policy reasons behind strict products liability doctrine; in particular, the court noted that Amazon is likely to be the only party available for suit in the distribution chain and that Amazon, “like conventional retailers, has the capacity to adjust the cost of compensating injured plaintiffs between itself and the third-party sellers in the course of their ongoing relationship.”⁸⁹

In *Loomis v. Amazon.com*, a California court, relying in part on *Bolger*, found that Amazon could be strictly liable, even though it did not provide product fulfillment services for the defective product.⁹⁰ The court reasoned that “Amazon’s own

⁸¹ OWEN, *supra* note 21, at 246.

⁸² See, e.g., N.J. STAT. ANN. § 2A:58C-2 (West 2019) (“A manufacturer or seller of a product shall be liable” if certain conditions are met); TENN. CODE ANN. § 29-28-102 (2019) (defining “manufacturer” and “seller”).

⁸³ 53 Cal. App. 5th 431, 462 n.12 (2020).

⁸⁴ *Id.* at 466.

⁸⁵ E.g., *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 107 (Tex. 2021).

⁸⁶ *Bolger*, 53 Cal. App. 5th at 437.

⁸⁷ *Id.* at 479 (“Amazon contends *Bolger* was erroneously decided because it ignores long-standing limitations on strict liability law.” However, “we explain below...how Amazon has misinterpreted...the cases regarding liability of service providers.”).

⁸⁸ *Id.*

⁸⁹ *Id.* at 454.

⁹⁰ 63 Cal. App. 5th 466, 483 (2021) (“TurnUpUp did not elect to utilize the [Fulfillment by Amazon] services. ... We are persuaded the trial court erroneously granted summary adjudication on the strict liability claim based on a stream of commerce approach.”); see also Eric Goldman, *California Court Holds Amazon Strictly Liable for Marketplace Items Amazon Didn’t Fulfill—Loomis v. Amazon*, TECH. & MKTG. L. BLOG (Aug. 28, 2021), <https://blog.ericgoldman.org/archives/2021/04/>

business practices ma[d]e it a direct link in the vertical chain of distribution under California's strict products liability doctrine.”⁹¹ The court found Amazon's actions were “consistent with a retailer or a distributor of consumer goods” for purposes of strict products liability.⁹²

In *MS v. Amazon.com*, a 2023 case involving a hidden “embedded pinhole camera” sold by a third-party seller and used surreptitiously to observe the plaintiff, the district court rejected Amazon's arguments that it had no duty of care to the plaintiff.⁹³ The court noted that Amazon “failed to properly inspect” the plaintiff's camera on three separate occasions and that Amazon exercised some degree of control over the camera's online description as well as promoted the product for sale on its platform.⁹⁴

Although in some recent cases, courts have declined to accept e-commerce platforms attempts to deflect products liability by contending that they are not product sellers or distributors, historically such arguments have proved fruitful in several cases.⁹⁵ For instance, the court in *Amazon.com v. McMillan* concluded that Amazon was not a seller while applying Texas' products liability law, a section of law heavily influenced by the Restatement.⁹⁶ It reasoned that “considering title to determine seller status is also consistent with the approach taken by other jurisdictions that follow the Restatement's framework for strict products liability.”⁹⁷

In *State Farm Fire & Casualty Co. v. Amazon.com*, the court found that Amazon was not a seller under Arizona's strict liability law and instead analogized Amazon's shipping and packaging practices in connection with the third-party sale of goods at issue to that of a shipper, such as the U.S. Postal Service.⁹⁸ The court also noted that Amazon did not obtain title to the goods, which supported its conclusion that Amazon was not a seller.⁹⁹ In *Eberhart v. Amazon.com*, the court granted Amazon's

california-court-holds-amazon-strictly-liable-for-marketplace-items-amazon-didnt-fulfill-loomis-v-amazon.htm [<https://perma.cc/U86V-K7C4>] (discussing the Loomis case and noting that “A second California appellate court has endorsed Bolger but goes further: strict liability applies even if Amazon doesn't do the fulfillment.”).

