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Catherine M. Sharkey

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# Products Liability in the Digital Age: Online Platforms as “Cheapest Cost Avoiders”

CATHERINE M. SHARKEY<sup>†</sup>

*Products liability in the digital age entails reckoning with the transformative shift away from in-person purchases at brick-and-mortar stores to digital purchases from e-commerce platforms. The epochal rise of the online storefront has vastly expanded the prevalence of direct-to-consumer sales, implicating complex questions of how liability rules should respond when those consumers are harmed by the products they buy, especially in this age of international e-commerce and cross-border sales.*

*Imposing liability on online platforms on grounds of their superior ability to prevent harms from newly emergent risks, i.e., their status as “cheapest cost avoiders,” reveals courts’ efforts to vindicate the regulatory needs of society, and hence pin responsibility on entities in the best position to have readily avoided harm arising from the imposition of excessive risks. Products liability is a microcosm of how the common law evolves over time, specifically, here, to respond to new societal risks—posed by the automobile, mass-produced goods, and now, digital e-commerce. At each juncture in the development of products liability law, judges have relied explicitly on deterrence, or prevention of harm, rationales to address new forms of risks and prevent them from materializing into harms, and in doing so, have recognized new harms and/or expanded tort liability.*

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## INTRODUCTION

Judge John Wiley of the California Court of Appeals provocatively described *Loomis*,<sup>1</sup> in which Amazon was held strictly liable for burn injuries caused by a hoverboard listed on its online platform that burst into flames, as a case that “beautifully illustrates the deep structure of modern tort law: a judicial quest to minimize the social costs of accidents—that is, the sum of the cost of accidents and the cost of avoiding accidents.”<sup>2</sup> Seizing on the online platform’s name, Judge Wiley insisted that “Amazon can control its river . . . [by] undertak[ing] cost-effective steps to minimize accidents from defective products sold on its website” and that “[s]trict tort liability will underline the priority Amazon places on its safety efforts.”<sup>3</sup> Elaborating further on this Calabresian analysis of Amazon as “cheapest cost avoider” (“CCA”), Judge Wiley reasoned that “[w]hen efforts to minimize accident costs are relatively inexpensive and apt to be effective, courts impose tort duties,” and, because “Amazon has cost-effective options for minimizing accident costs,” “Amazon therefore has a duty in strict liability to the buyers from its site.”<sup>4</sup>

*Loomis* is a window into “the deep structure of modern tort law” and an opportunity to reflect upon how—and why—CCA reasoning permeates judicial decisions in products liability cases, especially those addressing novel risks at the cutting edge of the regulatory state. What emerges is a richer conception of the CCA rationale that transcends the conventional view (at least in the academy) that relegates or cabins its influence to the domain of economic efficiency interests. Consideration of liability for online platforms as CCA reveals the mechanism by which courts’ decision to impose liability on new entities derives from the regulatory needs of society, and hence the desire to pin responsibility on entities in the best position to have readily avoided harm arising from the imposition of excessive risks.<sup>5</sup> To be sure, there are normative dimensions to the determination of what is “cheap” and “costly” that reflect the ever-changing tastes and values in society, and existing torts—themselves derived from pressing regulatory needs in society—dramatically influences the evolution of these normative views insofar as they influence what society deems

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1. 277 Cal. Rptr. 3d 769 (Cal. Ct. App. 2021).

2. *Id.* at 787 (Wiley, J., concurring). See generally Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 HARV. L. REV. 1423 (2021) (reviewing JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020)) (“The deterrence-driven ‘cheapest cost avoider’ theory drove the development and expansion of products liability. It remains a powerful driving theory for modern tort cases that tackle torts at the cutting edge of the regulatory state and address widespread societal harms.”) [hereinafter Sharkey, *Modern Tort Law*].

3. *Loomis*, 277 Cal. Rptr. 3d at 787 (Wiley, J., concurring).

4. *Id.*

5. See Catherine M. Sharkey, *Holding Amazon Liable as a Seller of Defective Goods: A Convergence of Cultural and Economic Perspectives*, 115 NW. U. L. REV. ONLINE 339, 356 (2020) (“Perhaps the convergence of cultural and economic perspectives is a distinct feature of modern torts, where given the culture and politics of American law in 2020, a culturally specific norm incorporating power dynamics is efficiency-as-responsibility, meaning that the party with greatest control over a risk must pay for damages in the event of harm.”) [hereinafter Sharkey, *Holding Amazon Liable*].

costly or harmful.<sup>6</sup> The evolution of products liability in the digital age as a means of addressing dangers posed by the online platform economy reflects this public-private interplay: products liability expands in light of what society decides should be deterred and how (the public side), and such expansion is inextricably linked to private individuals' ability to bring causes of action to redress harms inflicted (the private side).

Part I traces distinct stages of the evolution of products liability in the United States, culminating in the arrival of the fifth (and current) stage of products liability in the digital age: the advent of the online platform economy. This historical sketch highlights how the deterrence-driven CCA theory facilitated the development and expansion of products liability in response to new societal risks. Part II recognizes that the challenge going forward is to refine and apply the CCA framework in novel areas of tort law. For instance, courts might acknowledge the primacy of the CCA framework but differ as to its application in particular cases, e.g., is the "cheapest cost avoider" of product harms arising in e-commerce the buyer, third-party party vendor, or online platforms? Part II further unpacks the factors underpinning Judge Wiley's ultimate conclusion that "there is no doubt about Amazon's ability to control the distribution system Amazon invented. Amazon *is* the distribution system. It thus should be strictly liable for defective products people buy from its site[,]”<sup>7</sup> and since “Amazon . . . completely controls its river[,] [t]here is nothing socially irrational or ineffectively redundant about making Amazon strictly liable for accidents from products bought from its website.”<sup>8</sup>

### I. PRODUCTS LIABILITY IN THE DIGITAL AGE

Liability for harms arising from the use of products was historically limited to the realm of contract, further restrained by a strict privity requirement that restricted recovery to parties in a direct relationship.<sup>9</sup> Thus, the buyer could sue the seller, but not the remote manufacturer, of a defective product.<sup>10</sup> This privity limitation served as a formidable barrier to recovery, leaving a relatively small domain for private enforcement of product injuries in what I shall term stage one of the development of products liability. In the ensuing years, transformative changes in society paved the way for dramatic shifts in products liability.

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6. See generally Guido Calabresi & Spencer Smith, *On Tort Law's Dualisms*, 135 HARV. L. REV. F. 184 (2022).

7. *Loomis*, 277 Cal. Rptr. 3d at 792 (Wiley, J., concurring).

8. *Id.* at 793–94 (Wiley, J., concurring).

9. See RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, *CASES AND MATERIALS ON TORTS* 667 (12th ed. 2020) (situating privity limitation within first of four stages in history of U.S. products liability law).

10. See *id.* (“Courts often held that the ‘privity’ limitation prevented the injured party—whether consumer, user, or bystander—from suing the ‘remote’ supplier of the product in question, that is, one who has no direct contractual relationship with the injured party. Instead an injured consumer or user could sue only the immediate vendor of the product; an injured bystander could sue only the party in possession of the product just before the injury occurred.”).

The automobile portended the first dramatic shift, ushering in stage two. As the automobile replaced the horse-and-buggy, drivers and pedestrians faced increased risks to life and limb on an entirely new scale. Soon the pressure was too much for the privity limitation to bear. In the seminal *MacPherson v. Buick* case,<sup>11</sup> Judge Benjamin Cardozo acknowledged that the heightened risk individuals in society faced from the automobile, which had emerged as a “thing of danger,”<sup>12</sup> necessitated a transformative shift in liability—namely the fall of privity.<sup>13</sup> As Cardozo famously opined: “Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.”<sup>14</sup> The privity limitation, whereby recovery was limited to those in a direct contractual relationship with one another, no longer made sense with the advent of the automobile. Indeed, the one entity that did not need the protection of the law from the risks posed by the automobile would seem to be the retailer in direct privity with the manufacturer—who would almost surely not be the one to use the car and face its risks.<sup>15</sup>

Mass production of consumer goods ushered in the third stage of products liability. In a pioneering concurrence in *Escola v. Coca Cola*,<sup>16</sup> Justice Roger Traynor set the scene, highlighting how mass production had transformed the way in which consumers purchased products: “As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public.”<sup>17</sup> The liability framework that ensured the safety of handicrafts sold from individual seller to buyer no longer sufficed to protect consumers who faced new hazards from mass-produced goods bought from mass retailers: “The manufacturer’s obligation to the consumer must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more intermediaries.”<sup>18</sup> It took two decades for the seed planted by Justice Traynor to flourish into a new form of strict products liability. First, in California in 1965 with *Greenman v. Yuba*

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11. 111 N.E. 1050 (N.Y. 1916).

12. *Id.* at 1053.

13. *See id.* (“We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.”).

14. *Id.*

15. *See id.* (“The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion.”).

