

# Prime & Punishment: Evaluating Amazon’s Liability for Defective Products from A-to-Z in AZ

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## INTRODUCTION

From air fryers and Apple watches to Ziploc bags and zero-gravity chairs, consumers can purchase everything on Amazon.com—as famously indicated by Amazon’s A-to-Z logo. The “online-everything store” accounts for roughly 37–49% of all online commerce in the United States.<sup>1</sup> This suggests an immense number of consumers interact with Amazon.com for various purchasing needs on a daily basis.

One unique aspect of Amazon’s operations is that it only manufactures a minority of the products sold on its website. Products manufactured by third parties make up 58% of sales on Amazon.com.<sup>2</sup> So if consumers purchase products from Amazon.com that a third party manufactured, who is responsible if the product is defective? The obvious answer is the manufacturer because it placed the product in the marketplace. However, an individual consumer may not have the ability to track down and hold an obscure third-party manufacturer responsible for its defective product.

Take, for example, the case of Angela Bolger.<sup>3</sup> Bolger purchased a replacement laptop battery for \$12.30 from Amazon.com.<sup>4</sup> The battery eventually exploded, causing severe burns to her.<sup>5</sup> Three third-party companies participated in the manufacture, design, and distribution of the battery: Lenoge, Herocell Inc., and Shenzhen Uni-Sun Electronics Co.<sup>6</sup>

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1. Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 PENN ST. L. REV. 321, 332 (2020).

2. Robert Sprague, *It’s a Jungle Out There: Public Policy Considerations Arising from a Liability-Free Amazon.com*, 60 SANTA CLARA L. REV. 253, 255 (2020).

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

4. *Id.* at 609.

5. *Id.* at 604.

6. *Id.* at 609.

Lenoge and Herocell Inc. did not appear after Bolger served them with her complaint and therefore defaulted.<sup>7</sup> Shenzhen Uni-Sun Electronics Co. was located in the People's Republic of China, so when Bolger initiated service of process, she "was informed it could take two to three years to complete."<sup>8</sup> Thus, even with two default judgments in hand against Lenoge and Herocell Inc., Bolger would still have to pursue them to collect the compensation awarded to her by the court. A plaintiff's final judgment only entitles them to relief—it does not guarantee the plaintiff will receive it. The question becomes, what is an injured plaintiff to do?<sup>9</sup> In response to this problem, courts should hold other entities in the chain of distribution strictly liable for defective products.

The purpose of strict products liability is to ensure that the manufacturers or sellers of defective products bear the costs of injuries from such products rather than the injured persons who are powerless to protect themselves.<sup>10</sup> Comment C to the Restatement (Second) of Torts Section 402A states: "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them."<sup>11</sup> The liability rationale is that manufacturers and sellers who are forced to absorb the cost of accidents will pass those costs along to consumers through increased prices. This is a relatively easy task for those entities compared to an individual consumer dealing with the "crushing financial burdens of personal injuries."<sup>12</sup> Courts across the nation have disagreed on whether strict products liability can apply to an intermediary like Amazon when a defective third-party product causes injury. Many of these decisions

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7. *Id.*

8. *Id.*

9. Bolger is not the only consumer who has had a difficult time locating a third-party manufacturer after purchasing a defective product on Amazon.com and trying to file a lawsuit against that manufacturer. *See, e.g., Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 142 (3d Cir. 2019) (explaining that the plaintiff, after purchasing a dog collar on Amazon.com which snapped back and blinded her, could not locate a representative of the third-party manufacturer); *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 197 (5th Cir. 2020) (explaining that the plaintiff, after purchasing from Amazon.com a remote control with a battery which their young child swallowed, filed suit against Amazon and the third-party manufacturer, but the third-party never responded or made an appearance).

10. *See Hazine v. Montgomery Elevator Co.*, 861 P.2d 625, 628 (Ariz. 1993) (citing *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963)) ("Strict products liability developed because other theories of recovery proved inadequate to protect injured users and consumers."); *see also Kuhnke v. Textron, Inc.*, 684 P.2d 159, 161–62 (Ariz. Ct. App. 1984) (holding that Arizona applies strict liability to sellers as well as manufacturers of defective products).

11. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. L. INST. 1965); *see also Kuhnke*, 684 P.2d at 161–62 (ruling that Arizona follows § 402A of the Restatement).

12. DAVID G. OWEN & MARY J. DAVIS, PRODUCTS LIABILITY AND SAFETY 179 (Saul Levmore et al. eds., 8th ed. 2004).

hinged on whether Amazon is a “seller” of these third-party defective products.