⁹¹ *Loomis*, 63 Cal. App. 5th at 480.

⁹² *Id.* at 481. In fact, the court stated that “[w]hatever term” one uses “to describe Amazon's role, be it 'retailer,' 'distributor,' or merely 'facilitator,'” Amazon “was pivotal in bringing the product here to the consumer.” *Id.* at 485 (quoting *Bolger v. Amazon.com*, 53 Cal. App. 5th 431, 438 (2020)). Amazon's actions, the court asserted, “support” the “conclusion that Amazon is in the vertical chain of distribution of the alleged defective hoverboard.” *Id.* at 485.

⁹³ No. 3:23-cv-0046, 2023 WL 8283642. At *1 (S.D. W. Va. Nov. 30, 2023).

⁹⁴ *Id.* at *3 (denying Amazon's motion to dismiss the negligence claim).

⁹⁵ Eric Goldman, *Texas Supreme Court Says Amazon Isn't the Seller of Marketplace Items It Fulfills—Amazon v McMillan*, TECH. & MKTG. L. BLOG (July 3, 2021), <https://blog.ericgoldman.org/archives/2021/07/texas-supreme-court-says-amazon-isnt-the-seller-of-marketplace-items-it-fulfills-amazon-v-mcmillan.htm> [<https://perma.cc/8K47-35BT>].

⁹⁶ 625 S.W.3d 101, 112 (Tex. 2021).

⁹⁷ *Id.* at 111.

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

⁹⁹ *Id.*; see also *Great N. Ins. Co. v. Amazon.com, Inc.*, 524 F. Supp. 3d 852, 857 (N.D. Ill. 2021) (dismissing strict products liability claim because Amazon “never sourced, owned, possessed, or offered them for sale.”).

summary judgment motion on the plaintiff's strict liability claim by reasoning, in part, that Amazon did not take title to the product from the third-party seller.¹⁰⁰ The court noted that "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."¹⁰¹ The *Eberhart* court also dismissed the plaintiff's negligence claim, reasoning that since the e-commerce platform was not the manufacturer, seller, or distributor of the defective product, it did not owe a duty to the plaintiff.¹⁰² A negligent misrepresentation claim involving a potentially false description of a defective product may also succumb to successful arguments by an e-commerce platform that the platform made no statements about the defective product if the third-party seller drafted the product description.¹⁰³

Courts may also consider the level of control that the e-commerce platform exercises over the product and transaction in determining whether the company is a seller or distributor for purposes of products liability law.¹⁰⁴ For instance, New Jersey's products liability statute defines a product seller as "a party who sells; distributes; leases; installs; ... packages; labels; markets; ... or otherwise is involved in placing a product in the line of commerce."¹⁰⁵ In *Allstate N.J. Insurance Company v. Amazon.com*, the district court noted that a company is only a product seller for purposes of the New Jersey statute if it "exercised control of the product itself—that is, the ability to exercise dominance over, for example, the manner in which the product is sold."¹⁰⁶ The court reasoned that, although Amazon may have assisted storing and shipping the defective battery, those actions did not provide sufficient evidence of control and did not make Amazon a seller.¹⁰⁷ Similarly, in *Fox v. Amazon.com*, the court found that Amazon was not a seller under Tennessee's products liability statute because it did not exercise sufficient control over the alleged

¹⁰⁰ 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018).

¹⁰¹ *Id.* at 398.

¹⁰² *Id.* at 400.

¹⁰³ See, e.g., *Great N. Ins. Co.*, 524 F. Supp. 3d 852, 859 (discussing the elements of a negligent misrepresentation claim and noting that "a reasonable jury could not find that Amazon made the allegedly false statement, *i.e.*, that the Paradise hoverboard contained Samsung batteries [because the] ... product description for the hoverboard ... was written by Paradise and provided by Paradise to Amazon").