16. 150 P.2d 436 (Cal. 1944).

17. *Id.* at 443 (Traynor, J., concurring).

18. *Id.*

*Prods.*,<sup>19</sup> then propagating throughout the country via the newly minted *Restatement (Second) of Torts* § 402A,<sup>20</sup> strict liability displaced negligence as the foundation for a new liability framework to protect consumers from the hazards of mass-produced goods. Especially in an age where mass advertising promoted mass-produced goods, as between hapless consumers and mass producers of products, the manufacturers emerged as the cheapest cost avoiders.<sup>21</sup>

Stage four saw a gradual expansion of the strict products liability framework from manufacturing defects—the primary target of the *Restatement (Second) of Torts* § 402A—to the ever-widening spheres of design defect and failure to warn.<sup>22</sup> Indeed, the decades from the mid-1960s to mid-1990s witnessed an extraordinary expansion of strict products liability. As these categories of injuries dramatically expanded, courts responded to enlarge the domain of products liability but also to tweak the underlying liability framework, introducing negligence-inflected risk-utility tests to cover design and warnings-based claims.<sup>23</sup> In 1998, the *Restatement (Third) of Torts: Products Liability* attempted a further curtailing of expansive strict products liability by introducing a more restrictive formulation of a risk-utility test, the reasonable alternative design requirement, for design defects.<sup>24</sup> By and large, this more restrictive standard did not catch on; nonetheless, the late 1990s into the dawn of the 21st century was characterized by stasis more than expansion of traditional products liability.

We have now arrived at a fifth stage as products liability confronts the digital age, typified by a transformative shift away from in-person purchase

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19. 377 P.2d 897, 900 (Cal. 1963) (holding “[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”).

20. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965) (providing that manufacturing defects are governed by strict liability).

21. See *Escola*, 150 P.2d at 443–44 (Traynor, J., concurring) (“The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trademarks. Consumers no longer approach products warily but accept them on faith . . . . Certainly there is greater reason to impose liability on the manufacturer than on the retailer who is but a conduit of a product that he is not himself able to test.”) (citations omitted).

22. See EPSTEIN & SHARKEY, *supra* note 9, at 668 (“The fourth and present stage of products liability law began in the decade following the 1965 Restatement with a series of important decisions in ‘defective design’ and ‘failure to warn’ cases, as they are now commonly known. These cases, which somewhat ironically have expanded liability within the negligence framework, form the centerpiece of modern products liability law.”).

23. See generally *Barker v. Lull Eng’g Co.*, 573 P.2d 443 (Cal. 1978) (advancing “consumer expectations test” (product defective in design if it failed to perform as safely as ordinary consumer would expect when used in intended or reasonably foreseeable manner) and “risk-utility test” (product defective in design if benefits of the challenged design do not outweigh risk of danger inherent in such design)).

24. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (AM. LAW INST. 1998) (“A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe[.]”).

transactions at brick-and-mortar stores toward digital purchases on e-commerce platforms.<sup>25</sup> The epochal rise of the online storefront has vastly expanded the volume of direct-to-consumer sales,<sup>26</sup> implicating a panoply of potential harms to consumers<sup>27</sup> and raising the question of whether liability rules should be changed, especially in light of the development of international e-commerce and cross-border sales.<sup>28</sup> Moreover, the rapid acceleration of online commerce not only dramatically shifts consumers’ expectations regarding the ready availability of a wide array of consumer goods, but also coincides with a technological and information revolution that affords new possibilities for product oversight and safety.<sup>29</sup> At the same time, the newly-emergent, yet rapidly growing and expanding platform economy has created opportunities for new business models to evade traditional products liability frameworks that have yet to catch up.

Two key insights emerge from this thematic grouping of the stages of products liability from the late 19th century to the present. First, products liability is a microcosm of how the common law evolves over time, specifically

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25. See Sharkey, *Holding Amazon Liable*, *supra* note 5, at 340 (“Amazon’s meteoric growth and expansion—accelerated by the global COVID-19 pandemic—signals the revolutionary transformation away from brick-and-mortar physical stores to the virtual marketplace.”) (footnote omitted).

26. See, e.g., Juozas Kaziukėnas, *The Decade of Chinese Factories Selling Directly to the World*, MARKETPLACE PULSE (Aug. 13, 2020), <https://www.marketplacepulse.com/articles/the-decade-of-chinese-factories-selling-directly-to-the-world> (“[Chinese] factories that previously produced products for retail giants like Walmart realized that e-commerce platforms allowed them to reach consumers directly. . . . Although by removing intermediaries, Amazon lost many of the checks in the supply chain created by them. Amazon wasn’t the only platform that allowed that, but its Fulfillment by Amazon (FBA) created a shopping experience that eliminated long delivery times often associated with buying from China.”); *Global B2C E-commerce Market to Witness Substantial Growth Between 2021-2028 Expanding at a CAGR of 9.7%*, BUS. WIRE (Dec. 3, 2021), <https://www.businesswire.com/news/home/20211203005417/en/Global-B2C-E-commerce-Market-to-Witness-Substantial-Growth-Between-2021-2028-Expanding-at-a-CAGR-of-9.7---ResearchAndMarkets.com> (“The global B2C e-commerce market size is anticipated to reach USD 7.65 trillion by 2028. . . . Online goods and service providers offer various options to their customers, such as vast product portfolio, discounted price rates, convenient payment methods, same-day delivery, and easy return policies while purchasing any goods or services, resulting in growing customer preference toward e-commerce platforms.”).

27. See *The Benefits and Risks of Direct-to-Consumer Strategies in Manufacturing*, LIBERTY MUT. INS. (Mar. 29, 2019), <https://business.libertymutual.com/insights/the-benefits-and-risks-of-direct-to-consumer-strategies-in-manufacturing> (“Selling directly to consumers introduces new exposures to the manufacturer that wholesalers or retailers may typically take responsibility for as part of third-party contractual agreements. For example, this could include new product liability risks related to labeling and shipping or cyber and general liability risks that come with running an e-commerce store.”).

28. To date, scholars have wrestled with the tensions posed by regulating goods produced for a national market via state products liability laws, which can differ quite significantly across states. See, e.g., Samuel Issacharoff & Catherine Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006) (touching on this theme). Such tensions are exacerbated in light of the borderless nature of e-commerce.

29. See *Product Safety and Compliance in Our Store*, AMAZON (Aug. 23, 2019), <https://www.aboutamazon.com/news/company-news/product-safety-and-compliance-in-our-store> (“Every few minutes, our tools review the hundreds of millions of products, scan the more than five billion attempted daily changes to product detail pages, and analyze the tens of millions of customer reviews that are submitted weekly for signs of a concern and investigate accordingly. Our tools use natural language processing and machine learning, which means new information is fed into our tools daily so they can learn and constantly get better at proactively blocking suspicious products.”).

to respond to new societal risks—posed by the automobile, mass-produced goods, and now, digital e-commerce. Second, a deterrence-based, prevention of harms or CCA justification for doctrinal shifts is a continuous thread, an enduring principle that can be traced back to *MacPherson* and carried through to today.<sup>30</sup> At each juncture in the development of products liability law, judges relied explicitly on deterrence rationales to address new forms of risks and prevent them from materializing into harms, and in doing so, recognized new harms and/or expanded tort liability.

## II. ONLINE PLATFORMS AS “CHEAPEST COST AVOIDERS”

Strict products liability has evolved in light of new risks presented by an increasingly complex and mechanized society and to address new business models designed to shield entities from liability.<sup>31</sup> Historically, CCA applied to “sellers” of a manufacturer’s products, because it was the sellers who, through their ongoing relationship with the manufacturers and through contribution and indemnification in litigation, combined with their role in placing the product in the consumer’s hands, were in the best position to pressure the manufacturers to create safer products. The question then arises: what about the fifth stage, namely the transformative shift in the digital age to e-commerce platforms? How does one apply the principles underlying strict liability to product harms emanating from the platform economy?

Seen in this light, the conventional targeting of “sellers”—and the accompanying definition of a seller as one who transfers legal title of a product or good—was a convenient proxy for the CCA in the extant brick-and-mortar store economy. But, holding fast to the centrality of transfer of legal title to the definition of “seller,” even as the transformation in delivery of products takes place and the technical potential for wide-scale post-market monitoring of goods opens up, is reminiscent of courts’ rigid adherence to the privity requirement, even as the transformative force of the automobile and then mass-produced goods forever reshaped the products liability landscape.

The CCA framework instead would switch focus away from transfer of legal title and countenance a broader definition of “seller” (or “distributor”) that tags responsibility upon the party best able to ensure product safety. In the words of the *Bolger* court, drawing specifically on precedents that extended manufacturer strict liability to retailers: “Amazon, . . . like conventional retailers, ‘may play a substantial part in insuring that the product is safe or may

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30. See Sharkey, *Modern Tort Law*, *supra* note 2, at 1436–40 (demonstrating centrality of cheapest-cost-avoider analysis in seminal modern products liability cases).