The Arizona Supreme Court has yet to address the issue of Amazon’s status as a seller of defective third-party products sold on its website. This Comment will argue that under Arizona law, Amazon fits the definition of a seller such that Arizona courts should hold it strictly liable for defective products sold by Amazon itself and third parties participating in its Fulfilled by Amazon (FBA) program. Part I of this Comment provides context. It overviews Arizona strict products liability law and the definition of a “seller,” as well as Amazon’s website and operations. Part II analyzes whether Arizona courts should define Amazon as a seller of products it manufactures and lists on Amazon.com. Part III considers whether Arizona courts should define Amazon as a seller for defective products sold by third parties on Amazon.com through its FBA program.<sup>13</sup> Part IV analyzes whether Arizona courts should define Amazon as a seller of defective products sold by third parties on Amazon.com through its Fulfilled by Merchant (FBM) program.<sup>14</sup> Part V concludes and addresses the policy implications of Amazon’s potential liability for third-party defective products.

## I. CONTEXT

Before analyzing the issue, one must first become familiar with Arizona strict products liability law and Amazon’s operations. This Part overviews Arizona strict products liability law while focusing on the definition of a “seller” within the chain of distribution. It also overviews Amazon’s operations in the context of Amazon’s Business Solutions Agreement and A-to-Z Guarantee.

### A. *Arizona Strict Products Liability Law and the Definition of a “Seller”*

Strict products liability holds an entity responsible for a product that injures a consumer, essentially making the entity a “guarantor of his product, even though he had exercised all reasonable care.”<sup>15</sup> Arizona follows the Restatement (Second) of Torts Section 402A, which states:

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13. In the FBA program, third-party sellers ship their products to Amazon for it to maintain in its warehouses until consumers order them. *See infra* Section III.A.

14. In the FBM program, third-party sellers ship their products directly to consumers when ordered. *See infra* Section IV.A.

15. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 688–89 (1941), *reprinted in* DAVID G. OWEN & MARY J. DAVIS, *PRODUCTS LIABILITY AND SAFETY* 157 (Saul Levmore et al. eds., 8th ed. 2004).

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or to his property if: (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the consumer without substantial change in the condition in which it was sold.<sup>16</sup>

To establish a prima facie case of strict liability, the plaintiff bears the burden of showing that: (1) the product is defective and unreasonably dangerous; (2) the defective condition existed at the time the product left the defendant's control; and (3) the defective condition is the proximate cause of the plaintiff's injuries and property loss.<sup>17</sup>

The use of the term "sell" in the Restatement definition is vitally important; it suggests that the entity who sells defective products is liable for those products. The Arizona Legislature, in following the Restatement, codified strict products liability in tort as applied to sellers as well as manufacturers.<sup>18</sup> A.R.S. Section 12-681(9) defines "seller" for strict liability purposes as "a person or entity, including a wholesaler, distributor, retailer or lessor, that is engaged in the business of leasing any product or selling any product for resale, use or consumption."<sup>19</sup> Arizona courts interpret this definition broadly, in accordance with the policies underlying strict liability.<sup>20</sup> Thus, a seller for purposes of strict products liability is also an entity that participates significantly in the stream of commerce and has the right to control the incidents of manufacture or distribution.<sup>21</sup>

In *Grubb v. Do It Best Corp.*, the Arizona Court of Appeals clarified the test for determining whether an entity has significantly participated in the chain of distribution so as to qualify as a seller of the defective goods passed through that chain. In that case, the court considered whether a cooperative of hardware stores was a seller for the purposes of strict products liability.<sup>22</sup> The cooperative negotiated prices with third-party vendors on behalf of its members' stores and permitted the member stores to purchase products from the cooperative's warehouse or directly from the third-party vendors.<sup>23</sup>

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16. *Kuhnke*, 684 P.2d at 161–62 (emphasis omitted).

17. *Dietz v. Waller*, 685 P.2d 744, 747 (Ariz. 1984) (quoting *Rocky Mountain Fire and Cas. Co. v. Biddulph Oldsmobile*, 640 P.2d 851, 854 (Ariz. 1982)).

18. *See Grubb v. Do It Best Corp.*, 279 P.3d 626, 627 (Ariz. Ct. App. 2012).

19. ARIZ. REV. STAT. § 12-681(9) (2022).

20. *Grubb*, 279 P.3d at 627.

21. *See id.* at 627–28.

22. *Id.* at 628–29.

23. *Id.* at 628.