¹⁰⁴ See, e.g., *Stiner v. Amazon.com, Inc.*, 164 N.E.3d 394, 399 (Ohio 2020) ("based on the understanding that placing a product in the stream of commerce requires some act of control over the product, we conclude that Amazon should not be held liable as a supplier under the Ohio Products Liability Act.").

¹⁰⁵ N.J. STAT. ANN. § 2A:58C-8 (West 2019). The statute also defines a manufacturer as "(1) any person who designs, formulates, produces, creates, makes, packages, labels or constructs any product or component of a product; (2) a product seller with respect to a given product to the extent the product seller designs, formulates, produces, creates, makes, packages, labels or constructs the product before its sale; (3) any product seller not described in paragraph (2) which holds itself out as a manufacturer to the user of the product." *Id.*

¹⁰⁶ *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738 (FLW), 2018 U.S. Dist. LEXIS 123081, at *20 (D.N.J. July 24, 2018).

¹⁰⁷ *Id.* at *23-24.

defective hoverboard sold by a third party on its platform.¹⁰⁸ The court reasoned that Amazon “did not choose to offer the hoverboard for sale, did not set the price of the hoverboard, and did not make any representations about the safety or specifications of the hoverboard on its marketplace.”¹⁰⁹

These cases demonstrate that plaintiffs who purchase goods sold by third-party sellers on e-commerce platforms may face significant hurdles when attempting to bring strict products liability and negligence claims against e-commerce platforms. Several cases, including the ones discussed earlier, suggest that e-commerce platforms are not product sellers for purposes of products liability law. Indeed, as one court evaluating this issue has observed, “many courts have concluded that Amazon [and other e-commerce platforms are] are not seller[s] when [they] do not hold or relinquish title to the product.”¹¹⁰

On the other hand, an e-commerce platform’s heavy involvement in a transaction, such as conducting multiple inspections of a product offered for sale by a third-party company, may lead some courts to reject e-commerce platform’s arguments that they are not sellers for purposes of products liability law or owe a duty of care to buyers. As of the date of writing, the case law in this area is unclear, leaving behind neither a definitive nor consistent answer to the question of whether an e-commerce platform qualifies as a seller or distributor under products liability law or whether such entities consistently owe buyers a duty of care for the sale of third-party products on their platforms.

8.3 CDA IMMUNITY

In addition to requirements found in warranty and products liability law that may serve as a bar to successful claims against e-commerce platforms, the federal CDA can also negatively impact the viability of certain products liability claims.¹¹¹ The CDA provides, in relevant part, that “[no] provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹¹² The CDA allows e-commerce

¹⁰⁸ No. 3:16-cv-03013, 2018 U.S. Dist. LEXIS 90101, at *20–21 (M.D. Tenn. May 30, 2018), *aff’d in part, rev’d in part*, 930 F.3d 415, 424, 427 (6th Cir. 2019). (“A primary purpose of [the TPLA] [Tennessee Products Liability Act of 1978] is ‘to ensure that an injured consumer may maintain a strict liability action against whomever is most likely to compensate him for his injuries.’ ... [W]e are not convinced, on the record before us, that Defendant exercised sufficient control over Plaintiff Megan Fox’s hoverboard to be deemed a ‘seller’ of the hoverboard under the TPLA. Thus, we hold that there is no genuine dispute of material fact regarding Plaintiffs’ TPLA claim, and affirm the district court’s dismissal [but] we hold that Defendant assumed a duty to warn Plaintiff Megan Fox of the dangers posed by the hoverboard when it sent her the December 12, 2015 email [instructing the recipient to “pass along” the warnings to the end-user”].”).

¹⁰⁹ 930 F.3d 415, 425 (6th Cir. 2019).

¹¹⁰ Amazon.com, Inc. v. McMillan, 625 S.W.3d 101, 111 (Tex. 2021); *see also* Goldman, *supra* note 95.

¹¹¹ 47 U.S.C. § 230 (2018).