31. *Cf. Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 605 (2020) (“Strict products liability was created judicially because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and because of the limitations in the negligence and warranty remedies.”).

be in a position to exert pressure on the manufacturer to that end; the retailer’s strict liability thus serves as an added incentive to safety.”<sup>32</sup>

#### A. WHY APPLY THE CCA FRAMEWORK?

In the brick-and-mortar economy of goods, defining “seller” formalistically as transferor of legal title served as a suitable proxy for CCA. But with the platform economy revolution of the digital age it no longer does; moreover, the circumvention principle has led to a new form of e-commerce business model designed specifically to evade legal responsibility for dangerous products, leading to externalized product safety risks onto the public. It is thus time to revert to the underlying CCA framework—the principles of which have guided the evolution of products liability throughout successive stages—to search for new answers.

##### 1. *The Anachronistic Hold of Legal Title*

Early cases addressing the liability of an online platform (in each case thus far, Amazon) hewed to traditional conventional definition of “seller” as one who transfers legal title of a good to the buyer. Thus, in *Eberhart v. Amazon.com, Inc.*,<sup>33</sup> the New York federal district court held that Amazon fell outside the “distribution chain,” and as such, could not be held liable as a distributor under state strict products liability law.<sup>34</sup> According to the court, legal title is the *sine qua non* of liability: “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.”<sup>35</sup> Not only did the court hew to the traditional hold of “legal title,” it emphatically rejected the CCA framework for deciding the issue, noting that, in numerous prior situations, the court had “explicitly rejected the proposition that strict liability may be imposed on an entity that merely facilitat[es] the distribution of a defective product simply because that entity is in the best position to exert pressure on the product’s manufacturer.”<sup>36</sup>

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32. *Id.* at 617 (quoting *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171–72 (Cal. 1964)). *Vandermark* was the seminal case applying strict products liability to nonmanufacturing retailers (and distributors). As Mark Geistfeld elaborates, the rule of strict products liability for retailers is entirely premised on a deterrence rationale:

[A]n upstream supplier or the manufacturer can be insolvent or otherwise not subject to indemnity liability, leaving a downstream seller without recourse [via an indemnity action shifting responsibility to the manufacturer]. That prospect, however, gives sellers an incentive to deal with financially sound suppliers and manufacturers that contractually obligate themselves to provide indemnification for the seller’s tort liabilities. And to the extent that a seller is still concerned about its exposure to liability, it has an incentive to engage in independent product testing, a practice that has been adopted by large domestic retailers of products manufactured by foreign firms.

MARK A. GEISTFELD, *PRINCIPLES OF PRODUCTS LIABILITY* 330 (3d ed. 2020).

33. 325 F. Supp. 3d 393 (S.D.N.Y. 2018).

34. *Id.* at 397, 400.

35. *Id.* at 398.

36. *Id.* at 399 (internal quotations omitted).

A subsequent New York federal district court doubled down on this reasoning in *Philadelphia Indemnity Insurance Co. v. Amazon.com, Inc.*<sup>37</sup> On “nearly identical facts” to those in *Eberhart*,<sup>38</sup> the court rejected the argument that “Amazon was at the top of the chain of distribution and was in the best position to further the public policy considerations underlying the doctrine of strict products liability.”<sup>39</sup> To begin, the court reasoned that “[g]iven that Amazon d[id] not know who the manufacturer is, it [was] not in a position to influence it.”<sup>40</sup> But it also seized the opportunity to cast doubt on the CCA framework, remarking that “just because a party might have the ability to exert pressure on a manufacturer does not mean that it is necessarily best placed to do so.”<sup>41</sup>

Notwithstanding the degree of control Amazon exerted over the purchase of the goods—including, in each case, storing the goods as part of its warehouse inventory pursuant to the “Fulfilled by Amazon” program—the fact that Amazon never took title to the products in question was determinative to these New York federal courts’ rejection of strict products liability.<sup>42</sup> This outdated definition of seller/distributor, moreover, is reified in some state products liability statutes.<sup>43</sup>

But e-commerce companies can (and have) readily (and profitably) exploit this formalistic definition of seller tied to transfer of legal title by designing a business model for a platform middleman who conveys title from a third-party vendor to end-user, otherwise acting much in the way of a traditional seller or distributor of goods. Indeed, given the ease with which goods can be listed, distributed, or sold via an online platform that steadfastly resists accepting legal title, circumvention of legal liability was not only to be expected, but perhaps

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37. 425 F. Supp. 3d 158 (E.D.N.Y. 2019).

38. *Id.* at 163. According to the court, the facts of the case were on all fours with *Eberhart*: (1) “[t]he plaintiff . . . purchased a product from a third-party vendor through Amazon.com[,]” and (2) “the third-party vendor . . . participated in Amazon’s Fulfillment by Amazon service” so that “the same terms and conditions . . . applied[.]” *Id.*

39. *Id.* at 164.

40. *Id.*

41. *Id.*

42. Moreover, these two federal cases influenced a recent New York state appellate court opinion. *See Wallace v. Tri-State Assembly, LLC*, 201 A.D.3d 65, 68 (App. Div. 1st Dep’t. 2021) (“Central to both courts’ analyses was the undisputed fact that at no time did Amazon ever obtain title to the products in question and, rather than being viewed as a distributor, Amazon is better characterized as a provider of services[.]”). The plaintiffs raised warranty claims (and not strict products liability); nonetheless, the court’s reasoning went further to embrace what it termed “the well-settled legal principle that liability may not be imposed for breach of warranty or *strict products liability* upon a party that is outside the manufacturing, selling, or distribution chain[.]” which includes Amazon, as Amazon “merely provided the website . . . used to purchase the [allegedly defective product] from an independent third-party seller and have it assembled by an independent third-party assembler.” *Id.* at 68–69 (emphasis added).

43. *See, e.g.*, LA. R.S. § 9:2800.53(2) (defining “seller” as “a person or entity who is not a manufacturer and who is in the business of conveying title to or possession of a product to another person or entity in exchange for anything of value”); MD. CODE ANN., COM. LAW §§ 2-103(1)(d), 2-106 (defining a seller as a person who sells or contracts to sell goods, and defining a sale as the passing of title from the seller to the buyer for a price); 810 ILL. COMP. STAT. 5/2-106 (defining a sale as the passing of title from the seller to the buyer for a price).

even encouraged. Professors Edward Janger and Aaron Twerski go so far as to argue that the early U.S. courts’ creation of an “Amazon exception to tort law[]”<sup>44</sup> is a result of Amazon.com consciously “hid[ing] its true role from consumers.”<sup>45</sup>

## 2. “Cheapest Cost Avoider”

At the core of the CCA framework are factors that signify an entity’s knowledge of relevant risks and degree of control over such risks sufficient to prevent harms arising from them. With regard to product safety, inspection and monitoring of the product (ideally over time) in order to learn of existing or emerging dangerous propensities is key. An added dimension is the capacity, on the basis of such examination or investigation into product safety risks, to influence the manufacture, design, or warnings of the product. In this way, the entity’s role or involvement ensures against risks and incentivizes safety with the ultimate goal of preventing injuries arising from the product.

The CCA framework, and its prevention of harm imperative, sheds light on the evolution of “seller” to extend its doctrinal reach to consignors but stop short of auctioneers.<sup>46</sup> A consigner (even without accepting legal title) is well-positioned to pass upon the quality of the products within its ken, whereas an auctioneer, with “impromptu” contact with the goods, is not.<sup>47</sup> Nor does an auctioneer have the kind of continuous relationship with producers as do consignors such that they could influence the safety features of those products.<sup>48</sup>

The CCA will often have additional features which may be relevant to courts’ identification of the CCA but are not strictly necessary or core to its identification.<sup>49</sup> First, contractual undertakings—specifically, providing

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44. Edward J. Janger & Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller Not a Neutral Platform*, 14 BROOK. J. CORP. FIN. & COM. L. 259, 262 (2020).

45. *Id.* at 259.

46. The Restatement (Third) of Torts: Products Liability extends strict products liability to “commercial product lessors” and “a wide range of nonsale, nonlease transactions” in which title never passes. § 20 cmt.a. But excludes transactions involving intermediaries such as “commercial auctioneers” or firms “engaged exclusively in the financing of product sale or lease transactions.” *Id.* §20 & cmt.g.

47. *See, e.g.*, *Musser v. Vilsmeier Auction Co.*, 562 A.2d 279, 282 (Pa. 1989) (“[T]he auctioneer is not equipped to pass upon the quality of the myriad of products he is called upon to auction and with which his contact is impromptu.”).

48. *Id.* (“Nor does [the auctioneer] have direct impact upon the manufacture of the products he exposes to bids, such as would result from continuous relationships with their producers and which would be expected to provide him with influence over the latter in acting to make products safer.”).

