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### Swimming Up the Stream of Commerce: How Plaintiffs in Products Liability Litigation are Disadvantaged by Current Personal Jurisdiction Doctrine

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# SWIMMING UP THE STREAM OF COMMERCE: HOW PLAINTIFFS IN PRODUCTS LIABILITY LITIGATION ARE DISADVANTAGED BY CURRENT PERSONAL JURISDICTION DOCTRINE

## INTRODUCTION

*“The Court must periodically intervene in the perpetual battle between plaintiffs and corporations over personal jurisdiction, especially when one side has secured a competitive advantage. The time for such intervention has likely arrived.”*<sup>1</sup>

Emma is a resident of Billings, Montana, and she ordered the “Whitten 10-in-1, 8 Blade Onion Mincer, Chopper, Slicer, Cutter, Dicer, with Container” on Amazon. The product is a multifunctional kitchen tool that can chop, slice, cut, and dice your vegetable of choice. By pushing down on the container’s lid, the vegetable is forced through blades, resulting in perfectly cut vegetables. Via Amazon Prime, Emma received the gadget within twenty-four hours of ordering it. Once it arrived, she read the instructions and tested it on a yellow onion that she was using to make dinner. It appeared to work perfectly. So, she used a different sized blade insert on a clove of garlic. Again, it seemed to work perfectly. As she began to eat, she felt something sharp and tasted blood. She had just swallowed a part of a razor blade. The blade severely cut her mouth, throat, and intestines. She survived after several intensive surgeries.

While being assembled, the manufacturer’s equipment did not securely place one of the blades onto the plastic, and the tension that pushed down on the onion caused part of the blade to break off. Mountains of hospital bills and lost wages later, Emma wants someone to be held responsible for her injuries. Jacques-Norway manufactured the product. Their website has a “shop” option, but when you click on the listed product, you are taken to the product

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1. D. (Douglas) E. Wagner, *Hertz So Good: Amazon, General Jurisdiction’s Principal Place of Business, and Contacts Plus as the Future of the Exceptional Case*, 104 CORNELL L. REV. 1086, 1132 (2019).

page on Amazon. You cannot directly buy the product from Jacques-Norway. Jacques-Norway is headquartered in Norway, but the product Emma bought was made in China by an unlisted third party that Jacques-Norway subcontracts for manufacturing. Amazon ships the product, and it is sold by Gilmer HomeGoods. Gilmer HomeGoods sells sixteen different products on Amazon, made by six different manufacturers. Gilmer HomeGoods' actual name is Morrissey LLC, and its business address is in Westbrook, Maine. Upon a Google search, Morrissey LLC does not have a webpage, nor is there any available contact information. Amazon is headquartered in Seattle, Washington, and is incorporated in Delaware. Emma has come to your law firm to see what you can do about her unfortunate situation.

*Question 1: Identify and analyze the legal issues presented, possible claims and defenses, as well as the jurisdictions in which you can bring suit against each potential defendant.*

This products liability/civil procedure hypothetical would give most first-year law students nightmares. Nevertheless, it also illustrates the complications accompanying the rise of e-commerce and the widespread use of online marketplaces. The development of the online marketplace has implicated a spectrum of legal issues that the law is not yet equipped to address, and the expansion of the e-commerce market is unlikely to stabilize or slow down any time soon.<sup>2</sup> The frequency of litigation instigated by transactions on e-commerce marketplaces will likely follow the same trend, and it is time for the law to evolve alongside these new technologies.

The growth of e-commerce has facilitated an increasing number of products' travel, frequently across state and international lines. This development has subsequently increased litigation between parties who are of diverse residencies. These disputes have challenged the fundamental territorial principles that established early personal jurisdiction doctrine. Moreover, unprecedented corporate expansion—both geographically and economically—has created an environment that has outgrown a doctrine focused on protecting defendants' rights. As courts are beginning to reform their analysis in products liability litigation towards finding Amazon

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2. See Jacob Greenwood & Keren Pakes, *Research Reveals Permanent Shift Towards Ecommerce as Over Half of Consumers (55%) Plan to Use Online Channels During 2020 Holiday Shopping Season*, BUS. WIRE (Nov. 19, 2020, 5:00 AM), <https://www.businesswire.com/news/home/20201119005552/en/Research-Reveals-Permanent-Shift-Ecommerce-Consumers-55> [<https://perma.cc/BWN2-DKQT>].

and others like it strictly liable for injuries caused by products sold on their sites, Amazon will have to find another way out, likely through challenging the presiding court's adjudicatory authority.

This Comment will evaluate whether the Supreme Court of the United States' interpretation of personal jurisdiction has progressed at the necessary speed to adequately address the issues arising out of Americans' dependence on Amazon. More generally, it will look at the implications of the Supreme Court's current understanding of personal jurisdiction and assess whether the current state of the doctrine is sheltering corporations behind new types of business models. By looking specifically at products liability litigation involving goods sold on Amazon,<sup>3</sup> it will conclude that the expansion of e-commerce has challenged the adequacy of current approaches to personal jurisdiction and products liability disputes. The solution to the issues caused by this stagnant nature of law requires simultaneous specific personal jurisdiction and products liability doctrinal reform.

## I. BACKGROUND

*“One of the best ways for a corporation to win litigation is to make sure the courthouse doors never open for the plaintiff in the first place.”*<sup>4</sup>

### A. *How Big Are They, Really?*

With the ability to sell anyone, anything, anywhere, it is not surprising that in 2021 more than 2 billion people worldwide are estimated to buy goods online.<sup>5</sup> In 2020, global e-commerce sales totaled \$4.1 trillion<sup>6</sup> and by 2023, that number will likely reach \$6.5 trillion.<sup>7</sup> Amazon accounts for a majority of the American e-

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3. I am using Amazon as an example of various concepts, ideas, and implications. This is not to isolate the issue to one e-commerce platform, but, because Amazon is taking up such a large majority of online sales and has monopolized e-commerce, it is the most relevant e-commerce platform to use for the purposes of evaluating the issues being discussed.

4. Wagner, *supra* note 1, at 1086.

5. Seamus Breslin, *15 Amazon Statistics You Need to Know in 2022*, REPRICER EXPRESS, <https://www.repricerexpress.com/amazon-statistic> [<https://perma.cc/3MAL-SWFW>].

6. Ethan Cramer-Flood, *Global Ecommerce 2020*, INSIDER INTELLIGENCE: EMARKETER (June 22, 2020), <https://www.emarketer.com/content/global-ecommerce-2020> [<https://perma.cc/Y44P-G5UQ>].

7. *Global Ecommerce Sales (2019–2025)*, OBERLO, <https://www.oberlo.com/statistics/global-ecommerce-sales> [<https://perma.cc/FVY8-MRFJ>].

commerce market.<sup>8</sup> One-third of Americans have an Amazon Prime membership;<sup>9</sup> unsurprisingly, Amazon is the highest-grossing e-commerce platform in the world.<sup>10</sup> Amazon also sells everything. An Amazon user can shop for a pressure cooker, a pair of socks, and a phone case simultaneously without leaving the website. The combination of convenience and variety has fueled customer loyalty: 89% of consumers reported that they are more likely to shop on Amazon than on any other e-commerce site.<sup>11</sup> There are currently 12 million different products sold on Amazon,<sup>12</sup> sold by 2 million different vendors.<sup>13</sup>

### B. *So, What's the Issue?*

There will always be some risk when buying a product that you personally did not see assembled. Society generally trusts the manufacturers and sellers of goods. In light of this trust, the law has protected consumers through safety regulations and penalizing parties in the distribution chain for injuries caused by defective products. However, as technology advances and the structure of trade changes, the tools used to implement safeguards have become outdated. It is the responsibility of lawmakers and courts alike to update the law to address these changes to the best of their ability.

The Supreme Court's interpretation of personal jurisdiction has not progressed at the necessary speed to adequately account for the issues that arise out of transactions facilitated on mega online retailers. Their failure has had a domino effect that leaves plaintiffs unable to recover and has curtailed the manufacturers' and distributors' incentives to abide by regulations, increasing consumers'

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8. *Top Ecommerce Companies in 2022*, OBERLO, <https://www.oberlo.com/statistics/top-ecommerce-companies> [<https://perma.cc/4HEQ-W5NA>].

9. See Breslin, *supra* note 5.

10. *Top Ecommerce Companies in 2022*, *supra* note 8.

11. Arishekar N, *Amazon Statistics (Seller, FBA, and Product) That'll Surprise You*, SELLERAPP, <https://www.sellerapp.com/blog/amazon-seller-statistics> [<https://perma.cc/EQH3-XFDC>].