¹¹² *Id.* § 230(c)(1).

platforms and other qualifying entities to escape certain products liability claims associated with speech published by third parties. Some technology companies have also argued that they should receive CDA immunity from certain claims that are based on their use of targeted algorithmic recommendation systems.¹¹³

While the CDA should not apply to bar claims involving products liability and warranty claims when such claims seek to hold e-commerce platforms liable for their own conduct, some courts have found that the CDA immunizes e-commerce platforms from claims for problematic products sold on their platforms when such claims would require the court to treat the e-commerce platform as the “speaker or publisher of content” provided by a third party.¹¹⁴ Professor Eric Goldman suggests that, generally, because of the CDA, an e-commerce platform such as eBay “is not liable when its merchants sell problematic goods.”¹¹⁵ Several courts have adopted, to varying degrees, this approach.¹¹⁶

For instance, in *McDonald v. LG. Electronics, USA, Inc.*, a case involving the third-party sale of defective battery, the court dismissed the plaintiff’s failure to warn negligence claim due to CDA immunity, but observed that, if a consumer proves

¹¹³ See, e.g., *Force v. Facebook, Inc.*, 934 F.3d 53, 65–66 (2nd Cir. 2019) (finding, in a case involving content supporting terrorism appearing on its platform, that Facebook’s “matchmaking” tools, such as its newsfeeds that use algorithms to cull out content most likely to interest users, do not render Facebook a “non-publisher” ineligible for CDA immunity); *see also* *Gonzalez v. Google LLC*, 2 F.4th 871, 894 (9th Cir. 2021), *vacated*, 598 U.S. 617 (2023) (per curiam) (stating it that, even if it “takes as true the allegation that Google’s algorithms recommend ISIS content to users,” the “algorithms do not treat ISIS-created content differently than any other third-party created content,” and, as a result, Google retains CDA immunity).

¹¹⁴ Kim, *supra* note 23, at 358. Professor Kim notes “Section 230 poses challenges when a product liability claim is brought against a social media platform as opposed to one where goods are sold.” *Id.* at 367. She further points out that claims “based upon contract or breach of warranty do not implicate section 230 because they are not based upon content posted by others.” *Id.* at 383. In the *Bolger* case, the court “rejected Amazon’s claims that Section 230 barred the plaintiff’s strict products liability claim associated with the sale of a defective laptop on Amazon’s website;” it reasoned that the plaintiff’s strict liability claims depended on “Amazon’s own involvement in the distribution of an allegedly defective product, not on its status as a speaker or publisher of content provided by a third-party seller for a product listing.” *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 464 (2020). It also noted that “courts have declined to apply Section 230 to strict products liability claims.” *Id.* In a related case involving the purchase and sale of counterfeit products on eBay, the court concluded that the “imposition of [California Autographed Sports Memorabilia] liability on eBay, as well as liability for negligence and violation of the UCL, [wa]s inconsistent with section 230 because appellants’ causes of action ultimately hold eBay responsible for misinformation or misrepresentations originating with other defendants or third parties.” *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 820 (2002). After all, eBay “merely made the individual defendant’s false product descriptions available to other users on its Web site, or provided the web site on which the individual defendants designated their collectibles as autographed so to allow such a claim would mean placing eBay in the shoes of the individual defendants, making it responsible for their publications or statements.” *Id.* at 832–33.

¹¹⁵ Eric Goldman, *eBay Isn’t Liable for Selling Recalled Merchandise—Hinton v. Amazon, TECH. & MKTG. L. BLOG* (Dec. 17, 2014), <https://blog.ericgoldman.org/archives/2014/12/ebay-isnt-liable-for-selling-recalled-merchandise-hinton-v-amazon.htm> [<https://perma.cc/84WW-NYEC>].