49. *But see* *Carpenter v. Amazon.com, Inc.*, No. 17-cv-03221-JST, 2019 WL 1259158, \*4 (N.D. Cal. Mar. 19, 2019) (finding CCA necessary but insufficient to hold defendant outside vertical chain of distribution, relying instead on three-factor “marketing enterprise doctrine” test: “(1) the defendant received a direct financial benefit from its activities and from the sale of the product; (2) the defendant’s role was integral to the business enterprise such that the defendant’s conduct was a necessary factor in bringing the product to the initial consumer market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process.”). The *Carpenter* court held, however, that, “even assuming . . . that Amazon had a substantial ability to influence the manufacturing or distribution process, . . . the Plaintiffs . . . failed to produce sufficient evidence to raise a genuine dispute of material fact on the second prong,” and, therefore, Amazon was properly granted

warranties against product defects—might be a signal of a party’s willingness and ability to control risks. Second, whether the entity takes physical possession of the goods, or engages in moving, storing, labeling, packaging and/or shipping them, could signal the level of control it exerts. Third, the amount of economic benefit or financial gain from a product could warrant further investigation of its business model, and knowledge and control factors. Fourth, the fact that the entity is necessary to bring the final product to the relevant market might also be a signal of its potential CCA status.

There are alternative grounds, apart from deterrence-based CCA, for holding an entity liable under products liability.<sup>50</sup> First, loss or risk spreading (as distinct from loss or risk minimization) as a rationale would look to the entity’s ability to raise prices to spread costs over its consumer base.<sup>51</sup> Second, the “consumer expectations” rationale attaches liability to entities that foster consumer reliance through their involvement in the distribution and/or sale of a product. Notwithstanding the comparative decline of the consumer expectations rationale as the CCA deterrence rationale gained force,<sup>52</sup> the platform economy “fifth stage” of products liability has perhaps ushered in a resurgence of this rival (or complementary) rationale. As a California state court put it succinctly: “Amazon customers have an expectation of safety—and Amazon specifically encourages that expectation[.]”<sup>53</sup> Online platforms (such as Amazon) can situate themselves as the sole interlocutor between the third-party vendor and consumer;<sup>54</sup> from the consumer’s perspective, the platform provides the product

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summary judgment notwithstanding whether it controlled or could substantially influence the defective product’s manufacturing or distribution. *Id.* at \*5.

50. Here, I pause to acknowledge (but not address further) the goal of compensation or providing recourse to injured plaintiffs. I align myself with the view that, while it may be that third-party vendors may be defunct, insolvent, or impossible to locate by the time of suit, just because Amazon is available to pay damages does not mean that it should be held strictly liable. *See Oberdorf v. Amazon, Inc.*, 930 F.3d 136, 164 (3d Cir. 2019) (Scirica, J., dissenting in part) (“[A] seller may be defunct, insolvent, or impossible to locate by the time of suit, . . . [b]ut . . . to assign liability for no reason other than the ability to pay damages is inconsistent with our jurisprudence.”) (internal quotation marks omitted).

51. *See id.* at 144 (considering, as one of four factors, “[w]hether ‘[t]he [actor] can distribute the cost of compensating for injuries resulting from defects by charging for it in his business, i.e., by adjustment of the rental terms.’”) (quoting *Musser*, 562 A.2d at 282).

52. *See, e.g.*, Clayton J. Masterman & Kip Viscusi, *The Specific Consumer Expectations Test for Product Defects*, 95 INDIANA L.J. 183, 196–97 (2020) (“[C]ourts remain deeply divided over what test should be used to evaluate products liability claims. Courts that switched to the risk-utility test generally did so because the consumer expectations test proved unmanageable and flawed in practice, and because the risk-utility test more clearly resembles the negligence test with which the courts are more familiar and comfortable.”). *But see* GEISTFELD, *supra* note 32, at 74 (“[T]he risk-utility test only complements the consumer expectations test and cannot completely substitute for it.”).

53. *Bolger v. Amazon.com, LLC.*, 267 Cal. Rptr. 3d 601, 618; *see Product Safety and Compliance in Our Store*, *supra* note 29 (“[B]ecause of our direct relationships with customers, we are able to trace and directly notify customers who purchased a particular product online and alert them to a potential safety issue—our systems are far more effective than other online and offline retailers and customers can feel confident they’ll have the information they need.”) (emphasis added).

54. *Oberdorf*, 930 F.3d at 144–45 (noting third-party vendors could communicate with customers only through Amazon, enabling Amazon to conceal itself from the customer and, thereby, leave them with no direct recourse).

information (and may even be identified as the seller of some, if not all, goods on the platform), processes payment, and deals with any returns or exchanges.

#### B. WHO IS THE CHEAPEST COST AVOIDER?

Courts might acknowledge primacy of the CCA framework for resolving the issue of liability for e-commerce harms but nonetheless differ in applying the framework as to who is the CCA: the buyer, third-party vendor, or online platform?<sup>55</sup>

*Oberdorf*—a recent addition to the torts canon,<sup>56</sup> announcing the arrival of the “fifth” stage of products liability—was an inflection point in the United States, signaling the turning of the tide away from earlier courts’ formalistic reliance on transfer of title as the bright-line marker of a seller. Moreover, the case’s journey from the federal district court (*Oberdorf I*<sup>57</sup>) to the court of appeals (*Oberdorf II*<sup>58</sup> and *Oberdorf III, en banc*<sup>59</sup>) to the state supreme court<sup>60</sup> illustrates that, notwithstanding a shared dedication to the CCA framework and prevention of harm as a primary goal, courts reach different conclusions with regard to which entity/entities involved in e-commerce is/are in fact the cheapest cost avoider(s).

To begin, the federal courts (hearing cases on diversity jurisdiction, applying state law) agreed that the Pennsylvania Supreme Court had embraced a CCA framework. Or, to be more precise, at least two of the four factors the state court looked to in determining whether an actor was a “seller” resonate strongly with the CCA framework: (1) whether “imposition of strict liability upon the [actor] serves as an incentive to safety,” and (2) whether the actor is “in a better position than the consumer to prevent the circulation of defective products.”<sup>61</sup>

55. Moreover, this challenge arises more generally when courts face novel tort law issues. See Sharkey, *supra* note 2, at 1423–24 (“When the U.S. Supreme Court faced a novel tort law issue in 2019 in *Air & Liquid Systems Corp. v. Devries* — namely, whether the manufacturer of a ‘bare-metal’ product such as a turbine, blower, or pump has a duty to warn of dangers that arise from the later incorporation of asbestos-laden parts into the product — the Justices turned to first principles from tort theory. . . . [W]hile the majority and dissent disagreed as to which party — the bare-metal product manufacturer or the subsequent parts manufacturer — was in fact the cheapest cost avoider, they were unanimous in using the lens of law-and-economics, incentive-driven tort theory.”); *Id.* at 1454 (“The challenge going forward is how to refine and apply the ‘cheapest cost avoider’ framework in novel areas of tort law.”).

56. See EPSTEIN & SHARKEY, *supra* note 9, at 706–13.

57. 295 F. Supp. 3d 496 (M.D. Pa. 2017).

58. 930 F.3d 136 (3d Cir., 2018).

59. 818 F. App’x. 138 (3d Cir. 2020) (certifying the question of whether Amazon is a “seller” under Pennsylvania law to the Pennsylvania Supreme Court).

60. The case settled after oral argument before the Pennsylvania Supreme Court prior to answering the question of whether Amazon is a “seller” under Pennsylvania law.

61. *Oberdorf*, 930 F.3d at 144 (quoting *Musser v. Vilsmeier Auction Co.*, 562 A.2d 279, 282 (Pa. 1989)). The other two factors are: “Whether the actor is the ‘only member of the marketing chain available to the injured plaintiff for redress’”; and “Whether ‘[t]he [actor] can distribute the cost of compensating for injuries resulting from defects by charging for it in his business, i.e., by adjustment of the rental terms.’” *Id.* The latter of these is a “loss spreading” rationale. See *supra* note 47 and accompanying text.

But then the federal courts leaned in opposite directions when applying the framework to Amazon. The *Oberdorf I* lower court reasoned that Amazon “cannot have any ‘direct impact upon the manufacture of the products’ sold by the third-party vendors.”<sup>62</sup> The court explained further that, “[b]ecause of the enormous number of third-party vendors . . . Amazon is . . . ‘not equipped to pass upon the quality of the myriad of products’ available on its Marketplace.”<sup>63</sup> The *Oberdorf II* appeals court reversed course, applying the same framework but concluding instead that Amazon was in fact the CCA.<sup>64</sup> First, the court reasoned, given that Amazon is able to remove unsafe products from its website, imposing strict liability would incentivize it to do so.<sup>65</sup> Second, according to the court, Amazon’s website is the public-facing forum for products listed by third-party vendors and is in a unique position to receive reports of defective products, whereas third-party vendors’ channels to communicate with customers are limited by Amazon.<sup>66</sup>

At that point, the court of appeals, taking the case *en banc* in *Oberdorf III*, and in a case of first impression, certified the case to the Pennsylvania Supreme Court to decide, once and for all, how to apply its CCA framework to e-commerce. But alas, following oral argument in the Pennsylvania Supreme Court, the parties settled—leaving the doctrinal issue unresolved.