12. See Emily Dayton, *Amazon Statistics You Should Know: Opportunities to Make the Most of America's Top Online Marketplace*, BIGCOMMERCE, <https://www.bigcommerce.com/blog/amazon-statistics/#a-shopping-experience-beyond-compare> [<https://perma.cc/2JSM-S47A>].

13. Kiri Masters, *The Most Surprising Stats from Amazon's 2021 Small Business Empowerment Report*, FORBES (Oct. 20, 2021, 5:55 AM) <https://www.forbes.com/sites/kiri-masters/2021/10/20/the-most-surprising-stats-from-amazons-2021-small-business-empowerment-report/?sh=36b7c503545f> [<https://perma.cc/C4E8-YTKK>].

exposure to potentially defective goods.<sup>14</sup> Consumers are inherently at a disadvantage when litigating opposite distributors and manufacturers. Most individuals harmed by defective products lack resources to spend on legal fees: corporations have in-house counsel and resources to pay for lengthy litigation. When prolonging litigation by focusing on jurisdictional issues, defendants thwart the plaintiffs' ability to recover.

Alternative procedural measures, such as class action suits and multidistrict litigation, are viable options to avoid litigating jurisdictional issues. However, these measures are only alternatives for litigation involving multiple plaintiffs. Class actions and multidistrict litigation require multiple disputes implicating a common issue or a class of people who have all been harmed by the same product.<sup>15</sup> This option is also generally limited to products with design defects and not with manufacturing errors. Because design defects affect entire product lines, there are likely multiple consumers of the defective product who have been injured, making a class action suit possible. Plaintiffs injured by a manufacturing defect would seldom have this option because manufacturing defects tend to affect few products in the product line, frequently resulting in a single defective product. With only one plaintiff, a class action suit is not available as an alternative measure. Multidistrict litigation is also limited to plaintiffs litigating disputes that arise out of a common issue, limiting plaintiffs' opportunity to use that measure to times when other plaintiffs are litigating the same issue, which threatens statute of limitations issues; there is no guarantee that factually similar cases will arise within the allotted time prescribed by the statute of limitations.

Notwithstanding the feasibility of these alternative measures, plaintiffs should have the option to bring individual lawsuits. A plaintiff may have reasons for wanting to do so and should not have their options limited because the law has not been updated to account for technological change. By limiting a plaintiff's means of recovery, the law disadvantages plaintiffs merely for being plaintiffs who are suing entities that are structured beyond the scope of what the law addresses. Even in cases where there are many plaintiffs, an individual should not be limited to certain remedial measures due to insufficient personal jurisdiction doctrine.

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14. See Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J.L. & TECH. ONLINE 181, 193 (2019).

15. FED. R. CIV. P. 23(a).

## 1. Amazon Escapes Liability, Thwarting Plaintiffs' Ability to Recover

Amazon has avoided liability through a business model that circumvents tort common law definitions of “distributor,” “manufacturer,” and “seller.”<sup>16</sup> Amazon’s website sells a combination of products. They sell products that they, themselves, designed and manufactured and products manufactured by entities that are not affiliated with Amazon.<sup>17</sup> Products reach the consumer via four different avenues: “Fulfilled by Merchant” (“FBM”), “Fulfilled by Amazon” (“FBA”), “Seller-Fulfilled Prime” (“SFP”), and “Multi-Channel Fulfillment” (“MCF”).<sup>18</sup> The services differ based on Amazon’s involvement in the transaction and how the product reaches the consumer.<sup>19</sup> A seller using “FBM” is responsible for fulfilling and shipping products that they sell.<sup>20</sup> “SFP” is the same as “FBM,” but the products are eligible for Amazon’s 2-day free shipping at the expense of the third-party vendor.<sup>21</sup> When using “FBA,” Amazon “catalogs, warehouses, packages, ships, and handles customer service responsibilities for the vendor’s products.”<sup>22</sup> In return, Amazon collects storage and fulfillment fees.<sup>23</sup> “MCF” provides all the same services as “FBA” but has various shipping speeds in addition to Amazon’s two-day free shipping.<sup>24</sup>

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16. Jay Greene, *Burning Laptops and Flooded Homes: Courts Hold Amazon Liable for Faulty Products*, WASH. POST (Aug. 29, 2020, 6:00 AM), <https://www.washingtonpost.com/technology/2020/08/29/amazon-product-liability-losses> [<https://perma.cc/F5G4-DKND>] (“Amazon has argued in court that this relationship absolves it of any liability related to defective products sold by those vendors. And for many years, courts have largely sided with Amazon.”).

17. Shantal Riley, *Who’s Responsible for Defective Products Sold on Amazon?* PBS: FRONTLINE (Mar. 11, 2020), <https://www.pbs.org/wgbh/frontline/article/whos-liable-for-defective-products-sold-on-amazon> [<https://perma.cc/D3GE-R482>].

18. See Arishekar N, *supra* note 11; Bullard, *supra* note 14, at 193.

19. See *infra* notes 21–25 and accompanying text.

20. See Kristina Lopienski, *Amazon Fulfilled by Merchant (FBM): How It Works and How It Compares to Fulfillment by Amazon (FBA)*, SHIPBOB (May 4, 2020), <https://www.shipbob.com/blog/amazon-fulfilled-by-merchant-fbm> [<https://perma.cc/Y7FJ-SD6B>].

21. See *Seller Fulfilled Prime, Sell Products with the Prime Badge Directly from Your Warehouse*, AMAZON, <https://sell.amazon.com/programs/seller-fulfilled-prime> [<https://perma.cc/6LV7-RRM3>]; see also Kristina Lopienski, *Is Seller Fulfilled Prime Worth the Cost? Weighing the Requirements, Pros, & Cons*, SHIPBOB (June 13, 2019), <https://www.shipbob.com/blog/seller-fulfilled-prime> [<https://perma.cc/TVP9-K3AZ>].

22. Bullard, *supra* note 14, at 193; see *Fulfillment by Amazon*, AMAZON, <https://sell.amazon.com/fulfillment-by-amazon.html> [<https://perma.cc/GH2Y-RT7L>].

23. *Save Time and Help Grow Your Business with FBA*, AMAZON, <https://sell.amazon.com/fulfillment-by-amazon.html> [<https://perma.cc/DU3K-MHG9>]; see also Bullard, *supra* note 14, at 194.

24. Lopienski, *supra* note 20.

These services blend the legally defined roles of a manufacturer, distributor, and seller, making it more challenging to identify which party *can* be held liable. Under its current policy, Amazon takes no responsibility for defective items sold by third-party vendors.<sup>25</sup> Courts have agreed, ruling that Amazon is not liable for these injuries.<sup>26</sup> The solution seems straightforward enough: hold the third-party vendor liable. However, one issue makes this impossible for a majority of plaintiffs: they cannot find them. Many third-party vendors are located outside of the United States,<sup>27</sup> and many are impossible to find or do not exist as legally recognized entities.<sup>28</sup> If a plaintiff cannot find the contact information for or identify these vendors, how can the plaintiff bring them into court?<sup>29</sup>

As explained by Rachel Weintraub, Legislative Director and General Counsel for the Consumer Federation of America, “If these companies are successful in arguing that, because of innovation, they fall outside of traditional legal terms, it leaves consumers without a tool that the law traditionally provides them . . . . We don’t want to create more immunity for sellers of defective products.”<sup>30</sup> By not adequately updating personal jurisdiction doctrine, the Supreme Court is disregarding how major e-commerce marketplaces have transformed the market, thereby creating immunity in the name of innovation.

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25. See Riley, *supra* note 17.

26. See, e.g., *Stiner v. Amazon.com, Inc.*, 164 N.E.3d 394, 400 (Ohio 2020) (holding that “Amazon’s role in the chain of distribution is not sufficient to trigger the imposition of strict liability for defective products sold by third-party vendors on its marketplace”); see also Greene, *supra* note 16 (“Amazon racked up a string of legal victories, arguing that it merely was a conduit that connected sellers to shoppers, sheltered from claims that it was responsible for defective goods third-party merchants sold on its site.”); Riley, *supra* note 17.

27. Half of the world’s Amazon sellers are based outside of the United States. See *The State of the Amazon Seller*, JUNGLE SCOUT (2021), <https://www.junglescout.com/amazon-seller-report> [<https://perma.cc/3QRT-D8KF>].