¹¹⁶ *Id.* (citing *Stoner v. eBay, Inc.*, No. 305666, 2000 WL 1705637 (Cal. Super. Ct. Nov. 1, 2000)).

that an e-commerce platform “played a *direct* role in tortious conduct – through its involvement in the sale or distribution of the defective product – Section 230” of the CDA will not immunize a defendant “from all products liability claims.”¹¹⁷ The court reasoned that the negligent failure to warn claim sought to impose on the e-commerce platform either “a duty to edit and filter content posed by third parties” on the e-commerce platform’s website or “a duty to speak alongside content posted by third parties.”¹¹⁸

In *Hinton v. Amazon.com*, the court rejected claims arising from the sale of defective hunting products recalled by the CPSC and reasoned that “the expansive scope of CDA immunity has been found to encompass state tort claims, alleged violations of state statutory law, requests for injunctive relief, and purported violations of federal statutes not specifically excepted by § 230.”¹¹⁹ In *Hinton*, the plaintiff alleged various claims, including breach of the implied warranty of merchantability, negligence, failure to warn, and violation of federal law.¹²⁰ Similarly, in *Inman v. Technicolor USA, Inc.*, the plaintiff asserted various products liability and warranty claims based on the sale of allegedly defective vacuum tubes on eBay’s website.¹²¹ The court held that the CDA immunized eBay from liability to the extent that those claims “rest[ed] on the use of eBay’s website by third-party users.”¹²²

In *Great Northern Insurance v. Amazon.com*, the court found the CDA barred plaintiff’s negligent misrepresentation claim against Amazon for the sale of defective hoverboards on the company’s website.¹²³ The court determined that, because Amazon did not author the product description for the defective product, Amazon could not “be treated as the ‘speaker’ of [that content] for purposes of the negligent misrepresentation claim.”¹²⁴ In *Eberhart v. Amazon.com*, the district court noted that, to the extent that the plaintiff sought to assert a negligence claim that Amazon

¹¹⁷ 219 F. Supp. 3d 533, 537–40 (2016) (finding that “while plaintiff’s negligence and breach of implied warranty claims (Counts VI and VII) are not barred under the [CDA], plaintiff’s negligent failure to warn claim (Count V) falls within the scope of Section 230” of the CDA and “must be dismissed”).

¹¹⁸ *Id.* at 538; *see also* *McMillan v. Amazon.com, Inc.*, No. 4:18-CV-2242, 2020 U.S. Dist. LEXIS 102025, at *4 (S.D. Tex. June 8, 2020) (plaintiff “rais[ed] five causes of action against Amazon: (1) strict liability for design defect; (2) strict liability for marketing defect; (3) breach of implied warranty; (4) negligence; and (5) gross negligence.” The court evaluated the CDA’s applicability to products liability claims associated with the third-party sale of a remote with a battery compartment flaw on Amazon’s website and found that the claims that “relate to Amazon’s editorial control over the product detail page and failure to provide adequate warning on the page” were barred by the CDA. *Id.* at *23.)

¹¹⁹ 72 F. Supp. 3d 685, 689, 691 (2014) (“Plaintiff has failed to evince any legally cognizable exception to the application of CDA immunity to the claims presently before the Court.”).

¹²⁰ *Id.* at 687 (plaintiffs’ amended complaint presented “the following counts: (1) request for injunction; (2) negligence; (3) intentional conduct; (4) gross negligence; (5) breach of the implied warranty of merchantability; (6) failure to warn; (7) breach of the duty of good faith and fair dealing; (8) violation of the Mississippi Consumer Protection Act; (9) violation of federal law; and (10) punitive damages.”).

¹²¹ No. 11-666, 2011 WL 5829024, at *1 (W.D. Pa. Nov. 18, 2011).

¹²² *Id.* at *8.

¹²³ 524 F. Supp. 3d 852, 853, 859 (N.D. Ill. 2021).