The *Grubb* court clarified previous precedent and identified six factors that courts should consider when determining whether an entity within the chain of distribution has participated significantly such that it is also a seller of goods.<sup>24</sup> The factors are: (1) whether the entity owned, possessed, or inspected the defective product; (2) whether the entity is responsible for damage to the product during transit or provides a warranty for the product's quality; (3) whether the entity is providing a service to others in the stream of commerce or specific goods to the public; (4) whether the entity levies fees to cover its operation costs or to make a commission or profit from the transaction; (5) whether the entity has a "special relationship" with the manufacturer such that it may influence the safety or design of the product; and (6) whether consumers rely on the entity's presence to verify the product's quality.<sup>25</sup>

The court applied this test in *Grubb* and found that Do It Best Corp. (DIB) did not participate significantly in the chain of distribution.<sup>26</sup> The court noted that DIB never owned or possessed the defective product.<sup>27</sup> The plaintiff did not provide any evidence that DIB provided a warranty for the product or claimed responsibility for the product's quality during transit.<sup>28</sup> The court categorized DIB's process of collecting the consumer's payment and passing it on to the vendor as a service to the third-party vendor, rather than a method of providing goods to consumers.<sup>29</sup> The court admitted that DIB collected a small fee from each sale, but concluded that this fee was minimal given the totality of the circumstances and acknowledged that most of it went to cover DIB's billing costs.<sup>30</sup> The plaintiff did not present evidence indicating DIB had a special relationship with the third-party vendor that would allow it to influence the product's design or manufacturing.<sup>31</sup> Nor did the plaintiff present evidence that the consumer relied on DIB's involvement in the transaction as a guarantee of the product's quality.<sup>32</sup> In summation, each of the *Grubb* factors suggested that DIB should not be categorized as a seller.

Since the Arizona Court of Appeals decided *Grubb* in 2012, Arizona courts have not applied the test as laid out above to the question of whether

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24. *See id.* at 628–29 (considering *Antone v. Greater Ariz. Auto Auction, Inc.*, 155 P.3d 1074 (Ariz. Ct. App. 2007) and *Dillard Dep't Stores, Inc. v. Associated Merch. Corp.*, 782 P.2d 1187 (Ariz. Ct. App. 1989)).

25. *See id.*

26. *Id.* at 629.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

an entity, like Amazon, is a seller.<sup>33</sup> However, the Ninth Circuit Court of Appeals did apply *Grubb* to the question of Amazon's seller status in *State Farm Fire and Casualty Co. v. Amazon.com, Inc.*<sup>34</sup> In that case, a consumer bought a hoverboard manufactured by a third-party seller from Amazon.com.<sup>35</sup> The hoverboard's batteries spontaneously combusted, causing damage to the consumer's home.<sup>36</sup>

The Ninth Circuit cited *Grubb* in its analysis but applied slightly different factors to its facts.<sup>37</sup> The court considered seven factors: (1) whether the entity provided a warranty for the product's quality; (2) whether the entity is responsible for the product during transit; (3) whether the entity exercised enough control over the product to inspect or examine it; (4) whether the entity took title or ownership of the product; (5) whether the entity derived an economic benefit from the transaction; (6) whether the entity had the capacity to influence a product's design and manufacture; and (7) whether the entity fostered consumer reliance through its involvement.<sup>38</sup> In contrast to the factors from *Grubb*, the Ninth Circuit separated the issues of warranty and responsibility for the product during transit into two factors, and separated the issues of inspection and ownership of the product into two factors. The Ninth Circuit did not analyze the impact of possession of the product or the impact of whether the entity is simply providing a service to others in the stream of commerce.

Applying these factors, the Ninth Circuit found that Amazon is not a seller for the purposes of strict products liability.<sup>39</sup> First, the Ninth Circuit ruled that Amazon could not provide a warranty for a product's quality because it disclaims any warranties in its Business Solutions Agreement (BSA).<sup>40</sup> Second, the court ruled that although Amazon takes responsibility for a product during transit, that fact is not dispositive because entities like the U.S. Postal Service also take responsibility for the transit of products without courts considering them sellers.<sup>41</sup> Third, the court ruled that Amazon does not have enough control over third-party products to inspect them since it does not actually inspect products in practice.<sup>42</sup> Fourth, the court found that Amazon does not take title to third-party products at any time during its

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33. Just as well, the question of whether Amazon is a seller has not come before Arizona courts.

34. 835 F. App'x 213, 214 (9th Cir. 2020).

35. *Id.* at 214.

36. *Id.*

37. *Id.* at 215–16.

38. *Id.*

39. *Id.*

40. *Id.* at 216; see also *infra* Section I.B.2.

41. *State Farm*, 835 F. App'x at 216.