The *Oberdorf* saga, then, presents a microcosm of the vexing issue of applying the CCA framework in the context of liability for e-commerce product harms: namely, who is the CCA—the buyer/consumer, the third-party vendor, or the online platform (Amazon in this case)?

### 1. Buyer

Relatively little attention is given to the buyer or consumer as putative CCA. Nonetheless, when placing an order with Amazon, buyers assent to Amazon’s “Conditions of Use,” in which Amazon disclaims all warranties for products sold by third-party sellers.<sup>67</sup> Moreover, there is some judicial sentiment that Amazon does not exercise, relative to the consumer, greater influence in the

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62. *Oberdorf*, 295 F. Supp. 3d at 501 (quoting *Musser*, 562 A.2d at 282). On appeal in *Oberdorf II*, Judge Scirica agreed. See *Oberdorf*, 930 F.3d at 164–65 (Scirica, J., dissenting in part) (“Amazon Marketplace is ‘not in the business’ of choosing, monitoring, or influencing the third-party sellers’ products or manufacturing processes.”). Moreover, Judge Scirica added, “Amazon Marketplace does not exercise, relative to the consumer, any greater ‘influence in the manufacture of safer products[.]’ and so should not be forced to adopt ‘a fundamentally new business model simply because it could.’” See *id.*

63. *Oberdorf*, 295 F. Supp. 3d at 501 (quoting *Musser*, 562 A.2d at 282). As a result, the *Oberdorf I* court concluded, Amazon “cannot be liable . . . under a strict products liability theory.” *Id.*

64. *Oberdorf*, 930 F.3d at 144 (noting “*Musser* is a significant case to which we look for guidance,” but it “does not command the result that Amazon seeks”).

65. *Id.* at 145–46.

66. *Id.* at 146–47.

67. See *State Farm Fire & Cas. Co. v. Amazon.com Inc.*, 407 F. Supp. 3d 848, 851 (D. Ariz. 2019) (“Amazon’s conditions of use plainly state that Amazon does not warrant the offerings of any third-party vendor.”) (internal quotation marks omitted).

manufacture of safer products, and so should not be forced to adopt a fundamentally new business model simply because it can.<sup>68</sup>

But the reality is, even if Amazon is not the CCA vis-à-vis the consumer, attention would turn next to the third-party vendor. Products liability has moved beyond the days when privity reigned supreme and disclaimers of liability cemented the consumer/buyer as CCA. Moreover, given the fundamental shifts in the consumer marketplace and power dynamics of e-commerce, which only exacerbate the informational asymmetries, the Amazon consumer seems especially ill-suited to bear liability.<sup>69</sup> The third-party vendor emerges as another more feasible candidate (relative to the ultimate consumer) besides the online platform to consider as CCA.

## 2. *Third-Party Vendor*

Numerous courts (including *Oberdorf I*) applying the CCA framework (in whole or in part) have identified the third-party vendor as the most realistic target for liability. It is worth unpacking the reasoning behind such decisions.

In one such case, a federal district court in New Jersey affirmed the central “principle[] of . . . allocating the risk of loss to the party better able to control the risk[.]”<sup>70</sup> But the court rejected Amazon as CCA on the ground that it “lack[ed] control over the product at issue, making it, ultimately, unable to manage the risks posed by the allegedly defective product.”<sup>71</sup> The court proffered three primary reasons. First, the court looked simply to the fact that Amazon did not contract with the manufacturer of the allegedly defective product.<sup>72</sup> Second, while Amazon *did* contract with the third-party vendor through the Amazon Services Business Solutions Agreement, the court downplayed its significance, finding that it “relate[d] mainly to the relationship between the two parties, not to Amazon’s control over [the third-party vendor’s] product.”<sup>73</sup> Third, the Amazon Services Business Solutions Agreement did not “grant Amazon the discretion to raise prices; so, unlike a manufacturer or seller, Amazon would not be able to recapture the expense of an occasional defective product by an increase in the cost of the product.”<sup>74</sup>

But none of these reasons address the core features of knowledge and control over the relevant risks. First, privity is no longer a requisite element for

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68. *Oberdorf*, 930 F.3d at 164–65 (Scirica, J., dissenting in part).

69. See Sharkey, *Holding Amazon Liable*, *supra* note 5, at 346–48.

70. Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-cv-2738-FLW-LHG, 2018 WL 3546197, at \*11 (D.N.J. July 24, 2018).

71. *Id.* (granting Amazon’s motion for summary judgment as to claims of products liability against it under a state product liability statute).

72. See *id.* (“[N]o contract exists between Amazon and the manufacturer; in fact, Amazon admits it does not know the manufacturer’s identity. Thus, lacking a contractual relationship with the manufacturer or supplier, Amazon was not in a position to exert pressure to ensure the safety of the product[.]”) (internal quotation marks omitted).

73. *Id.*

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

products liability (the court's first rationale); nor is loss spreading (the third rationale) a primary driver of the CCA framework. The *Allstate* court's *ipse dixit*—namely that, because it lacked a contractual relationship with either the manufacturer or supplier, “Amazon was not in a position to exert pressure to ensure the safety of the product”<sup>75</sup>—is conceptually similar to courts that toe the formalistic title line, but even less convincing in that it reasserts the bygone privity limitation as the dividing line.

Still, other courts have embraced CCA as a key component of their analysis of whether strict liability should extend beyond the distributive chain of a traditional seller, taking into account these key knowledge and control factors, but still finding that Amazon is not CCA.<sup>76</sup> For example, an Illinois federal district court was not persuaded that “[t]he facts that Amazon had the right to require third-party sellers to meet certain safety requirements in order to list their products on the marketplace . . . and that Amazon stopped allowing third-party sellers to list [the product] on the marketplace . . . unless they showed proof of compliance with safety standards” sufficed to target Amazon as the CCA. Notwithstanding the evidence that Amazon could in fact exercise control, the court ruled that such evidence “d[id] not establish that Amazon was in a position to eliminate the unsafe character of the product,” reasoning that liability would go too far given that “Amazon cannot be expected to judge the quality of every product for sale by third parties.”<sup>77</sup>

A federal district court in Arizona (again, sympathetic to the overarching CCA framework<sup>78</sup>) elaborated on this rationale. First, it insisted that “[e]ven after receiving products from third-party vendors, Amazon still exercises only minimal control over those products such that it has little meaningful ability to

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75. *Id.* at \*11.

76. *See* Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766 (N.D. Ill. 2019). In order to determine whether strict liability should be extended beyond the distributive chain of a traditional “seller,” the court relied on a three-prong test that asked whether an entity: “(1) participated in the manufacture, marketing and distribution of an unsafe product, (2) derived economic benefit from placing the unsafe product in the stream of commerce, and (3) [been] in a position to eliminate the unsafe character of the product and prevent the loss.” *Id.* at 779. The court reasoned that, although (2) cut against Amazon, (1) and (3) (the CCA factor) cut in favor of it. *See id.* at 779–80. The court ultimately granted Amazon’s motion for summary judgment as to claims of strict products liability against it under state law. *See id.* at 782.

77. *Id.* at 779–80 (internal quotation marks omitted). *But see* Fox v. Amazon.com, Inc., 926 F.3d 295, 304–05 (6th Cir. 2019) (finding Amazon capable of spurring production of safer goods based on (1) its restrictive contracts with third-party vendors, (2) its attempts to require third-party vendors to submit compliance documentation for potentially dangerous products, and (3) its ban on certain dangerous products from being sold on its marketplace).