¹²⁴ *Id.*

was liable, “either directly or vicariously, for the content it permitted [the third-party seller] to post on *amazon.com*, such a claim is preempted by § 230 of the [CDA].”¹²⁵

While the CDA may not bar breach of warranty, strict products liability, and certain negligence claims that rely on an e-commerce platform’s direct role in a transaction (as opposed to the content of the website), the CDA can, in some instances, shield e-commerce companies from other types of claims involving problematic products, such as negligent misrepresentation or negligent failure to warn, particularly when those claims appear to rely on online content submitted by the third-party seller.¹²⁶

To avoid the CDA hurdle when the source of the product’s problem is the inclusion of a harmful substance, a consumer could attempt to bring a somewhat analogous claim under state law that mandates disclosure of harmful substances, assuming that there is no other source of federal law that may preempt such a claim. California’s Safe Drinking Water and Toxic Enforcement Act of 1986, also known more commonly as Proposition 65,¹²⁷ requires any entities “in the course of doing business” to first make specific disclosures by providing clear and reasonable warnings that a product contains “chemical[s] known to the state to cause cancer or reproductive toxicity.”¹²⁸ Since Proposition 65 claims do not appear to be consistently preempted by the CDA, an e-commerce platform that fails to provide necessary warnings for products on its website that contain harmful chemicals may expose itself to liability.¹²⁹

In *Lee v. Amazon*, the court found that the CDA did not bar the plaintiffs Proposition 65 claim involving a listing of a product containing mercury sold by a third party on Amazon’s website without a Proposition 65 warning.¹³⁰ The court reasoned that the Proposition 65 claim was not “an attempt to hold Amazon responsible” for content posted by the third-party seller and such a claim did “not require Amazon to modify or remove third-party content but rather to provide a warning where Amazon’s own conduct makes it subject to [Proposition 65].”¹³¹ Moreover, if a “brick-and mortar-drug store” had sold the product, the court noted, the seller would

¹²⁵ 325 F. Supp. 3d 393, 400 n.5 (S.D. N.Y. 2018).

¹²⁶ See, e.g., *Loomis v. Amazon.com, LLC*, 63 Cal. App. 5th 466, 474 n.3 (noting that “Amazon concede[d] the CDA only applied to shield it from [the plaintiff’s] fraud claim and not [the plaintiff’s] strict liability and negligence claims.”). See generally OWEN, *supra* note 21, at 109–136 (giving a detailed discussion of the requirements of a negligent failure to warn, negligent misrepresentation and fraud claim in the context of products liability for defective products).

¹²⁷ CAL. HEALTH & SAFETY CODE § 25249.5 et seq. (West 1986).

¹²⁸ *Id.* § 25249.6.

¹²⁹ See, e.g., *Lee v. Amazon.com, Inc.*, 76 Cal. App. 5th 200, 254 (2022) (“Proposition 65 imposes a duty to warn on every business that “exposes” an individual to a listed chemical.”).

¹³⁰ *Id.* at 260.

¹³¹ *Id.* at 258–60. (“Proposition 65 is not inconsistent with the CDA because imposing liability on Amazon for failing to comply with its own, independent obligations under Proposition 65, does not require treating Amazon as the publisher or speaker of third-party sellers’ content. Accordingly, if Lee can establish all the elements of a violation of Proposition 65, [s]ection 230 does not immunize Amazon from liability.”).

have had to provide a Proposition 65 warning and so too should Amazon.¹³² Indeed, the court determined that “nothing in the text or purpose of the CDA suggests it should be interpreted to insulate Amazon from responsibility under Proposition 65 that would apply to a brick-and-mortar store.”¹³³ The *Lee* case suggests that, if a state’s laws mandate warnings for products and disclosures in connection with the sale of products, such a law may prove to be a viable route to defeat CDA immunity.

8.4 ADDITIONAL PROPOSALS

Amazon announced plans in 2021 to provide some compensation to buyers of defective goods sold by third party-sellers, but the company indicated that this policy goes “far beyond [its] legal obligations,” suggesting that third party sellers rather than Amazon remain legally responsible for such products.¹³⁴ Additionally, in July 2024, the CPSC issued an order finding that Amazon qualifies as a distributor under federal law and is responsible for providing notices of associated recalls of third-party hazardous products, among other things.¹³⁵ Despite these developments, amendments are still needed to existing state laws to adequately protect consumer interests.