42. *Id.*

operations process.<sup>43</sup> Fifth, the court ruled that although Amazon derives a benefit from each transaction, that fact is not dispositive because Amazon only derives a small benefit from each transaction, suggesting its interest in them is limited.<sup>44</sup> Sixth, the court found that Amazon did not have the capacity to influence a third-party seller's design and manufacturing decisions because the plaintiff did not present sufficient evidence as to that factor.<sup>45</sup> Finally, the court ruled that Amazon's involvement in a transaction could not foster consumer reliance because Amazon lists the third-party seller's name on the product's listing and the sales receipt.<sup>46</sup> Plus, the plaintiff did not cite any precedent supporting the contention that an injured party's subjective belief about the identity of the seller weighs in favor of finding that entity strictly liable.<sup>47</sup>

In dissent, Judge Clifton noted that the issue in *State Farm* was complex, and while the majority came to a plausible conclusion, a different conclusion "would also be plausible."<sup>48</sup> Judge Clifton stated that Arizona precedent does not clearly cover Amazon's responsibility in strict products liability lawsuits, and for that reason the Ninth Circuit should have certified the issue to the Arizona Supreme Court.<sup>49</sup> Given the impact that Amazon has had on the retail marketplace, Judge Clifton felt it beneficial that the issue be resolved "by Arizona for itself."<sup>50</sup>

Some courts have cited the Ninth Circuit's majority analysis as an example of a court finding Amazon to not be a seller for strict liability purposes.<sup>51</sup> However, Arizona courts have not cited the decision. Ultimately, the Ninth Circuit's decision does not bind the Arizona Supreme Court. Also, the analysis within the decision would likely prove unhelpful to Arizona courts trying to solve this issue in the future. All the factors point one way,<sup>52</sup> which makes it difficult to determine how the factors relate to each other, which factors carry more weight than others, and under what circumstances Amazon would be a seller for strict products liability purposes. This, alongside Judge Clifton's other arguments, supports the position that the Ninth Circuit should have certified this case to the Arizona Supreme Court.

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 217.

49. *Id.*

50. *Id.*

51. *See, e.g.,* *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 201 (5th Cir. 2020) (exemplifying the *State Farm* decision as an instance in which a court concluded Amazon is not a seller); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 528 F. Supp. 3d 686, 696 n.2 (W.D. Ky. 2021) (exemplifying, again, the *State Farm* decision as an instance in which a court concluded that Amazon is not a seller).

52. *See generally State Farm*, 835 F. App'x at 214.

This Comment offers an interpretation of the *Grubb* factor test that differs from the Ninth Circuit's. This analysis is more likely to reflect that of the Arizona Supreme Court's, if presented with this issue, for three reasons. First, the *Grubb* decision implies that courts should consider product warranty and responsibility for the product during transit together in one factor.<sup>53</sup> The Arizona Court of Appeals considered in one sentence the implications of whether DIB provided a warranty for the product or represented itself as responsible for the product in transit.<sup>54</sup> This choice stands out because the court analyzed each of the other *Grubb* factors identified above in separate sentences.<sup>55</sup> Combining these two considerations together implies that the two are similar in nature and, if analyzing either component on its own, it should not receive the same weight as the other identified factors. Separating nominally distinguished features into two independent factors may influence how courts conduct their analysis.

Second, the *Grubb* decision also implies that courts should consider ownership, possession, and the ability to inspect a product together as one factor.<sup>56</sup> The Arizona Court of Appeals considered in the same sentence whether DIB owned and possessed the product.<sup>57</sup> This treatment justifies adding possession to the ownership factor. Additionally, this Comment argues that it is improper to analyze, in a separate factor, an entity's ability to inspect the product because the Arizona Court of Appeals did not consider DIB's ability to inspect in its final analysis. By not including that consideration in its final analysis, the court implied that it does not deserve the same weight as the other considerations. However, the court acknowledged that it had previously held that temporary physical possession of a defective product could be outweighed by ownership *or* inspection of the product.<sup>58</sup> This previous holding suggests that inspection is still an important consideration and should affect the balancing of factors. By balancing possession with ownership and inspection, the court implied that these three considerations are interrelated. This justifies considering them together in one factor.

Third, whether the entity provides a service to third-party vendors within the chain of distribution is a relevant consideration. Although the Ninth Circuit did not include it in its analysis, the Arizona Court of Appeals applied

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53. See *Grubb v. Do It Best Corp.*, 279 P.3d 626, 629 (Ariz. Ct. App. 2012).

54. *Id.*

55. See *id.*

56. See *id.*

57. *Id.*

58. *Id.* at 628 (citing *Antone v. Greater Ariz. Auto Auction, Inc.*, 155 P.3d 1074, 1079 (Ariz. Ct. App. 2007)).



this factor in *Grubb*.<sup>59</sup> Courts citing *Grubb* should consider each of the factors raised in its analysis.