28. Greene, *supra* note 16 (“[M]any of the third-party sellers are effectively judgment-proof . . . . When products from Chinese sellers hurt shoppers in the United States, the merchants often disappear, leaving consumers unable to hold them accountable.”).

29. See, e.g., *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020); *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136 (3d Cir. 2019); see *infra* notes 49–80 and accompanying text.

30. Riley, *supra* note 17.



2. Amazon Has Little Incentive to Regulate the Safety of the Products They Sell, Creating an Environment Where Third-Party Vendors Also Have Limited Incentive to Invest in Product Safety Measures

Without the threat of liability, there is limited incentive to install proper protocol to check the safety of the products. One of the major draws of shopping online is the massive selection of items. With 2.5 million third-party vendors selling products through various channels, it is impossible for Amazon to thoroughly vet every vendor and the safety of every item they sell.<sup>31</sup> The massive size of the online marketplace allows products sold by third-party vendors to fall through the cracks of U.S. product regulation because most of them are manufactured outside of the country.<sup>32</sup> Amazon spokeswoman, Cecilia Fan, stated that although the company aims to be the online marketplace with the broadest selection, the company is not doing so at the expense of customer safety.<sup>33</sup> However, it is almost impossible for Amazon to do so because

it has allowed so many sellers into its marketplace, [which] also made it difficult to police for dangerous goods . . . . Some Chinese manufacturers and sellers, which [Amazon] aggressively recruited to create a catalogue of products so extensive that no other retailer could match it, do not manufacture products to standards set by U.S. lawmakers and regulators.<sup>34</sup>

Amazon increases the threat of injury to the American consumer while simultaneously making money off facilitating transactions that expose American consumers to products that do not comply with product safety regulations, all while escaping liability for any injuries those products have caused.<sup>35</sup>

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31. See Greene, *supra* note 16 (“Amazon has emerged as the nation’s largest online retailer, in part by turning its store into an online bazaar where more than 2.5 million third-party vendors sell their goods. The company has prioritized that vast selection, allowing merchants to sell on the site with scant vetting.”).

32. See *The State of the Amazon Seller*, *supra* note 27.

33. Greene, *supra* note 16.

34. *Id.*

35. Riley, *supra* note 17 (“In 2014, a 23-year-old Missouri man died after his helmet came off in a motorcycle accident. The helmet was out of compliance with federal safety standards when it was purchased on Amazon . . . . Amazon denied it was the seller of the helmet. The company eventually settled for \$5,000, but admitted no liability.”).

### C. *Proposed Solution*

The solution requires a synchronous reformation of procedural and substantive law. Products liability law needs to include entities that facilitate transactions between third-party sellers and consumers as part of the distribution chain. Amazon frequently is the “but for” cause of defective products reaching consumers, which justifies the imposition of liability. Because the Restatement of Torts may not be updated in the near future, courts should, in the meantime, label Amazon a “seller.”

Procedurally, online marketplaces that facilitate transactions between third-party vendors and consumers should be subject to personal jurisdiction in the states where they send the products. Amazon should be subject to the jurisdictions where products caused injuries “but for” their service. By facilitating transactions between third-party vendors and consumers, Amazon conducts business with the consumers, thereby satisfying minimum contacts, subjecting them to personal jurisdiction in the forum where the consumer received the product. Plaintiffs should have the ability to bring Amazon into court to litigate claims that resulted from defective products reaching the plaintiff.

## II. THE GRAY AREA: WHAT IS AMAZON?

### A. *As a Matter of Law*

In the states that recognize strict products liability, the product manufacturer, distributor, seller, or all three, can be held liable for injuries sustained to the consumer, regardless of whether they were at fault.<sup>36</sup> Strict liability focuses on protecting innocent

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36. See generally ARK. CODE ANN. § 4-86-102 (2021); CONN. GEN. STAT. ANN. § 52-572m(a) (2021); ME. STAT. tit. 14, § 221 (2020); MINN. STAT. § 544.41 (2021); MONT. CODE ANN. § 27-1-719 (2021); N.J. STAT. ANN. § 2A:58C-9 (West 2021); OR. REV. STAT. § 30.920; (2021) S.C. CODE ANN. § 15-73-10 (1974); Casrell v. Altec Indus., Inc., 335 So.2d 128 (Ala. 1976); Swenson Trucking & Excavating, Inc. v. Truckweld Equip. Co., 604 P.2d 1113 (Alaska 1980); O.S. Stapley Co. v. Miller, 447 P.2d 248 (Ariz. 1968); Barker v. Lull Eng'g Co., 143 Cal. Rptr. 225 (1978); Payne v. Soft Sheen Prods., Inc., 486 A.2d 712 (D.C. 1985); Adobe Bldg. Ctrs., Inc. v. L.D. Reynolds, 403 So. 2d 1033 (Fla. 1981); Stewart v. Budget Rent-A-Car Corp., 470 P.2d 240 (1970); Suvada v. White Motor Co., 210 N.E.2d 1182 (Ill. 1965); Phipps v. Gen. Motors Corp., 363 A.2d 955 (Md. App. 1975); Shoshone Coca-Cola Bottling Co. v. Dolinski, 420 P.2d 855 (Nev. 1966); Buttrick v. Arthur Lessard & Sons, Inc., 260 A.2d 111 (N.H. 1969); Stang v. Hertz Corp., 479 P.2d 732 (N.M. 1972); Sukljan v. Charles Ross & Son Co., Inc., 511 N.Y.S.2d 821 (1986); Kirkland v. Gen. Motors Corp., 521 P.2d 1353 (Okla. 1974); Webb v. Zern, 220 A.2d 853 (Pa. 1966); Ritter v. Narragansett Elec. Co., 283 A.2d 255 (R.I. 1971); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967);

consumers and is fundamentally rooted in tort law's public policy's foundational goal of making the injured party whole.<sup>37</sup> Strict liability also plays a role in incentivizing product regulation by discouraging American corporations from outsourcing their manufacturing and distribution to foreign parties shielded from American courts' jurisdiction.<sup>38</sup>

Although not every state recognizes strict liability in products liability,<sup>39</sup> ten of the states that do not recognize strict liability have exceptions for situations where a manufacturer is either not subject to "service of process under the laws of the claimant's domicile,"<sup>40</sup> has been "judicially declared insolvent,"<sup>41</sup> or is a combination of the two.<sup>42</sup> In these cases, an innocent seller of a defective product may be found liable for injuries caused by the manufacturer because that manufacturer is not reachable by the court or that the plaintiff would not recover from the manufacturer. This

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Hahn v. Armco Steel Co., 601 P.2d 152 (Utah 1979); Zaleskie v. Joyce, 333 A.2d 110 (Vt. 1975); Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 66 (W. Va. 1979). Dippel v. Sciano, 155 N.W.2d 55 (Wis. 1967); Ogle v. Caterpillar Tractor Co., 716 P.2d 334 (Wyo. 1986).

37. See *Products Liability*, LEGAL INFO. INST.: CORNELL L. SCH., [https://www.law.cornell.edu/wex/products\\_liability](https://www.law.cornell.edu/wex/products_liability) [<https://perma.cc/G7F3-CBJS>].

38. See Petition for Review at 19, *Acqua Vista Homeowners Ass'n, v. MWI, Inc.*, 2017 Cal. LEXIS 3311 (Mar. 6, 2017) (No. S240489), 2017 CA S. Briefs LEXIS 532 at \*25 (arguing that limiting liability to suppliers inhibits product safety regulations); e.g., Alexandra Muir, *The Race to Safety: How Private Lawmaking and Voluntary-Standard Adoption Can Inspire a Global Regime that Strengthens and Harmonizes Product Safety Standards*, 23 IND. J. GLOB. LEGAL STUD. 323, 327 (2016) (discussing Japan's adoption of strict products liability and how it led to improved product safety measures and increased protections for consumers); see also Laurel Pyke Malson & Clifford J. Zatz, *Supreme Court Hears Arguments on Expanding U.S. Jurisdictional Reach Over Foreign Manufacturers*, CROWELL & MORING LLP (Jan. 26, 2011), <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Supreme-Court-Hears-Arguments-on-Expanding-US-Jurisdictional-Reach-over-Foreign-Manufacturers> [<https://perma.cc/WK9C-TGHX>].

39. See CONG. RSCH. SERV., RL32560, SELECTED PRODUCTS LIABILITY ISSUES: A 50-STATE SURVEY 1-4 (2005), [https://www.everycrsreport.com/files/20051013\\_RL32560\\_8c8ec5ee5b46f07a994e3dcd6a979488a55b3dd5.pdf](https://www.everycrsreport.com/files/20051013_RL32560_8c8ec5ee5b46f07a994e3dcd6a979488a55b3dd5.pdf) [<https://perma.cc/NL7B-J2UP>].