78. *State Farm Fire & Casualty Co. v. Amazon.com, Inc.*, 407 F. Supp. 3d 848 (2019). In order to determine “if entities participate significantly in the stream of commerce and are therefore subject to strict liability,” the court looked to many factors, including whether they: (1) provide a warranty for the product’s quality; (2) are responsible for the product during transit; (3) exercise enough control over the product to inspect or examine it; (4) take title or ownership over the product; (5) derive an economic benefit from the transaction; (6) have the capacity to influence a product’s design and manufacture; or (7) foster consumer reliance through their involvement.” *Id.* at 851. I take CCA framework to be reflected primarily in (3) and (6).

inspect them.”<sup>79</sup> Moreover, Amazon lacks “the time and technical know-how needed to inspect, detect, and ultimately remove dangerous defects from the products it is in the business of selling *before* placing them in the stream of commerce that the typical manufacturer or seller does.”<sup>80</sup> Second, the court reasoned that, at most, Amazon can wield “indirect” pressure regarding manufacturing processes or design choices.<sup>81</sup> “Specifically, Amazon does not have a unilateral ability to force any vendor or manufacturer to adopt any particular design or manufacturing method.”<sup>82</sup> Moreover, even though “its marketplace may provide a great opportunity for such businesses, those businesses remain free to sell their wares through other channels.”<sup>83</sup>

One striking feature (to be addressed further below) is the abundance of federal courts (sitting in diversity) deciding this issue of first impression. But there are also a couple of state court decisions following suit and resisting designating Amazon the CCA. A Texas State Supreme Court Justice, concurring in the majority’s rejection of liability for Amazon based on an interpretation of “seller” contained in the state products liability statute,<sup>84</sup> reasoned that “the law should not treat those that play only an incidental role in a product’s placement as sellers, because they are rarely in a position to deter future injuries by changing a product’s design or warnings.”<sup>85</sup> And the Ohio Supreme Court, likewise resting its decision on an interpretation of “seller” contained in its products liability statute, nonetheless signaled its hostility to finding Amazon the CCA, maintaining that the third-party vendor (“like the consignee”) “may bear the risk for actually placing the product into the stream of commerce,” but given “Amazon’s peripheral role in relation to the distributive chain of the [allegedly defective product]” it was not “in a position to ensure against risks or to incentivize safety.”<sup>86</sup>

While these decisions do seem to confront, head-on, the key control factors (albeit against the backdrop of specific language in state products liability

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79. *Id.* at 852.

80. *Id.*

81. *See id.* at 853–54 (Although . . . Amazon can influence third-party vendors in some ways, it wields no more than indirect pressure over their design choices or manufacturing processes.”).

82. *Id.* at 854.

83. *Id.* The United States Court of Appeals for the Ninth Circuit affirmed, describing the lower court’s analysis as “neither a novel approach to the law nor overly rigid . . . [and] entirely consistent with existing Arizona case law.” *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App’x 213, 216 (9th Cir. 2020).

84. The Texas Products Liability Act defines a “seller” as “a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.” TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(3).

85. *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 116 (Tex. 2021) (Boyd, J., dissenting).

86. *Stiner v. Amazon.com, Inc.*, 120 N.E.3d 885, 892 (Ohio Ct. App. 2019) *aff’d* 164 N.E. 3d 394, 399–400 (Ohio 2020) (“[The appellant] points to various factors to argue that Amazon controls all aspects of sales by third-party vendors. According to [the appellant], Amazon prevents sellers from contacting customers; retains sole discretion to determine the content, appearance, and design of its website; reserves the right to alter the content of product descriptions; and imposes restrictions on pricing. While these factors may demonstrate the degree of control that Amazon seeks to exert in its relationship with sellers, they do not establish that Amazon exercised control over the product itself sufficient to make it a ‘supplier’ under the Act.”).

statutes), they characterize Amazon’s role as “incidental” or “peripheral” without much elaboration of the underlying empirical facts. We turn next to a pair of California state court decisions that include the most extensive discussion to date of these underlying facts, which tend to establish the requisite level of knowledge and control over the relevant products risks.

### 3. Online Platform

What sets the California state court decisions, *Bolger* and *Loomis*, apart is the extent to which each delves into the empirical facts underlying a CCA analysis (against the backdrop of essentially common law, as opposed to statutory, products liability standards).<sup>87</sup> The *Bolger* court set forth a number of Amazon’s “current efforts” (detailed below) that demonstrate its “capacity to exert its influence on third party sellers to enhance product safety.”<sup>88</sup> In so doing, it delivers the theoretical notion of CCA—which might be indeterminate as between third-party vendor and online platform—to the doorstep of practical, empirical reality, as concerns Amazon. And, in the eyes of Judge Wiley, concurring in *Loomis*, given the facts relating to “Amazon’s position in the distribution chain [that] allows it to take cost-effective steps to reduce accidents,” it is “not a close call” to impose liability on Amazon given that “the benefits of the actions Amazon can take to minimize accidents vastly outweigh the costs of these actions to Amazon.”<sup>89</sup>

Online platforms in the e-commerce economy have the capacity to situate themselves as a novel form of gatekeeper between third-party suppliers and customers:<sup>90</sup> “[j]ust as a conventional retailer, Amazon can use its power as a gatekeeper between an upstream supplier and the consumer to exert pressure on those upstream suppliers . . . to enhance safety.”<sup>91</sup> Just as a conventional retailer can exert pressure on manufacturers with whom it is not in contract, so too the online platform can exert indirect pressure on manufacturers through the parties with whom it does have ongoing relationships, namely the third-party vendors.<sup>92</sup>

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87. *Bolger* is also significant as it stands as the first state appellate court decision holding Amazon strictly liable.

88. *Bolger v. Amazon.com, Inc.*, 267 Cal. Rptr. 3d 601, 617 (Cal. Ct. App. 2020).

89. *Loomis v. Amazon.com, Inc.*, 277 Cal. Rptr. 3d 769, 789 (Cal. Ct. App. 2021).

90. For example, following reports on the prevalence of review fraud on Amazon’s platform, Amazon said it permanently banned over 600 Chinese brands across 3,000 seller accounts it suspected of violating its policies. See Sean Hollister, *Amazon Says It’s Permanently Banned 600 Chinese Brands for Review Fraud*, THE VERGE (Sept. 17, 2021), <https://www.theverge.com/2021/9/17/22680269/amazon-ban-chinese-brands-review-abuse-fraud-policy>. Similarly, following a media investigation into over 4,000 items on Amazon’s platform that had “been declared unsafe by federal agencies,” two thousand of which “were missing standard health-risk warning labels,” Amazon made changes to or outright removed thousands of listings. Ben Gilbert, *Amazon Was Caught Selling Thousands of Items That Have Been Declared Unsafe by Federal Agencies*, BUS. INSIDER (Aug. 23, 2019, 7:33 AM), <https://www.businessinsider.com/amazon-selling-unsafe-items-third-party-sellers-report-2019-8>.

91. *Loomis*, 277 Cal. Rptr. 3d at 784 (quoting *Bolger*, 267 Cal. Rptr. 3d at 618).

92. See *Bolger*, 267 Cal. Rptr. at 623 (“[E]ven assuming that it is true in some cases, Amazon is incorrect that a direct relationship with a *manufacturer* is necessary to promote product safety[.]” as “Amazon, like a

Online platforms can take various steps to proactively affect product safety.<sup>93</sup> At the outset of a platform’s relationship with third-party vendors, its initial listing contract can require safety certification, indemnification, and insurance as prerequisites to listing third-party vendors’ products. At the contracting stage, for example, Amazon’s “Amazon Services Business Solutions Agreement” imposes numerous restrictions on a third-party vendor’s ability to sell products on its platform.<sup>94</sup> It requires third-party vendors to comply with all applicable laws and regulations.<sup>95</sup>

Nor does the online platform’s proactive ability to influence product safety stop at the time of the initial contracting with the third-party vendor. It can continue to monitor for safety issues and remove dangerous products.<sup>96</sup> For example, Amazon has a Product Safety Team that monitors customer reviews and other data sources to identify product safety issues, regardless of whether the product was sold by Amazon or by a third-party vendor.<sup>97</sup> Moreover, Amazon deploys sophisticated machine learning technologies as part of a “robust and active process to monitor, track, and log consumer complaints.”<sup>98</sup> Specifically, Amazon touts:

Every few minutes, our tools review the hundreds of millions of products, scan the more than five billion attempted daily changes to product detail pages, and analyze the tens of millions of customer reviews that are submitted weekly for signs of a concern and

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conventional retailer, can exert pressure on manufacturers indirectly through the parties with whom it does have ongoing relationships, i.e., third party sellers.”); see *Loomis*, 277 Cal. Rptr. 3d at 781 (“Amazon had substantial ability to influence the manufacturing or distribution process through its ability to require safety certification, indemnification, and insurance before it agrees to list any product. . . . Amazon’s contention that it has no relationship with the manufacturer or the distributors has no bearing on whether it can influence the manufacturing process.”).

93. As in *Bolger*, the *Loomis* court determined that there were “steps, which Amazon ha[d] taken to ensure product safety in limited circumstances[] [that] refute[d] its contention that it ha[d] no ability to proactively affect product safety.” *Loomis*, 277 Cal. Rptr. 3d at 784.

94. See *Fox v. Amazon.com, Inc.*, 926 F.3d 295, 304–05 (6th Cir. 2019) (noting BSA “imposed various restrictions on [the third-party vendor’s] ability to sell products on [Amazon’s] marketplace.”).

95. Amazon retains “power to demand proof of . . . compliance [with all applicable laws and regulations], or of additional certifications, before a third-party seller may offer products for sale.” Thus, once potential product dangers come to light, Amazon can, at that point, require third-party vendors to submit compliance documentation. See *Fox*, 926 F.3d at 305 (“Defendant attempted to demand safety compliance documentation from third-party hoverboard sellers following initial reports of hoverboard fires and explosions.”).