The Ninth Circuit should have followed the lead of other circuits, which certified to the applicable state’s Supreme Court the question of how Restatement Section 402A applies to Amazon.<sup>60</sup> As noted in Judge Clifton’s dissent, applying strict products liability to Amazon for its role as an intermediary within the chain of distribution is a new and evolving concept. The Arizona Supreme Court has stated that “if state law is not clear on the question involved, it is better that the [Arizona Supreme Court] fulfill [its] responsibility to decide the state law issue rather than leave the federal bench to speculate on what [its] answers might be.”<sup>61</sup> Other circuits agree with this perspective.<sup>62</sup> If the Ninth Circuit had certified this question, it is likely that the Arizona Supreme Court’s analysis would have resembled the analysis to come in Parts II, III, and IV of this Comment and provided a more explicit test for Arizona courts to apply in future Amazon cases.

### B. *Amazon.com, the Online-Everything Store*

The sale of such a vast array of products—from athletic tape to zebra plush toys—requires a vast number of policies and procedures to support such a complex operation. This Section distinguishes the types of products sold on Amazon.com and explains the purchasing, delivery, and customer support phases of a consumer’s experience. It also explores two documents that define Amazon’s and the third-party seller’s obligations to each other: the BSA and the A-to-Z Guarantee.

#### 1. The Sale of Products

Products listed on Amazon.com fall into three categories: (1) products that Amazon itself produces or buys from manufacturers or distributors and sells to consumers at a price established by Amazon; (2) products sold by

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59. *Id.* at 628–29 (citing *Antone*, 155 P.3d at 1079–80; *Dillard Dep’t Stores, Inc. v. Associated Merch. Corp.*, 782 P.2d 1187, 1191 (Ariz. Ct. App. 1989)).

60. *See e.g.*, *Oberdorf v. Amazon.com, Inc.*, 818 F. App’x 138, 138 (3d Cir. 2020); *see also* *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 194 (5th Cir. 2020) (taking place after the Ninth Circuit’s decision but also certifying the question of Amazon’s liability for the purpose of strict products liability to the Texas Supreme Court).

61. *Torres v. Goodyear Tire & Rubber Co., Inc.*, 786 P.2d 939, 941 (Ariz. 1990).

62. *See generally* *McMillan*, 983 F.3d at 202 (holding that certification is advisable “where important state interests are at stake and the state courts have not provided clear guidance on how to proceed”); *Oberdorf*, 818 F. App’x at 139 (finding that applying Restatement (Second) of Torts § 402A to an e-commerce business raises “important and unresolved questions regarding state product liability law appropriate for certification”).

third parties participating in the FBA program;<sup>63</sup> and (3) products sold by third parties participating in the FBM program.<sup>64</sup> Sellers falling in the latter two categories select their own products, source the products from manufacturers or distributors, set purchase prices, and use Amazon's website to reach customers.<sup>65</sup> Products in the former category comprise roughly 40% of all sales through Amazon.com.<sup>66</sup> Amazon identifies products in the latter two categories by including the words "sold by" and the name of the third-party seller on the product's listing.<sup>67</sup>

Whether Amazon sells its own goods over Amazon.com or facilitates a third-party transaction, the consumer pays Amazon directly for the product.<sup>68</sup> Amazon charges the consumer's card and accepts the risk that the consumer's payment information is fraudulent.<sup>69</sup> After accepting payment, Amazon deducts a referral fee, aggregates the remaining proceeds, and remits them to the applicable seller.<sup>70</sup>

Once Amazon or the third-party seller ships the product, Amazon guarantees the delivery and quality of the product upon arrival.<sup>71</sup> Amazon will not deliver a damaged package.<sup>72</sup> Amazon ships FBA products in boxes with Amazon branding, while third-party sellers ship FBM products in regular boxes, with the label usually still identifying Amazon.<sup>73</sup>

After delivery, Amazon attempts to ensure the quality and safety of third-party products by tracking consumer complaints.<sup>74</sup> Depending on the

63. In the FBA program, third-party sellers ship their products to Amazon for it to maintain in its warehouses until consumers order them. *See infra* Section III.A.

64. In the FBM program, third-party sellers ship their products directly to consumers when ordered. *See infra* Section IV.A.

65. *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 606 (Cal. Ct. App. 2020).

66. *Id.*

67. *Id.*

68. *Id.* at 606–07 (explaining that Amazon retains the exclusive right to receive the consumer's payment).

69. *Amazon Services Business Solutions Agreement*, AMAZON SELLER CENT. § S-1.4 [hereinafter "BSA"], [https://sellercentral.amazon.com/gp/help/external/1791?language=en\\_US](https://sellercentral.amazon.com/gp/help/external/1791?language=en_US) [<https://perma.cc/3Y6J-JAWK>].