40. IDAHO CODE § 6-1407 (2021); WASH. REV. CODE § 7.72.040 (2022); see COLO. REV. STAT. § 13-21-402 (2021); DEL. CODE ANN. tit. 18, § 7001 (2021); MO. REV. STAT. § 537.762 (2019); N.C. GEN. STAT. § 99B-2 (2021); IOWA CODE § 613.18 (2021); KY. REV. STAT. ANN. § 411.340 (LexisNexis 2021); OHIO REV. CODE ANN. § 2307.78 (LexisNexis 2021); TENN. CODE ANN. § 29-28-106 (2021).

41. See DEL. CODE ANN. tit. 18, § 7001; IDAHO CODE § 6-1407; N.C. GEN. STAT. § 99B-2; OHIO REV. CODE ANN. § 2307.78; TENN. CODE ANN. § 29-28-106; WASH. REV. CODE § 7.72.040.

42. See DEL. CODE ANN. tit. 18 § 7001; N.C. GEN. STAT. § 99B-2; KAN. STAT. ANN. § 60-3306 (2020); IDAHO CODE § 6-1407; OHIO REV. CODE ANN. § 2307.78; TENN. CODE ANN. § 29-28-106; WASH. REV. CODE § 7.72.040.

means that if a court categorizes Amazon as a seller, they will be subject to liability in forty-three states.<sup>43</sup>

Various courts around the United States have been tasked with determining whether Amazon is a seller.<sup>44</sup> In many of these cases, Amazon's level of involvement in each transaction can differ; thus, its status has not been concretely defined and has heavily depended on the amount of weight the court assigns to Amazon's role in delivering the product to the consumer.

### 1. *Bolger v. Amazon.com, LLC*

In *Bolger v. Amazon.com, LLC*, San Diego resident Angela Bolger suffered severe burns when a replacement battery she ordered for her laptop exploded in 2016.<sup>45</sup> The \$12.30 battery was sold through Amazon's "FBA" service, and the seller was listed on the site as "E-Life."<sup>46</sup> "E-Life" was a fake name used by a Chinese-based company called Lenoge Technology (HK).<sup>47</sup> The battery explosion caused Bolger third-degree burns on her arms, legs, and feet and burned her clothing, bedroom furniture, and apartment flooring.<sup>48</sup> Bolger had to have surgery to graft the burnt parts of her skin.<sup>49</sup>

Bolger sued Amazon and Lenoge Technology for "strict products liability, negligent products liability, breach of implied warranty, breach of express warranty, and 'negligence/negligent undertaking.'"<sup>50</sup> Lenoge Technology did not respond, and the trial court entered a default judgment against it.<sup>51</sup> Amazon moved for summary judgment, contending that "the doctrine of strict products liability, as well as any similar tort theory, did not apply to it because it did not distribute, manufacture, or sell the product in question. It claimed its website was an 'online marketplace' and Lenoge was

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43. See, e.g., *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020); *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136 (3d Cir. 2019). But see, e.g., *Stiner v. Amazon.com, Inc.*, 164 N.E.3d 394 (Ohio 2020).

44. See, e.g., *Bolger*, 267 Cal. Rptr. 3d 601; *Oberdorf*, 930 F.3d 136; *infra* notes 49–80 and accompanying text.

45. 267 Cal. Rptr. 3d at 604.

46. *Id.*

47. *Id.*

48. *Id.*

49. Greene, *supra* note 16.

50. *Bolger*, 267 Cal. Rptr. 3d at 604.

51. *Id.*

the product seller, not Amazon.”<sup>52</sup> The trial court agreed with Amazon and granted summary judgment in its favor.<sup>53</sup> The Court of Appeal of California in the Fourth Appellate District rejected Amazon’s argument.<sup>54</sup> Writing for the majority, Judge Patricia Guerrero wrote:

As a factual and legal matter, Amazon placed itself between Lenoge and Bolger in the chain of distribution of the product at issue here. Amazon accepted possession of the product from Lenoge, stored it in an Amazon warehouse, attracted Bolger to the Amazon website, provided her with a product listing for Lenoge’s product, received her payment for the product, and shipped the product in Amazon packaging to her. Amazon set the terms of its relationship with Lenoge, controlled the conditions of Lenoge’s offer for sale on Amazon, limited Lenoge’s access to Amazon’s customer information, forced Lenoge to communicate with customers through Amazon, and demanded indemnification as well as substantial fees on each purchase. Whatever term we use to describe Amazon’s role, be it “retailer,” “distributor,” or merely “facilitator,” it was pivotal in bringing the product here to the consumer.<sup>55</sup>

The Court explained that as a matter of California law, Amazon’s role in its “FBA” program is “an integral part of the overall producing and marketing enterprise,”<sup>56</sup> and that it should be held strictly liable for injuries caused by defective products sold on its website through this program.<sup>57</sup> The court further justified liability, stating, “[b]ut for Amazon’s own acts, Bolger would not have been injured ... Amazon’s own acts, and its control over the product in question, form the basis for its liability.”<sup>58</sup>

Moreover, the court recognized the unavailability of other potential defendants and how that would impact consumer protection. The court explained that California has broadly applied strict liability, recognizing more viable defendants, because the primary purpose of products liability is to protect otherwise defenseless

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52. *Id.*

53. *Id.*

54. *See generally id.*

55. *Id.* at 604–05.

56. *Id.* at 612.

57. *Id.* at 620.

58. *Id.*; *see* Greene, *supra* note 16 (“A key to the Bolger ruling, and the other recent liability rulings against Amazon, is that the company warehoused and shipped the defective products. Rulings have held that Amazon’s possession of those products in its warehouses, as well as its shipping them in boxes covered in the company’s logo, puts it squarely in the distribution chain.”).

victims from defective products by creating an incentive for parties who have the power to actually make those products safe.<sup>59</sup> The California Supreme Court denied Amazon's subsequent appeal.<sup>60</sup>

## 2. *Oberdorf v. Amazon.com Inc.*

The United States Court of Appeals for the Third Circuit issued a similar ruling.<sup>61</sup> In *Oberdorf v. Amazon.com Inc.*, the court was asked if “Amazon’s role in effectuating the sale of products offered by third-party vendors” subjected them to liability for injuries caused by products sold by those third-party vendors on their website.<sup>62</sup> In 2015, Heather Oberdorf walked her dog using a dog collar she bought on Amazon from a third-party vendor called “The Furry Gang.”<sup>63</sup> Differing from the product in *Bolger*, The Furry Gang shipped the collar directly from its facility in Nevada to Oberdorf in Pennsylvania.<sup>64</sup> While Oberdorf was walking her dog, Sadie, the ring on the dog’s collar broke, which caused the retractable leash that she was using to snap back into her eyeglasses, injuring both eyes and completely blinding the left.<sup>65</sup> Oberdorf brought claims of “strict products liability, negligence, breach of warranty, misrepresentation, and loss of consortium” against Amazon and The Furry Gang.<sup>66</sup> Court documents indicate that neither Amazon nor

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59. *Bolger*, 267 Cal. Rptr. 3d at 612–13; see Greene, *supra* note 16 (“[T]he Fourth District Court of Appeal in California ruled that, like a physical retailer, Amazon is part of the distribution chain and could have exerted influence on product safety in a way few consumers could. And since the third-party seller, a Chinese company, couldn’t be found by the litigants, Amazon was the only viable defendant.”)

60. See generally *Bolger v. Amazon.com, LLC*, No. S264607, 2020 Cal. LEXIS 7993, at \*1 (Nov. 18, 2020).

61. Compare *supra* notes 50–60 and accompanying text, with *infra* notes 62–78 and accompanying text.

62. 930 F.3d 136 (3d Cir. 2019), *vacated and reh’g en banc granted*, 936 F.3d 182 (3d Cir. 2019). Upon rehearing, the en banc court petitioned the Supreme Court of Pennsylvania for certification of question of law asking, “Under Pennsylvania law, is an e-commerce business, like Amazon, strictly liable for a defective product that was purchased on its platform from a third-party vendor, which product was neither possessed nor owned by the e-commerce business?” *Oberdorf v. Amazon.com Inc.*, 818 Fed. Appx. 138 (3d Cir. 2020). The Supreme Court of Pennsylvania granted the petition. Order, *Oberdorf v. Amazon.com Inc.*, 237 A.3d 394 (No. 41 EM 2020), 2020 Pa. LEXIS 3911. However, before it could consider the question, the case settled out of court. Max Mitchell, *Products Liability Lawsuit Against Amazon Has Settled, Mooting Pa. Supreme Court Argument*, Legal Intelligencer (Sept. 23, 2020, 6:21 PM), <https://www.law.com/thelegalintelligencer/2020/09/23/products-liability-lawsuit-against-amazon-has-settled-mooting-pa-supreme-court-argument/?slreturn=20220221225604> [<https://perma.cc/3MAV-427Z>].