Given the significant role that e-commerce platforms play in the online distribution of products, they could, upon meeting certain criteria, qualify as sellers and merchants of goods sold by third parties on their platforms for purposes of warranty and products liability claims. Amendments to state laws could give effect to such a proposal. For instance, Article 2’s definitions of seller and merchant could specifically cover e-commerce platforms. The UCC could shed light on the role of algorithms and the use of product designation or description labels in connection

¹³² *Id.* at 258–59.

¹³³ *Id.* at 259; see also Eric Goldman, *California Courts Continue to Trim Section 230’s Protection for Amazon’s Marketplace (and Everyone Else)—Lee v. Amazon*, TECH. & MKTG. BLOG (Mar. 16, 2022), <https://blog.ericgoldman.org/archives/2022/03/california-courts-continue-to-trim-section-230s-protection-for-amazons-marketplace-and-everyone-els-lee-v-amazon.htm> [https://perma.cc/7Q2N-CB7L].

¹³⁴ *Amazon’s New Process Offers Customers Support in the Rare Case a Defective Product Causes Property Damage or Personal Injury*, AMAZON.COM www.aboutamazon.com/news/how-amazon-works/new-a-to-z-guarantee-better-protects-amazon-customers-and-sellers (“in the unlikely event a defective product sold through Amazon.com causes property damage or personal injury, Amazon will directly pay customers for claims under \$1,000 – which account for more than 80% of cases – at no cost to sellers, and may step in to pay claims for higher amounts if the seller is unresponsive or rejects a claim we believe to be valid.”); Jay Greene, *Amazon Agrees to Pay Shoppers Up To \$1,000 for Defective Goods After Facing High Profile Liability Cases*, WASH. POST, Aug. 10, 2021 www.washingtonpost.com/technology/2021/08/10/amazon-defective-products-claims/ (suggesting that Amazon’s new 2021 policy is an attempt “to forestall future litigation and legislation that could be difficult for them” and noting that the new policy would not have helped the plaintiff in the Bolger case since “her claims exceeded \$1,000.”).

¹³⁵ In the Matter of Amazon.com Inc., CPSC Docket No. 21-2 (U.S. Consumer Product Safety Comm. Jul. 29, 2024); Hailey Konnath, *Amazon Must Recall Unsafe Third-Party Products*, CPSC Says, LAW360, Jul. 30, 2024, www.law360.com/technology/articles/1863886?nl_pk=b8d021b1-f2fd-4bab-bcd3-ifad8ba87b61&utm_source=newsletter&utm_medium=email&utm_campaign=technology&utm_content=2024-07-31&read_main=1&nlsidx=c&nlaidx=o.

with warranty claims as well as data collection by e-commerce platforms and the knowledge element of the fitness warranty.

With respect to strict products liability, a proposed California bill would have codified some aspects of the holding in *Bolger* and, subject to certain exceptions, imposed strict liability on entities that qualified as “electronic retail marketplaces,” such as Amazon.¹³⁶ One significant drawback of this proposed bill was that it limited its definition of the term “product” to tangible goods that are “subject to strict product liability law.”¹³⁷ This definition fails to consider the sale of modern smart goods that heavily depend on a seller’s ongoing provision of services and software to function.¹³⁸ Indeed, state laws seeking to address products liability and warranty issues in today’s interconnected world should broadly define the term goods or products in a manner that accounts for the new nature of modern goods, which are often software- and service-centric items.¹³⁹