96. *Loomis*, 277 Cal. Rptr. 3d at 784 (“With the rights retained, Amazon could halt the placement of defective products in the stream of commerce, deterring future injuries.”).

97. See *About Product Safety at Amazon*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=202074030> (last visited July 1, 2022) (“The Product Safety Team at Amazon works to protect Amazon customers from risks of injury associated with products offered on Amazon by looking into and taking action on reported safety complaints and incidents.”). Elsewhere on its website, similar but slightly different descriptions of the Product Safety Team’s activities are given elsewhere on Amazon’s website. See *Product Safety and Recalls*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GLD7VXFKV4AWU78X> (last visited July 1, 2022) (“Our Product Safety Team *investigates* and *acts* on reported safety complaints and incidents to protect customers from risks of injury *related to products sold on Amazon.com.*”) (emphasis added).

98. *Bolger*, 267 Cal. Rptr. 3d at 617 (internal quotation marks omitted).

investigate accordingly. Our tools use natural language processing and machine learning, which means new information is fed into our tools daily so they can learn and constantly get better at proactively blocking suspicious products.<sup>99</sup>

Thus, on an ongoing basis, it analyzes such complaints and determines whether to continue to allow any product to be listed on Amazon.<sup>100</sup> If and when an issue is identified, Amazon may remove a product from its marketplace and/or suspend the third-party vendor.<sup>101</sup>

As Judge Wiley concluded: Amazon is “in a better position than its customers to learn of and to combat defects in products on its website.”<sup>102</sup> “Amazon is situated swiftly to learn of and to contain [any] emerging problem, thereby reducing accidental injuries[,]” e.g., “Amazon can cabin the danger by stopping sales[,]” “Amazon can alert past buyers who have yet to experience the lurking hazard[,]” and “Amazon has information about its customers and their purchases.”<sup>103</sup>

### C. WHO SHOULD DECIDE?

#### 1. Courts (State or Federal)

There is an interesting dynamic between federal and state courts with regard to emerging issues of first impression. *Oberdorf* is part of a trend of increasing federalization of products liability issues.<sup>104</sup> And yet, simultaneously there is a recognition that it is the purview of the highest state supreme court to set forth the governing standard. Thus, the Court of Appeals for the Third

99. See *Product Safety and Compliance in Our Store*, *supra* note 29.

Myriad issues are raised by Amazon’s deployment of machine learning/AI—including the extent to which it adheres to principles of “trustworthy AI,” as well as whether there is an appropriate mechanism whereby affected parties can challenge its automated determinations. See generally National Institute of Standards and Technology, *Trustworthy and Responsible AI*, NIST, <https://www.nist.gov/programs-projects/trustworthy-and-responsible-ai> (last visited July 1, 2022).

100. *Bolger*, 267 Cal. Rptr. 3d at 617 (“[Amazon] analyzes these complaints and determines whether to continue allowing a product to be offered for sale on Amazon.”).

101. See *id.* at 618 (“If Amazon is unsatisfied with a third party seller’s response, or if its products turn out to be defective, Amazon has the power to suspend sales of certain products or block a third party seller from offering products for sale.”). See *Fox*, 926 F.3d at 305 (“Defendant eventually ceased all hoverboard sales on its marketplace worldwide.”).

102. *Loomis v. Amazon.com, Inc.*, 277 Cal. Rptr. 3d 769, 794 (Cal. Ct. App. 2021) (Wiley, J., concurring).

103. *Id.* at 786 (Wiley, J., concurring).

104. See, e.g., Catherine M. Sharkey, *A Quiet Revolution in the Work of the Federal Courts: The New Federal Common Law of Torts*, 19 ANN. REV. LAW & SOC. SCIENCE (forthcoming 2023). A similar observation from the trenches:

Lawyers filing these cases should be aware that Amazon will remove any case it can to federal court. Astute readers may notice all the cases cited above are in federal district court. That’s no accident. Amazon has made clear its preference to have any personal injury or product liability case against it heard in federal court if possible.

Casey Gerry, *Personal Injury and Product Liability Claims Continue to Pile up for Amazon*, E-COM. LIAB. (Mar. 9, 2022), <https://www.ecommerceliability.com/personal-injury-and-product-liability-claims-continue-to-pile-up-for-amazon>.

Circuit, sitting en banc in *Oberdorf III*, certified the issue to the Pennsylvania Supreme Court to decide the issue of first impression as a matter of state law.<sup>105</sup> And the Court of Appeals for the Fifth Circuit likewise certified the issue to the Texas Supreme Court.<sup>106</sup> Strategic considerations, however, may keep states from deciding the issue on a state-by-state basis.

Consider the conundrum facing Judge Diana Motz who sat on a three-judge panel of the Court of Appeals for the Fourth Circuit in *Erie Ins. Co. v. Amazon.com, Inc.*<sup>107</sup> The majority upheld the lower federal court’s determination that Amazon was not liable as a “seller” under the state’s Uniform Commercial Code for defective products.<sup>108</sup> Judge Motz believed that, although state law supported the result, the state law was outmoded. Moreover, it was the specific prerogative of the state supreme court to respond to changing societal risks by reforming or expanding the common law of products liability:

Maryland’s highest court has repeatedly emphasized that considerations of public policy may justify a change in the common law when, in light of changed conditions or increased knowledge, the former rule has become unsound in the circumstances of modern life.<sup>109</sup>

And Judge Motz suggested the ways in which Amazon’s “outsized role” in transactions on its platform presented a strong case for revisiting traditional products liability.<sup>110</sup> But the federal court nonetheless decided the case (without certifying the question to the Maryland Court of Appeals) and resisted deeming Amazon a “seller” based upon the outdated definition ensconced in statutory law (a decision the Maryland legislature has not revisited).

## 2. Legislature(s)

Perhaps the most formidable barrier to the CCA framework arises not in principle but due to institutional choice, namely reflexive deference to legislatures, no matter how outdated the statutory language at issue. In *Fox v. Amazon.com, Inc.*,<sup>111</sup> the Tennessee federal district court conceded Amazon’s CCA status—“holding Amazon liable as a seller supports the policy . . . [of] promoting safety in the products sold to the public, and . . . placing the burden of loss on businesses like Amazon, rather than those who are injured by the products sold on its website”—but nonetheless insisted that this was a choice for the state legislature, as such result would require “an expansion of the Act’s

105. See 818 F. App’x. 138 (3d Cir. 2020).

106. See *McMillan v. Amazon.com*, 983 F.3d 194 (5th Cir. 2020).

107. 925 F.3d 135 (4th Cir. 2019).

108. See *supra* note **Error! Bookmark not defined.** and accompanying text.

109. *Erie Ins. Co.*, 925 F.3d at 145 (Mott, J., concurring).

110. *Id.* at 144–45 (Mott, J., concurring) (noting, *e.g.*, “purchaser[s] of . . . allegedly defective [products] . . . order[ing] . . . product[s] from Amazon’s website and pa[ying] Amazon directly[.]” “Amazon [taking] physical possession of . . . product[s], warehous[ing] [them], packag[ing] [them], and deliver[ing] [them] to . . . carrier[s][.]” “Amazon . . . assum[ing] the risk of credit card fraud, receiv[ing] payment, and remit[ing] a portion of that payment to . . . manufacturer[s][.]” etc.).

111. No. 3:16-cv-03013, 2018 WL 2431628 (M.D. Tenn. 2018).

current definition of ‘seller.’”<sup>112</sup> Nor was the court willing to expansively interpret the “spirit” (or underlying CCA rationale) of the statute’s text.<sup>113</sup> On appeal, the Fifth Circuit agreed both that the “primary purpose behind the doctrine of products liability” was “the capability to spur the manufacturing and sale of safer products in the future,” but that, nonetheless, its hands were tied by the statutory language.<sup>114</sup>

While this institutional debate—the extent to which state courts (or federal courts interpreting state law) can adapt and expand the common law or should defer to legislative action—plays out in many realms, it has particular force given the rapid technological changes that have enabled the arrival of the “fifth stage” of products liability in the digital age. Indeed, not to put too fine a point on this, an Ohio State Supreme Court Justice lamented that “the divide between the pre-internet age and the current age is so profound that laws like this [product liability] Act might as well have been written in the stone age.”<sup>115</sup>

That said—and while more generally one might fear inertia especially in such a rapidly developing area—there has been some state legislative activity originating in California. A proposed California consumer protection bill entitled “Product liability: electronic retail marketplaces,” would have “require[d] an electronic retail marketplace[] . . . to be held strictly liable[] . . . for all damages caused by defective products placed into the stream of commerce to the same extent as a retailer.”<sup>116</sup> And a subsequent proposed bill would, “in any strict products liability action, make an electronic place that, by contract or other arrangement with one or more third parties, engages in specified acts strictly liable for all damages proximately caused by a defective product that is purchased or sold through the electronic place to the same extent as a retailer would be liable for selling the defective product in the retailer’s physical store, regardless of whether the electronic place ever takes physical possession of, or title to, the defective product.”<sup>117</sup> These bills died in committee

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112. *Id.* at \*8. The Tennessee Products Liability Act of 1978 provides that “[a] manufacturer or seller of a product shall . . . be liable for any injury to a person or property caused by the product [if] the product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller[.]” defining a “seller” as “any individual or entity engaged in the business of selling a product, whether such sale is for resale, or for use or consumption.” TENN. CODE ANN. §§ 29-28-105, 29-28-102.