63. *Oberdorf*, 930 F.3d. at 141.

64. *Id.* at 142

65. *Id.*

66. *Id.*

counsel representing Oberdorf could contact or locate a representative of The Furry Gang.<sup>67</sup>

Amazon argued that under section 402A of the Second Restatement of Torts, it could not be held strictly liable because liability is limited to “sellers” of products, and Amazon is not considered a “seller” because “it merely provides an online marketplace for products sold by third-party vendors.”<sup>68</sup> Amazon attempted to argue that it falls under a similar distinction as an auction house and that under Pennsylvania law, an auction house is not considered a seller; therefore, it cannot be held strictly liable.<sup>69</sup> The Court rejected this argument and subsequently used it against Amazon.<sup>70</sup>

The Court used an analysis developed by the Pennsylvania Supreme Court when evaluating Amazon’s role.<sup>71</sup> Resembling the rationale used by the California court in *Greenman v. Yuba Power Products*,<sup>72</sup> the Pennsylvania court looked at the following four factors:

- (1) Whether the actor is the “only member of the marketing chain available to the injured plaintiff for redress”;
- (2) Whether “imposition of strict liability upon the [actor] serves as an incentive to safety”;
- (3) Whether the actor is “in a better position than the consumer to prevent the circulation of defective products”; and
- (4) 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.”<sup>73</sup>

The three-judge panel held that Amazon’s role in the transaction satisfied all four factors, qualifying them as a “seller.”<sup>74</sup> Writing for the majority, Judge Roth went beyond these considerations and addressed how the structure of Amazon’s business model should not restrict the law’s ability to protect consumers; she writes, “[w]e do not believe that Pennsylvania law shields a company from strict liability simply because it adheres to a business model that fails to prioritize consumer safety.”<sup>75</sup> Because Amazon had not yet had exposure to liability akin to traditional brick-and-mortar stores,

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67. *Id.*

68. *Id.* at 143.

69. *Id.* at 144 (citing *Musser v. Vilsmeier Action Co.*, 522 Pa. 367 (1989)).

70. *Id.*

71. *Id.* (citing *Musser*, 522 Pa. 367).

72. *See* 59 Cal. 2d 57 (1963).

73. *Oberdorf*, 930 F.3d. at 144 (quoting *Musser*, 522 Pa. at 374).

74. *Id.*

75. *Id.* at 146 n.28.

these decisions have been shocking to prominent e-commerce leaders and lobbyists, including the Internet Association and the Computer and Communications Industry Association.<sup>76</sup> TechNet expressed concern about the decision's impact on economic development, stating that the decision threatened to "undermine the development of e-commerce, and harm the U.S. economy."<sup>77</sup>

Defining online marketplaces as sellers, or, in states without strict liability, invoking the seller exception, would be an effective way to hold these marketplaces liable in the absence of an accessible manufacturer. This would fix the issue of inaccessible third-party vendors. The problem with this seemingly easy fix is that when the products liability restatement was last revised, the development of the e-commerce market was young,<sup>78</sup> and most "sellers" were located within the jurisdictions in which the consumer resided. Now, the development of e-commerce has separated buyers and sellers across state lines, which has made this option unreliable for plaintiffs who live in a different state than the marketplace headquarters and wish to try them in their home state.

### III. THE DEVELOPMENT OF PERSONAL JURISDICTION, STREAM OF COMMERCE, AND INTERNET CONTACTS

Personal jurisdiction is the doctrine that establishes the constitutional boundaries of a court's adjudicatory authority over plaintiffs and defendants.<sup>79</sup> The Supreme Court has focused personal jurisdiction doctrine on protecting defendants from unnecessary and unfair burdens of litigating outside of their home state.<sup>80</sup> In its most simplistic form, courts currently look at five factors to determine if the exercise of personal jurisdiction over the defendant is reasonable: "(1) 'the burden on the defendant,' (2) 'the plaintiff's interest in obtaining relief,' (3) 'the interests of the forum state,' (4) 'the procedural and substantive policies of other *nations*,' and (5)

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76. Riley, *supra* note 17.

77. *Id.*

78. "Before 1998, when the products liability Restatement was last revised, Amazon had been a public company for less than a year and sold only books. Its Amazon Prime service wasn't launched until 2005, and its FBA service wasn't launched until 2006." Bullard, *supra* note 14, at 218.

79. Williams S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1242 (2018) (citing *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102 (1987)).

80. *Id.* at 1223.



‘the . . . judicial system’s interests in obtaining the most efficient resolution of controversies.’”<sup>81</sup>

A. *Progression of Personal Jurisdiction: Responses to Technological and Societal Change*

The Supreme Court has historically evolved personal jurisdiction in conjunction with social, economic, and technological advancements.<sup>82</sup> When persons rarely stepped out of their home state’s borders, the Supreme Court focused on preserving the multistate federal court system’s judicial sovereignty.<sup>83</sup> Via its 1878 decision, *Pennoyer v. Neff*, the Court established that a state’s adjudicatory authority was limited to the parties and property within its borders.<sup>84</sup> This doctrine was appropriate because most parties to lawsuits were natural persons whose activity was mainly restricted to one state and whose residency could be easily determined.<sup>85</sup> However, as time went on and technology progressed, a strictly territorial approach to personal jurisdiction proved to be inadequate.

The importance of state boundaries decreased because developments in transportation allowed persons and products to more regularly cross state lines. The court needed to update personal jurisdiction to account for litigation between parties of diverse residence and litigation involving corporations doing business in multiple states.<sup>86</sup> The Court’s 1945 decision, *International Shoe Co. v. Washington*, which is the doctrine still used today, moved the focus to a combination of “minimum contacts” and fairness to the parties involved in the litigation.<sup>87</sup> Writing for the majority, Justice Stone transformed personal jurisdiction doctrine to account for the modernization of society. He wrote:

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81. *Id.* at 1242 (quoting *Asahi Metal*, 480 U.S. 102).

82. *See infra* notes 83–107 and accompanying text.

83. *See Pennoyer v. Neff*, 95 U.S. 714, 722 (1878); Wagner, *supra* note 1, at 1119 (arguing that the “evolution of the common law of territorial jurisdiction has come largely in response to socioeconomic-political pressures, as well as changes in technology and even philosophy” (quoting KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* 250 (3d ed. 2012))).

84. 95 U.S. 714, 722.

85. *See generally* Dodge & Dodson, *supra* note 79 (arguing for a nation-contacts test for personal jurisdiction).

86. *See generally* *Int’l Shoe Co. v. Wash.*, 326 U.S. 310 (1945).

87. *See generally id.*; *see also* Katie M. Jackson & William A. Hanssen, *California Court of Appeal Finds Amazon Is Not Shielded from Liability for Defective Product Sold Through Its Website*, 81 NAT’L L. REV. ONLINE, Nov. 16, 2020.

Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."<sup>88</sup>

*International Shoe* updated the law so that a court had personal jurisdiction over an out-of-state defendant when that defendant's contacts in the forum state are "sufficient to logically conclude that the defendant has benefitted from the laws of that state."<sup>89</sup> In *Hanson v. Denckla*, the Court refined minimum contacts doctrine, including whether the defendant took purposeful action that established minimum contacts in the specific forum state into the analysis.<sup>90</sup>

#### B. *Personal Jurisdiction and Products: Stream of Commerce*

Products liability litigation pushed the Supreme Court to refine personal jurisdiction doctrine further.<sup>91</sup> Interstate and international commerce raised the question of when a defective product hurts a plaintiff, can that plaintiff sue the manufacturer, distributor, or seller in the state where that plaintiff bought the product, even if the defendant's only contact was that the product ended up in the forum state by traveling through the stream of commerce.<sup>92</sup> The Court said: yes, they can, sometimes.<sup>93</sup>

In *World-Wide Volkswagen Corp. v. Woodson*, the Court established the "stream of commerce" approach to personal jurisdiction.<sup>94</sup> The plaintiffs in the landmark products liability suit had purchased a car in New York and, while driving that car through

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88. *Int'l Shoe Co.*, 326 U.S. at 316 (internal citations omitted).