Another alternative solution to e-commerce platforms’ liability for the sale of problematic goods by third-party sellers on their websites is highlighted in the Restatement (Third) of Torts: Products Liability.¹⁴⁰ Its comments note that, with respect to the liability of nonmanufacturing sellers, some state statutes provide for immunity from liability to the extent that personal jurisdiction over the potential manufacturing defendant exists and “the manufacturer is not, nor is likely to become, insolvent.”¹⁴¹

¹³⁶ See A.B. 3262, 2019 Leg., Reg. Sess. (Cal. 2019) (This bill would have made e-commerce retailers that qualified “strictly liable for all damages caused by defective products placed into the stream of commerce to the same extent that a retailer of that defective product would be liable,” subject to certain exceptions). The bill defined electronic retail marketplaces as an “electronic place or internet website that is engaged in the business of placing or facilitating the placement of products into the stream of commerce in this state, regardless of whether the vendor, product, or the marketplace has a physical presence in the state or whether … the electronic retail marketplace ever takes physical possession of the product.” *Id.*; see also Eric Goldman, *Amazon Is Strictly Liable for Marketplace Items, Reinforcing That Online Marketplaces Are Doomed—Bolger v. Amazon, TECH. & MKTG. BLOG* (Sept. 8, 2020), <https://blog.ericgoldman.org/archives/2020/09/amazon-is-strictly-liable-for-marketplace-items-reinforcing-that-online-marketplaces-are-doomed-bolger-v-amazon.htm> [https://perma.cc/D6JP-QUDF] (noting that in 2020 “the California Assembly and the California Senate Judiciary committee passed A.B. 3262, which would have mostly codified the *Bolger*” decision); Katy Murphy, *A California Cage Match: Amazon Squares Off Against eBay in Statehouse Brawl*, POLITICO (Aug. 25, 2020), www.politico.com/states/california/story/2020/08/25/a-california-cage-match-amazon-squares-off-against-ebay-in-statehouse-brawl-1312234 [https://perma.cc/VL5X-6Q8Y] (discussing the *Bolger* decision and California A.B. 3262).

¹³⁷ A.B. 3262, 2019 Leg., Reg. Sess. (Cal. 2019).

¹³⁸ See ELVY, *supra* note 19, at 164–165, 316–318.

¹³⁹ See *id.*

¹⁴⁰ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. e (AM. L. INST. 1998).

¹⁴¹ *Id.*; Several state products liability statutes contain somewhat similar liability provisions. See, e.g., KAN. STAT. ANN. § 60-3306 (2012) (“A product seller shall not be subject to liability in a product liability claim arising from an alleged defect in a product, if the product seller establishes that: … (5) any judgment against the manufacturer obtained by the person making the product liability claim would be reasonably certain of being satisfied.”); TENN. CODE ANN. § 29-28-106 (2011) (“No product liability action … shall be commenced or maintained against any seller, other than the manufacturer,

A similar approach could work in the e-commerce platform context. An e-commerce platform could avoid liability under products liability law for defective products sold by third-party sellers on their platforms if it can prove that the third-party seller or manufacturer is not insolvent and that the plaintiff can obtain a reasonable remedy from those parties. Lastly, with respect to CDA immunity, Congress could choose to amend the CDA to provide clear protections for products liability claims involving defective goods.

CONCLUSION

This chapter has exposed various requirements in warranty law under the UCC and in products liability law that may create obstacles to successful suits against e-commerce platforms for the sale of defective goods by third-party sellers on e-commerce websites. There is a pressing need for products liability law and warranty law to evolve to better address consumer concerns caused by the explosion of online shopping and the rise of e-commerce platforms. This chapter has offered a path forward.

unless: ... (5) [t]he manufacturer has been judicially declared insolvent."); WASH. REV. CODE § 7.72.040(2) (1991) ("A product seller, other than a manufacturer, shall have the liability of a manufacturer to the claimant if: (a) [n]o solvent manufacturer who would be liable to the claimant is subject to service of process under the laws of the claimant's domicile or the state of Washington; or (b) [t]he court determines that it is highly probable that the claimant would be unable to enforce a judgment against any manufacturer.").