113. *See id.* at \*8 n.4 (“To the extent Plaintiffs suggest the Court apply the spirit of the law rather than the actual text, the Court declines to do so.”).

114. *See* Fox v. Amazon.com, Inc., 926 F.3d 295, 304 (6th Cir., 2019).

115. *Stiner v. Amazon.com, Inc.*, 164 N.E. 3d 394, 403 (Ohio 2020) (Donnelly, J., concurring in judgment only). Ohio’s Products Liability Act defines a “supplier” as “either . . . [a] person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce[]” or “[a] person that, in the course of a business conducted for the purpose, installs, repairs, or maintains any aspect of a product that allegedly causes harm.” *Id.* at 398. In *Stiner*, the court focused on whether Amazon “otherwise participate[d] in [] placing [the] product in the stream of commerce[]” sufficient to be a “supplier” within the Act’s meaning. *Id.*

116. Assemb. B. 3262, 2019-2020 Leg., Reg. Sess. (Cal. 2020).

117. Assemb. B. 1182, 2021-2022 Leg., Reg. Sess. (Cal. 2021).

and—in the aftermath of Bolger and Loomis—have not been re-introduced, although they may serve as models for other state (or even federal) legislation.

### 3. Regulator(s)

Finally—whereas the most significant institutional choice in products liability is typically between courts and legislatures—in this specific realm, the Consumer Products Safety Commission (CPSC) has also taken a fairly novel (and aggressive) approach by filing an administrative enforcement action against Amazon under the Consumer Product Safety Act (CPSA).<sup>118</sup> Prior to the filing of this complaint, Amazon had proposed to the CPSC a product safety pledge similar to those in Australia and the European Union, which “call on online marketplaces to execute recalls for products sold in their online stores by third party sellers.”<sup>119</sup> The CPSC instead took action in order to force Amazon to “accept responsibility for recalling potentially hazardous products sold on Amazon.com” by “charging that . . . specific products are defective and pose a risk of serious injury or death to consumers and that Amazon is legally responsible to recall them.”<sup>120</sup>

On January 19, 2022, an administrative law judge determined that Amazon is a “distributor” that “distributes [consumer products] in commerce” as defined in the CPSA,<sup>121</sup> and that, as such, it is subject to regulation by the agency. Specifically, with regard to “Fulfilled by Amazon” (FBA) products, Amazon meets the definition of “distributor” given that it “(1) stores the merchants’ products at its facilities, (2) retrieves them from its inventory of Program merchants’ products, (3) places the products in shipping containers, and (4) delivers them directly to consumers by Amazon delivery vehicles or by carriers with whom Amazon contracts.”<sup>122</sup> The administrative law judge rejected

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118. In the Matter of Amazon.com, Inc., CPSC Docket No.: 21-2 (2021).

119. See Letter from Carletta Ooton, Vice Pres., Prod. Assuranc, Risk & Sec., Amazon to Acting Chairman Robert S. Adler & Comm’rs Elliot F. Kaye, Dana Baiocco & Peter A. Feldman (May 7, 2021), <https://www.cpsc.gov/s3fs-public/CPSC%20Letter%20to%20Commissioners%20Signed.pdf>.

120. Press Release, U.S. Consumer Prod. Safety Comm’n, CPSC Sues Amazon to Force Recall of Hazardous Products Sold on Amazon.com (July 14, 2021), <https://www.cpsc.gov/Newsroom/News-Releases/2021/CPSC-Sues-Amazon-to-Force-Recall-of-Hazardous-Products-Sold-on-Amazon-com>. In that same press release, Robert Adler, the Acting Chairman of the CPSC, emphasized the necessity of “grappl[ing] with how to deal with these massive third-party platforms more efficiently, and how best to protect the American consumers who rely on them.” *Id.*

121. Per 15 U.S.C.S. § 2052(a)(8), “[t]he term ‘distributor’ means a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product.” Per 15 U.S.C.S. § 2052(a)(7), “[t]he terms ‘to distribute in commerce’ and ‘distribution in commerce’ mean to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.”

122. See Order on Motion to Dismiss and Motion for Summary Decision at 7-8, In the Matter of Amazon.com, Inc., CPSC Docket No.21-2 (Jan. 19, 2022); see also *id.* at 11 (“Along with receiving, holding, and transporting consumer products—things a third-party logistics provider can do without becoming a distributor—Amazon operates a website that brings merchants who want to sell consumer goods together with consumers who want to buy those goods. And after a consumer purchases a Program product, Amazon provides round-the-clock customer service and processes all returns for Program products. Consumers return products to

Amazon's idea that "taking title to a product is necessary to being the product's distributor."<sup>123</sup> Nor did the judge accept Amazon's analogizing itself to "the operator of physical shopping mall." "While both a mall and Amazon.com provide a venue that brings customers and merchants together," the judge mused, "that's where the comparison ends." What distinguished Amazon emerged as central to its meeting the definition of a distributor:

Mall operators do not generally provide customer service as to products bought from stores in the mall. They also don't process returns or decide whether a customer will receive a refund, adjustment, or replacement. And because mall operators do not process returns, they cannot mandate reimbursements from stores.<sup>124</sup>

While, as a formal matter, the CPSC decision only governs Amazon's status as a "distributor" under the federal Consumer Product Safety Act, its reasoning might take on added significance as a kind of "federal common law" newly emergent as part of the increasing trend of federalization of products liability law, noted above.

#### CONCLUSION: ALIGNING INGENUITY WITH EFFICIENT CUSTOMER SAFETY

We may have reached a new inflection point—for Amazon, and for the online platform economy. Amazon has publicly pledged new safety initiatives. On August 10, 2021, it announced it would pay customers up to \$1,000 for damages or personal injury caused by products sold by third-party-vendors on its website.<sup>125</sup> When the California state legislature seemed poised to enact a bill holding electronic retail marketplaces subject to strict liability, Amazon signalled its support—provided that it apply to each of its competitors.<sup>126</sup> And on February 15, 2022, responding to the CPSC action, Amazon remarked: "We are aware of the judge's latest ruling in this case," and "while we continue to disagree with the notion that we are a distributor, we share CPSC's commitment to customer and product safety and will continue working toward that goal[.]"<sup>127</sup>

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Amazon, not the Program-participating seller. On receiving a returned product, Amazon, not the seller, decides whether the product can be resold.").

123. *Id.* at 8. The judge also rejected Amazon's claim countered that it was entitled to safe harbor protection as a logistics provider because it "solely receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product[.]" 15 U.S.C. § 2052(a)(16).

124. Order on Motion to Dismiss and Motion for Summary Decision, *supra* note 122, at 27.

125. See Jay Peters, *Amazon Will Pay Up to \$1,000 in Damages Caused by Defective Products*, THE VERGE (Aug. 10, 2021, 2:01 PM), <https://www.theverge.com/2021/8/10/22618418/amazon-pay-property-damage-personal-injury-claims-insurance>.

126. See *Amazon Stands Ready to Support AB 3262 If All Stores Are Held to the Same Standards*, AMAZON (Aug. 21, 2020), <https://www.aboutamazon.com/news/policy-news-views/amazon-stands-ready-to-support-ab-3262-if-all-stores-are-held-to-the-same-standards> ("We share the California legislature's goal of keeping consumers safe. To further that goal, this legislation aimed at protecting consumers should apply equally to all stores, including all online marketplaces.").

127. Martina Barash, *Amazon's New Distributor Status Means Safety 'Headaches' Ahead*, BLOOMBERG L., (Feb. 15, 2022, 6:00 AM), <https://news.bloomberglaw.com/product-liability-and-toxics-law/amazons-new-distributor-status-means-safety-headache-ahead>.

Courts are increasingly inclined to apply a CCA framework, reasoning that imposing products liability on Amazon “creates financial incentives that back up Amazon’s good words about its concern for customer safety.”<sup>128</sup> In the words of Judge Wiley, “[t]ort law will inspire Amazon to align its ingenuity with efficient customer safety” and “[o]nce Amazon is convinced it will be holding the bag on these accidents, this motivation will prompt it to engineer effective ways to minimize these accident costs” with the result that “[c]ustomers will benefit.”<sup>129</sup>

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128. *Loomis v. Amazon.com, Inc.*, 277 Cal. Rptr. 3d 769, 789 (Cal. Ct. App. 2021) (Wiley, J., concurring).

129. *Id.* at 786.

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