89. *Id.* at 323; Wagner, *supra* note 1, at 1094.

90. 357 U.S. 235 (1958); Jayci Nobel, *Personal Jurisdiction and the Internet: A Shift in the International Shoe Analysis for Users of Ecommerce and Peer-to-Peer Websites*, 42 S. ILL. U. L.J. 521 (2018).

91. See *infra* notes 92–94 and accompanying text.

92. See, e.g., *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

93. See sources cited *supra* note 92.

94. See generally 444 U.S. 286.

Oklahoma, were injured after getting into an accident.<sup>95</sup> The plaintiffs brought the suit in Oklahoma, claiming that their injuries resulted from the car's defective design.<sup>96</sup> The defendants argued that "Oklahoma's exercise of jurisdiction over them would offend the limitations on the State's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment."<sup>97</sup> The Court agreed, finding a lack of basis for Oklahoma to have personal jurisdiction over the defendant corporations because they did not take any specific action directed at the state connected to the cause of action, nor did they purposefully avail themselves to the laws of that state merely because a product they put in the stream of commerce happened to end up there.<sup>98</sup>

Thus, the Court developed the idea of "foreseeability" in determining where a manufacturer or distributor can be subject to personal jurisdiction,<sup>99</sup> "the court held that defendants are subject to a court's personal jurisdiction if they have placed an allegedly defective product into the 'stream of commerce' with the expectation that the product will be purchased by consumers in that forum."<sup>100</sup> The case established that a defendant's knowledge that there is a likelihood a product ends up in a forum state is not enough to establish personal jurisdiction in that state.<sup>101</sup> Later, the Court in *Asahi Metal Industrial Co. v. Superior Court* further specified the stream of commerce doctrine and required an additional showing that the defendant manufacturer, distributor, or seller must have intended to serve the forum state's market.<sup>102</sup>

### C. Personal Jurisdiction and the Internet

When looking at minimum contacts, the court evaluates "the relationship among the defendant, the forum, and the litigation."<sup>103</sup> Heard by the United States District Court for the Western District

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95. *Id.* at 287–88.

96. *Id.* at 288.

97. *Id.*

98. *See generally id.* at 286.

99. *Id.*

100. Alison Frankel, *Stakes Are High for Businesses, Products Liability Plaintiffs in Supreme Court's New Ford Cases*, REUTERS (Jan. 21, 2020, 5:39 PM), <https://www.reuters.com/article/us-otc-jurisdiction-idUKKBN1ZK2UX> [<https://perma.cc/Z7TL-47HB>].

101. *See generally World-Wide Volkswagen Corp.*, 444 U.S. 286.

102. *See generally* 480 U.S. 102 (1987).

103. *Calder v. Jones*, 465 U.S. 783, 788 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

of Pennsylvania, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* is a landmark personal jurisdiction case focused on internet contacts.<sup>104</sup> The *Zippo* decision provided a sliding scale test that evaluated whether personal jurisdiction was permissible based on the strength of the connection between the plaintiff's cause of action and the internet-based activity in question.<sup>105</sup> The decision expanded "personal jurisdiction in a...manner [that] would be directly proportionate to the nature and quality of the commercial activity that the entity was conducting over the Internet."<sup>106</sup> The court's decision was an appropriate expansion of personal jurisdiction doctrine in light of the nature of internet activity in 1997.<sup>107</sup>

However, during the late 1990s, most internet usage was for communication purposes and not a bustling e-commerce megamarket. The creation of an online marketplace has gone beyond the scope of the activity considered when formulating the *Zippo* test.<sup>108</sup> The test does not address online activity that implicates stream of commerce issues. The gap in activity covered by the established doctrine has reared its head in various state and federal courts; yet there is not a uniform binding precedent regarding the classification of product transactions made on the internet's mass e-commerce marketplaces.<sup>109</sup>

#### D. *Personal Jurisdiction in 2021: Ford Motor Co. v. Montana Eighth Judicial District Court*

In March of 2021, the Supreme Court further developed personal jurisdiction doctrine in *Ford Motor Co. v. Montana Eighth Judicial District Court*. Again, the Court was confronted with a personal jurisdiction question arising from a product liability claim.<sup>110</sup> The two cases addressed by the Court, originating in two Montana and Missouri district courts, were brought against Ford because of

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104. See generally 952 F. Supp. 1119 (W.D. Pa. 1997).

105. *Id.*

106. Nobel, *supra* note 90, at 530.

107. *Id.*

108. See *Zippo Mfg. Co.*, 952 F. Supp. 1119.

109. See *J. McIntyre Mach., Ltd. v. Nicasto*, 564 U.S. 873, 890 (2011) (Breyer, J., concurring) (discussing how the majority's decision did not address online retailers, leaving an open question of law: "if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case").

110. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Court*, 141 S. Ct. 1017, 1022 (2021).

injuries resulting from accidents caused by defective Ford vehicles.<sup>111</sup> However, the caveat is that Ford did not manufacture, design, or sell the specific cars in Montana and Missouri; and the plaintiffs had bought the cars second hand, meaning the cars were not initially sold to the consumer in the respective forum states.<sup>112</sup>

Ford responded to each suit with identical arguments and challenged the two district courts' jurisdiction over the disputes. Ford contended that the two courts had personal jurisdiction only if there was a causal connection between Ford's contacts with the forum state and the plaintiff's injury.<sup>113</sup> They argued that the plaintiffs lacked this causal connection and that personal jurisdiction would only be proper if Ford had manufactured, designed, or sold the vehicle involved in the accident in the forum states.<sup>114</sup>

Spanning over one majority and three concurring opinions, the Court unanimously affirmed that personal jurisdiction exists when an in-state plaintiff brings a products liability claim for injuries caused in-state against an out-of-state defendant.<sup>115</sup> Justice Kagan, joined by Justices Roberts, Breyer, Sotomayor, and Kavanaugh, delivered the majority opinion.<sup>116</sup> She opens the opinion with an intelligible articulation of the Court's holding, writing "[w]hen a company like Ford serves a market for a product in a State, and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit."<sup>117</sup>

In response to Ford's argument that precedent precluded the Court from establishing personal jurisdiction in the absence of an express "causal link," the majority focused on how their established doctrine does not merely permit personal jurisdiction in suits "arising out of" the defendant's contacts in the forum state but includes suits that "relate to" the defendant's contacts with the forum.<sup>118</sup> The Court reminded Ford that while many specific personal

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111. *Id.* at 1023.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Key Takeaways from the Supreme Court's Personal Jurisdiction Decision in Ford Motor Company v. Montana Eighth Judicial District Court*, DECHERT LLP (Mar. 26, 2021), <https://www.dechert.com/knowledge/onpoint/2021/3/key-takeaways-from-the-supreme-court-s-personal-jurisdiction-dec.html> [<https://perma.cc/V9GA-H9D2>].

116. *Ford Motor Co.*, 141 S. Ct. 1017, at 122.

117. *Id.*

118. *Id.* at 1026 (ruling "[n]one of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do," and that "some relationships will support jurisdiction without a causal showing").

jurisdiction issues heard by the Supreme Court addressed causal links, precedent does not require such a link, and the inquiry can focus on the “related to” component of the doctrine established in *Daimler*.<sup>119</sup>

The majority’s holding appears intelligible and easily applicable. However, the two concurrences reveal the implications of Justice Kagan’s misleading and confusing verbiage. Justice Alito brings the issue to light by pointing out the majority’s failure to explicitly define the limitations of the phrase “relate to” and how, without an unambiguous explanation of the difference between a “related to” analysis and a “causal connection” analysis, the ideas become commutable instead of distinct aspects of the doctrine.<sup>120</sup> He opines: “without any indication what those limits might be, I doubt that the lower courts will find [Justice Kagan’s mention of limitations on the related to component] terribly helpful. Instead, what limits the potentially boundless reach of ‘relate to’ is just the sort of rough causal connection I have described.”<sup>121</sup> Joined by Justice Thomas, Justice Gorsuch writes a separate concurrence, yet reiterates Justice Alito’s concerns regarding the majority’s inability to adequately articulate the boundaries of the “related to” standard.<sup>122</sup> He cautions the Court of the consequences of this inability by explaining where the doctrine now stands:

Where this leaves us is far from clear. For a case to “relate to” the defendant’s forum contacts, the majority says, it is enough if an “affiliation” or “relationship” or “connection” exists between them. But what does this assortment of nouns mean? Loosed from any causation standard, we are left to guess. The majority promises that its new test “does not mean anything goes,” but that hardly tells us what does. In some cases, the new test may prove more forgiving than the old causation rule.<sup>123</sup>

The decision does not substantially change personal jurisdiction doctrine. However, it does remind lower courts that while the Court’s analyses have been heavily focused on a causal link between a defendant’s actions and a plaintiff’s claim, that is not the only approach to the inquiry. However, the Court did recapitulate personal jurisdiction doctrine, demonstrating that their precedent does not confine personal jurisdiction analyses to strictly focus on

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119. *Id.*

120. *Id.* at 1033–34 (Alito, J., concurring).