70. *Bolger*, 267 Cal. Rptr. 3d at 607.

71. *A-to-Z Guarantee*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GQ37ZCNECJKTIFYQV> [<https://perma.cc/85YS-PG6L>].

72. Telephone Interview with Terrence Miller, Step-Up Van Driver DOT, Amazon (Aug. 25, 2021).

73. *Id.*

74. *Bolger*, 267 Cal. Rptr. 3d at 608.

severity of the complaint, Amazon may decide to discontinue listing that product on Amazon.com.<sup>75</sup>

## 2. The Business Solutions Agreement (BSA)

Amazon requires all third-party sellers' assent to the BSA. The BSA defines Amazon and the third-party seller each as independent contractors with no agency or employment relationship.<sup>76</sup> The BSA disclaims Amazon's involvement in transactions between customers and third-party sellers.<sup>77</sup> It requires that the third party indemnify Amazon for any claim related to the third-party's products sold through Amazon.com.<sup>78</sup> It also requires that the third-party seller obtain general commercial liability insurance—listing Amazon as an additional insured—if the third-party's sales meet the insurance threshold.<sup>79</sup>

Amazon reserves several rights of action under the BSA in case of product defects. First, Amazon reserves the right to place responsibility on the third-party seller to inspect its products and to know of any recalls related to its products.<sup>80</sup> Second, if Amazon determines the product is counterfeit or defective through its own investigation, it retains discretion to permanently withhold any payments to the third-party for sales related to that product.<sup>81</sup> Third, the BSA includes an arbitration clause which allows Amazon to pursue third-party sellers for claims related to an improper use of Amazon's services, such as selling defective products.<sup>82</sup>

## 3. The A-to-Z Guarantee

The A-to-Z Guarantee applies to Amazon, FBA, and FBM products alike.<sup>83</sup> The policy guarantees the condition and delivery of products sold on Amazon.com.<sup>84</sup> Consumers wishing to act on the Guarantee after purchasing

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75. *Id.* Amazon's "person-most-knowledgeable" on customer safety stated that Amazon has "a robust and active process to monitor for any customer complaints that come in." Amazon tracks, logs, and reports the complaints to the Consumer Products Safety Commission. "[D]epending on the severity of the scope, the frequency, [and a] variety of factors, [Amazon] will decide whether or not [it will] continue to sell a particular product or not." *Id.*

76. BSA, *supra* note 69, § 13.

77. *Id.* § 7(b).

78. *Id.* § 6.1.

79. *Id.* §§ 9, "Definitions" (stipulating that the Insurance Threshold in the United States is \$10,000 in sales).

80. *Id.* § S-3.1.

81. *Id.* § 2.

82. *See id.* § 18.

83. *A-to-Z Guarantee, supra* note 71.

84. *Id.*

a product must contact Amazon directly through Amazon.com.<sup>85</sup> Amazon provides purchasers of defective products with a refund of the product cost, the original shipping cost, and the cost to return the product.<sup>86</sup> Amazon may ask consumers inquiring about a refund to first contact the third-party seller through Amazon.com's messaging platform.<sup>87</sup> If, however, the third-party seller does not remedy the consumer's issue within 48 hours, Amazon will process the consumer's refund.<sup>88</sup>

The A-to-Z Guarantee contains a provision entitled the A-to-Z Claims Process for Property Damage and Personal Injury, which states that if, within ninety days of an injury from a third-party seller's defective product, a consumer exercises their option to enter the claims process, Amazon will negotiate with the consumer to compensate them and resolve their claim.<sup>89</sup> During this process, Amazon retains discretion to involve the seller in the resolution—meaning that the third-party seller is not necessarily involved in the claim resolution.<sup>90</sup> If the consumer accepts Amazon's offer to resolve the claim, they agree to release and assign their claim to Amazon, so it may then pursue recovery from other sources at its discretion.<sup>91</sup>

## II. AMAZON'S PRODUCTS

This Part analyzes whether Amazon is a seller of the products it lists on Amazon.com. Products that Amazon markets itself are unlike FBA or FBM products. Amazon takes ownership of these products by identifying itself as the brand name of the product on its listing.<sup>92</sup> Take the famous Amazon Kindle, for example. Amazon first released its Kindle e-reader in 2007.<sup>93</sup> Amazon buys Kindles from a manufacturer it contracts with and then lists them on Amazon.com for consumers to purchase.<sup>94</sup> This type of activity makes Amazon a seller of these products—a conclusion that a court may reach without consulting the *Grubb* factors.