121. *Ford Motor Co.*, 141 S. Ct. 1017, 1034 (Alito, J., concurring).

122. *Id.* (Gorsuch, J., concurring).

123. *Id.* at 1034–35.

causation. While the three opinions' rationales lack any direction regarding the boundaries of the "related to" analysis, they acknowledge its existence, signaling the imminent development and expansion of the doctrine.

#### IV. THE "WEB" OF E-COMMERCE, PRODUCTS LIABILITY, AND PERSONAL JURISDICTION

*"Seldom does a foreign manufacturer sell its product directly to customers. Rather, it generally places products into the United States commercial market where they are sold by another entity in the chain of distribution. Consequently, it is not feasible for the foreign manufacturer to have 'minimum contacts' with the forum state."*<sup>124</sup>

Personal jurisdiction doctrine regarding minimum contacts and the stream of commerce is in dire need of an update to address the significant changes in online activity, the market, and the economy. Traditional methods of selling products have been disrupted by websites such as Amazon, which have created a new type of stream that commerce travels down.<sup>125</sup> The stream of commerce and minimum contacts doctrines are not designed for transactions made on a massive e-commerce market that involve parties with confusing or unidentifiable roles in the distribution chain.<sup>126</sup> This Part will propose a solution to fill the gaps in personal jurisdiction doctrine that do not account for e-commerce marketplaces. The solution is to amend minimum contacts and stream of commerce doctrine to include both items fulfilled and manufactured directly by sellers and broaden the scope and include parties that facilitate those transactions online, regardless of whether they had physical control of the product's placement in the distribution chain. This approach not only conforms with the underlying principles of

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124. Taylor Simpson-Wood, *In the Aftermath of Goodyear Dunlop: Oyez! Oyez! Oyez! A Call for a Hybrid Approach to Personal Jurisdiction in International Products Liability Controversies*, 64 BAYLOR L. REV. 113, 121 (2012).

125. Noble, *supra* note 90, at 531–32.

126. "As the law currently stands, there is a great deal of uncertainty for online business sellers trying to determine the limits of their personal jurisdiction, especially if there is no physical location for the activity, and they did not personally create the contacts that are related to the claim." *Id.* at 522.

modern personal jurisdiction doctrine<sup>127</sup> but will forward an equitable application of products liability law.

### A. *Grounds: Issue with the Current State of the Law*

Even though products liability law is being updated to recognize non-traditional parties involved in the distribution chain, that will prove insufficient if other areas of law do not make the same progress by taking the e-commerce market into account. Amazon and other mass retailers such as Etsy, eBay, Wayfair, and Zappos, can currently escape liability because their facilitation of transactions between consumers and third-party vendors is not concretely interpreted as sufficient minimum contacts, nor is it concretely interpreted as placing a product into the stream of commerce. Thus, e-commerce marketplaces will escape personal jurisdiction in the state the product was sent to while making money off the transaction and being the “but for” cause of the product reaching the consumer.

#### 1. Reachability

Amazon’s website structure heavily limits the interactions between consumers and third-party vendors, with no variation between third-party vendors using FBA, FBM, SFP, and MCF.<sup>128</sup> This leaves Amazon in charge of facilitating the transactions, even if it never physically possesses the product. By limiting reachability, Amazon leaves very little recourse for plaintiffs seeking damages except for suing Amazon.<sup>129</sup> The cases listed previously that dealt with the unreachability of third-party vendors are not an anomaly but illustrative:

In *Allstate*, the third-party vendor of the defective laptop battery, Lenoge Technology HK Ltd. (known as “E-Life” on its Amazon seller account), is not subject to process in the United States.

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127. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (holding that personal jurisdiction could not be avoided “merely because the defendant did not physically enter the forum State”).

128. See *supra* notes 18–24 and accompanying text.

129. See Bullard, *supra* note 14, at 224 (“Without reachability, there is no way to hold the true seller or manufacturer of a defective product liable for the injuries it might cause. Especially with regards to products manufactured in China, it can be particularly difficult for injured parties to seek recourse under American law. It is fundamental to the promotion of products liability’s policy objectives that an entity in the distribution chain of a product be held accountable to injured plaintiffs. Amazon remains unwilling to require enough of its third-party vendors to ensure that they are reachable if a product proves dangerous.”).



Therefore, Ms. Wilmot was unable to sue Lenoge to recover for the damage caused by its laptop battery, necessitating a suit against Amazon in order to recover. Similarly, in *Fox*, the third-party vendor of the offending hoverboard, called “–DEALS–” on its Amazon seller account...was unable to be contacted in the aftermath of the hoverboard explosion. Amazon also does not allow contact between third-party sellers and buyers using FBA; communication regarding customer support or other inquiries must be handled through Amazon.<sup>130</sup>

The unreachability aspect of these transactions has become a significant source of litigation’s prolongation. Without a concrete solution, various courts will have to repetitively discuss the same issue, making differing rulings that will continue to muddy the waters and create contradicting persuasive precedent.

## 2. Unidentifiable Roles

Amazon’s business model is a system where multiple entities play undefined and legally unidentifiable roles in the distribution chain of defective products. It is clear that Amazon is not merely a “passive website.”<sup>131</sup> The facilitation of commercial transactions heightens their status to “interactive,”<sup>132</sup> but it is also obviously more than that. However, what that “more” is, is not yet legally clear. Amazon has varying levels of involvement in the transactions on its website. For example, its involvement in their “FBA” program resembles that of the traditional “distributor” or “seller.”<sup>133</sup> However, unlike many other online retailers, Amazon acts as a global institutional force:

Amazon is not *merely* an online company or product-listing platform. Its physical reach is extensive — it owns or leases more than 250 million square feet of space, including space for warehousing, fulfillment centers, and physical stores. Statistics from the United States

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130. *Id.* at 224–25; *see id.* at 224 n.208 (discussing *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738, 2018 WL 3546197 (D.N.J. July 24, 2018)) (arguing that “though Lenoge is not subject to process in the United States, Lenoge did agree to indemnify Amazon for any damages resulting from the sale of its products in the ‘Amazon Services Business Solutions Agreement’ it signed”).

131. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

132. *Id.*

133. Bullard, *supra* note 15, at 197 (“The sellers’ use of FBA substantially increased Amazon’s role in placing the defective products into consumers’ hands. For example, Amazon took charge of warehousing, packing, shipping, handling, customer service.”).

Department of Commerce show Amazon accounted for nearly half of e-commerce sales [in 2019].<sup>134</sup>

### 3. Defendant-Focused Personal Jurisdiction

Personal jurisdiction doctrine has been heavily focused on the defendants' constitutional rights.<sup>135</sup> Plaintiffs initially select the forum, and, therefore, they are in a position of power that involuntarily subjects defendants to their forum choice.<sup>136</sup> This has reasonably focused personal jurisdiction case law and commentary on defendants.<sup>137</sup> However, the hyper-focus on defendants has created an overly restrictive system that over-restricts plaintiffs' ability to bring defendants into forums where the defendants have been the but-for cause of the plaintiffs' injury.

### 4. Clarity

Personal jurisdiction doctrine pertinent to this issue has been structured around vague terms such as "purposeful availment," "minimum contacts," "foreseeability," and "related to."<sup>138</sup> These terms have "generated uncertainty among courts and commentators . . ."<sup>139</sup> There has been disagreement among circuits about what "related to" really means, which has been further confused by legal scholars creating new tests that stray from a "but for" causation test.<sup>140</sup> In a significant need of clarification, personal jurisdiction pertaining to corporations is "now suspended between *Daimler*'s warning that a court cannot deem a corporation at home simply because it does business there and Justice Sonia Sotomayor's concurrent warning that a strict reading of *Daimler* renders corporations like Amazon 'too big' for personal jurisdiction."<sup>141</sup>

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134. See *id.* at 209–10; see also Wagner, *supra* note 1, at 1128 ("Amazon's expansion . . . demonstrates that they do more than simply engaging in basic commerce. Amazon now owns the grocer Whole Foods, is in the process of becoming a major player in the pharmaceutical industry and has physical fulfillment centers in thirty states. It has physical offices in fifty-two locations in the United States, in twenty-eight states.")

135. Scott Dodson, Essay, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1464, 1464 (2019).

136. *Id.* at 1465.

137. *Id.*

138. Scott Dodson, *Personal Jurisdiction*, 28 CAL. LITIG. REV. 91, 92 (2015).

139. *Id.*

140. *Id.*

141. Wagner, *supra* note 1, at 1090.

## B. *Solution*

When a plaintiff is injured by a product that the plaintiff bought via a major e-commerce marketplace, that marketplace should be subject to personal jurisdiction in the state where the plaintiff received the defective product, regardless of whether the corporation ever had physical possession of the product at any time. This would include peer-to-peer platforms such as Etsy and eBay and mixed-marketplaces, such as Amazon and Wayfair.

Corporations may argue that this expansion of personal jurisdiction is unfair because it subjects the defendants to jurisdiction in practically every state. However, this solution is not subjecting corporations to general jurisdiction throughout the country; it is merely bringing them into court when their actions were a but-for cause of the plaintiff's injury in the forum where that product was directly sent. This approach does not dissolve the idea that corporations should be able to anticipate where they can be brought into court. If a company is profiting from a citizen of a particular state, and that transaction harms the citizen, that company is purposefully availing itself to that state's laws and jurisdiction.<sup>142</sup> If a company finds the cost of litigation to be too high in one forum, or the law so repugnant to its business, it has the freedom to refuse to facilitate transactions with citizens of that forum.

Amazon is the best suited entity to ensure that the third-party vendors will be available to show up in court because they are in contact and doing business with the third-party vendors and have the resources to employ procedures to verify that the third-party vendors are reachable. The consumer should not be prevented from recovering damages because Amazon is not vetting their third-party vendors' legitimacy or refusing to register them in a way that they can be contacted for legal purposes.<sup>143</sup> The rationale that too many vendors to keep track of, that it would be difficult to register them, or vet their legitimacy, is not a valid reason to disadvantage the consumer.

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142. See *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 562 U.S. 1198 (2011); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

143. See sources cited *supra* note 142.

## 1. Products Liability Reform

This solution would also include placing strict liability onto e-commerce platforms for all defective products sold on their websites. There would be no exceptions regarding the various types of distribution schemes.<sup>144</sup> If it facilitates a transaction that results in a defective product being sent to a consumer on its website, it is liable for those injuries. While Amazon and other e-commerce platforms have confused the traditional roles that are recognized and defined by tort law, public policy goals make the lack of a legally defined role in the distribution chain irrelevant. This is not to say that its *action* is irrelevant, but the verbiage assigned to what it does and a legal distinction for its role in the distribution chain should not be a way to confuse courts into ruling that it is not liable for injuries caused by harmful products sold on its site.

In two formative products liability cases, *Escola v. Coca-Cola Bottling Co.* and *Greenman v. Yuba Power Products, Inc.*, Justice Traynor highlighted the importance of prioritizing public policy goals of loss-spreading and promoting a type of liability that has foundations in social responsibility in light of the evolution and prevalence of products' mass-production.<sup>145</sup> In *Escola*, Traynor concluded that "a manufacturer [should] incur[] an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."<sup>146</sup> Regardless of what role the defendant had in the physical delivery of the product, Amazon is "pivotal in bringing the product . . . to the consumer,"<sup>147</sup> and is an "integral part of the overall producing and marketing enterprise,"<sup>148</sup> which fully justifies the application of strict liability. Courts have been willing in the past to expand the application of strict liability in light of various changes to the market, and this time is no different because

Amazon is as equally responsible for the injection of the product into the stream of commerce as the third-party vendor that posted it for sale through Amazon...Amazon is the final entity to provide

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144. For example, Amazon's involvement in their products that are fulfilled through their FBA service versus the ones fulfilled through their FBM service.

145. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57 (1963); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461–68 (1944) (Traynor, J., concurring).

146. *Escola*, 24 Cal. 2d 461 (Traynor, J., concurring)

147. *Jackson & Hanssen, supra* note 87.

148. *Id.*

an advertising platform, collect payment on, and handle a product before the carrier delivers it to the consumer . . . . It is also potentially the only accurately named, reliably identifiable entity in the . . . sales process; third-party vendors are asked to use a “friendly” name as the display-name on their Amazon seller account, which can conceal the true identity of the seller.<sup>149</sup>

## 2. Personal Jurisdiction Reform

Even though personal jurisdiction was the topic of the recent *Ford* decision, the Court did not provide direction for courts analyzing jurisdictional issues that arose from transactions facilitated via e-commerce platforms. In fact, the Court specifically states that their current doctrine does not cover these transactions. The majority writes:

None of this is to say that any person using any means to sell any good in a State is subject to jurisdiction there if the product malfunctions after arrival. We have long treated isolated or sporadic transactions differently from continuous ones. And we do not here consider internet transactions, which may raise doctrinal questions of their own.<sup>150</sup>

By purposefully excluding internet transactions from their personal jurisdiction analysis, the Court acknowledges the need for a separate approach to cases arising out of internet transactions.

If substantive law is changing in response to the changes in the market and the way commerce is exchanged, the procedural law should also be able to develop to match the realities of what is happening in the world as well as what is happening in the development of its substantive law counterpart. Without doing so, these two sects of law that are simultaneously used will be grounded in principles based on vastly different social and economic realities. Thus, even if Amazon is held strictly liable for defective products sold and distributed by third-party vendors, being able to argue that courts do not have jurisdiction both impedes achieving the public policy goals of products liability law and thwarts plaintiffs’ ability to recover.

Even though personal jurisdiction is rooted in protecting the sovereignty of the individual states and the due process rights of defendants, “[p]ersonal jurisdiction legitimately can treat plaintiffs and defendants differently, but those differences call for nuance

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149. Bullard, *supra* note 15, at 197.

150. *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 U.S. 1017, n.4 (2021).

and fact dependency, not a blanket exemption for plaintiffs from personal-jurisdiction protections.”<sup>151</sup> While the various states do have an interest in protecting their sovereignty and preventing their citizens from being unjustly subject to the power of another state, states also have an interest in protecting their citizens from being harmed by citizens of other states; “Amazon’s presence is permanent, physical, and unique—a state should have the power to protect its citizens from harms the corporation commits.”<sup>152</sup> In balancing “the burden on the defendant, the interests of the forum State, . . . the plaintiff’s interest in obtaining relief . . . ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies,’”<sup>153</sup> it is clear that personal jurisdiction over an e-commerce platform that facilitates products being delivered into a state is justified.

First, the burden on the defendant is minimal because corporations have massive numbers of resources available. Second, the plaintiff’s interest in obtaining securing relief in their home state forum is great. Individuals harmed by defective products can incur medical bills, lost wages, and property damage. The average American does not have the resources to waste money paying for the results of damages that they did not cause. In that same vein, they typically do not have the resources or time available to pursue lengthy litigation outside their home state. Third, without this change in personal jurisdiction doctrine, corporations will distract litigation from the substantive law and cause of action by continuously arguing that the court lacks personal jurisdiction. This distraction would curtail the interstate judicial system’s ability to effectively and efficiently resolve controversies.

## CONCLUSION

*“[I]t may be more loyal to the policy motivations behind strict products liability to shift from a ‘distribution chain’ analysis to an inquiry more focused on determining the degree to which any given entity is responsible for placing a defective product on the consumer market.”*<sup>154</sup>

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151. Dodson, *supra* note 135, at 1463.

152. Wagner, *supra* note 1, at 1128.

153. Dodge & Dodson, *supra* note 79, at 1215.

154. Bullard, *supra* note 14, at 231.

The time has come to update products liability and personal jurisdiction laws. In the face of an entirely new type of way to exchange goods, society has outpaced the law. As technology advances and products reach a growing number of consumers across the globe, the intersecting web of product distribution will continue to challenge established substantive and procedural law. By advancing both sects of law closely following economic and technological advancements, the justice system will be able to apply a version of the law that does not unfairly disadvantage one party over another. Amazon and other massive online retailers have permanently changed the world's way of buying and selling goods, and while anyone enjoys being able to order a vacuum cleaner, sneakers, and their textbooks all in the same place, the law must ensure that it proceeds safely.

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