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85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *A-to-Z Claims Process Terms and Conditions*, AMAZON §§ 1–5 (Aug. 10, 2021), <https://www.amazon.com/gp/help/customer/display.html?nodeId=GTUXEP9L4KCBFSLU> [<https://perma.cc/X5NQ-4TN8>].

90. *Id.* § 7.

91. *Id.* § 8.

92. *See, e.g.*, Amazon Search for “kindle”, AMAZON, <http://www.amazon.com> (enter the search term “kindle” in the bar at the top of the webpage).

93. Josh Hrala, *See How Amazon's Kindle Evolved Over Time*, POPULAR SCI. (Apr. 13, 2016, 8:10 PM), <https://www.popsci.com/evolution-kindle/> [<https://perma.cc/L9YL-ANFA>].

94. *See generally* Willy C. Shih, *The U.S. Can't Manufacture the Kindle and That's a Problem*, HARV. BUS. REV. (Oct. 13, 2009), <https://hbr.org/2009/10/the-us-cant-manufacture-the-ki> [<https://perma.cc/RR8H-AVXE>].

In *Dillard Department Stores, Inc. v. Associated Merchandising Corp.*, the Arizona Court of Appeals evaluated the status of three different entities involved in a transaction to determine if any of them were sellers for the purposes of strict liability.<sup>95</sup> The plaintiff purchased a piece of luggage at a store and a defective strap on the luggage injured him.<sup>96</sup> The court classified the store as a seller of the luggage, without conducting any analysis, by referencing the store's act of purchasing the luggage from a manufacturer and then selling it to the plaintiff.<sup>97</sup>

From this analysis, one can determine that Amazon is a seller of the products it lists, like Kindles. As in *Dillard*, where the act of purchasing luggage from a manufacturer and then placing it for sale in a retail store made the acting entity a seller of luggage, Amazon's act of purchasing Kindles from a manufacturer and then placing them on its retail website for sale should make it a seller of Kindles. For this reason, a court should find that Amazon is a seller of its own goods sold through Amazon.com.

### III. AMAZON'S FBA PROGRAM

This Section analyzes whether Amazon is a seller of the products listed for sale on Amazon.com through its FBA program. It begins by overviewing the FBA program and its operations, then it applies the *Grubb* factor test to those facts and explains why Arizona courts should define Amazon as a seller of FBA products.

#### A. How It Works

To join the FBA program, third-party sellers must apply to register their products.<sup>98</sup> Once Amazon approves the seller's application, the third-party seller ships its products to Amazon.<sup>99</sup> Amazon then stores those products at its facilities.<sup>100</sup> However, Amazon prohibits FBA sellers from delivering

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95. *Dillard Dep't Stores, Inc. v. Associated Merch. Corp.*, 782 P.2d 1187, 1187 (Ariz. Ct. App. 1989).

96. *Id.* at 1188.

97. *Id.* at 1187–88.

98. *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 607 (Cal. Ct. App. 2020).

99. BSA, *supra* note 69, § F-3.1.

100. Rickettson, *supra* note 1, at 333.

“unsuitable units”<sup>101</sup> to Amazon’s warehouse for sale.<sup>102</sup> Amazon retains the right to reject the shipment of any units it deems unsuitable.<sup>103</sup> If, at any point during Amazon’s possession of the product, it determines the product is unsuitable, title to that product passes to Amazon for it to dispose of the product as it deems necessary.<sup>104</sup> Disposal processes may include selling the unit, recycling it, donating it, or destroying it.<sup>105</sup>

Assuming a unit is accepted by Amazon, when a consumer orders an FBA product from Amazon.com, Amazon picks, packs, and ships the corresponding product from its facility.<sup>106</sup> If a consumer orders multiple items from different FBA sellers, Amazon retains the discretion to package all those items together in one Amazon branded box for shipping.<sup>107</sup> Amazon handles post-sale customer support related to the products.<sup>108</sup> This “includes around-the-clock management of customer inquiries, refunds, and returns.”<sup>109</sup>

If a consumer wishes to return an FBA product, the consumer coordinates the return with Amazon.<sup>110</sup> Amazon accepts the return and stores the product back in its warehouse, rather than shipping it back to the third-party seller.<sup>111</sup> Amazon inspects the product upon its return and determines its fitness for resale.<sup>112</sup> If the product is fit for resale, Amazon returns the product to its warehouse inventory.<sup>113</sup> An opposite determination, however, results in Amazon shipping the product back to the third-party seller.<sup>114</sup> Throughout the return process, the third-party seller cannot communicate with the consumer, except through Amazon’s messaging platform on

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101. An “unsuitable unit” is an item:

“(a) that is *defective*, damaged, unfit for a particular purpose, or lacking required label(s); (b) the labels for which were not properly registered with Amazon before shipment or do not match the product that was registered; (c) that is an FBA Excluded Product or does not comply with the Agreement (including applicable Service Terms and Program Policies); (d) that Amazon determines is unsellable or unfulfillable; or (e) that Amazon determines is otherwise unsuitable.” BSA, *supra* note 69, § FBA Definitions (emphasis added).

102. *Id.* § F-3.2.

103. *Id.*

104. *Id.* § F-7.3.

105. *Id.*

106. Rickettson, *supra* note 1, at 333.

107. *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 608 (Cal. Ct. App. 2020).

108. Rickettson, *supra* note 1, at 333.

109. *Id.*

110. *Bolger*, 267 Cal. Rptr. 3d at 608.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

Amazon.com.<sup>115</sup> The program anonymizes each party's personal information and email address.<sup>116</sup>

Regarding fees, Amazon charges FBA third-party sellers a storage and fulfillment fee on top of the traditional seller and referral fees Amazon levies on all third-party sellers.<sup>117</sup> If a consumer requests a return, Amazon also charges the third-party seller a return fee.<sup>118</sup>

### B. Grubb Factor Analysis

The *Grubb* factor test is helpful for determining whether Amazon is a seller of FBA products listed for sale on Amazon.com. Factors two, four, and six weigh in favor of finding that Amazon is a seller of FBA products, while factors one and three weigh against finding that Amazon is a seller of FBA products. Factor five is inconclusive.

#### 1. Factor One

Factor one likely weighs against finding that Amazon is a seller. This factor considers whether the entity owned, possessed, or inspected the defective product.<sup>119</sup> The Arizona Court of Appeals in *Dillard* analyzed whether a merchandising organization within the chain of distribution was subject to strict liability as a seller.<sup>120</sup> In considering factor one, the court noted that the broker "never owned or possessed the product," which weighed against finding that the broker was a seller.<sup>121</sup> Years later, in *Antone*, the court analyzed whether a commercial vehicle auctioneer was subject to strict liability as a seller.<sup>122</sup> Unlike in *Dillard*, the auctioneer in *Antone* did take possession of the vehicle in question.<sup>123</sup> In considering factor one, the court noted that "although the auctioneer may have had temporary physical possession [of the vehicle], it never owned or inspected the product," which weighed against finding the auctioneer was a seller.<sup>124</sup> The *Grubb* court worked to reconcile these cases in 2012. When dealing with factor one, the

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *See Grubb v. Do It Best Corp.*, 279 P.3d 626, 628–29 (Ariz. Ct. App. 2012).

120. *Dillard Dep't. Stores, Inc. v. Associated Merch. Corp.*, 782 P.2d 1187, 1189 (Ariz. Ct. App. 1989).

121. *Grubb*, 279 P.3d at 628 (citing *Dillard*, 782 P.2d at 1191).

122. *Antone v. Greater Ariz. Auto Auction, Inc.*, 155 P.3d 1074, 1075 (Ariz. Ct. App. 2007).

123. *Grubb*, 279 P.3d at 628 (citing *Antone*, 155 P.3d at 1079).

124. *Id.*

*Grubb* court focused on ownership and possession and held that never owning or possessing a product weighs against finding that entity to be a seller.<sup>125</sup>

Considering these precedents, one may logically conclude that ownership or possession of the defective product is the best evidence of factor one weighing in favor of liability. However, temporary possession, like what an auctioneer would have over a product throughout the auction process, is not enough to weigh in favor of liability. Inspection of the defective product is a factor courts will weigh; however, it is unclear how much weight courts will give it.

The facts above show Amazon takes possession of the products FBA sellers send to it by storing them in its warehouse.<sup>126</sup> However, this type of possession seems like that of an auctioneer during the auction process. It is temporary in nature with an ultimate intention to pass the product on to another entity. Amazon does take title to unsuitable units but only during the disposal process.<sup>127</sup> Those products would probably not become the subject of a strict products liability lawsuit because they would not fall into the hands of consumers purchasing through Amazon.com. Therefore, courts would likely give Amazon's possession little weight in the analysis.

Amazon retains the right to reject a product it deems unsuitable upon receipt,<sup>128</sup> which indicates Amazon must conduct a basic inspection of the unit. Since the definition of unsuitable units includes defective products, it is entirely possible that Amazon does inspect the products for defective qualities upon receipt. If so, this would indicate factor one may weigh in favor of liability, depending on how heavily courts weigh inspection in the analysis.

However, two reasons suggest Amazon does not inspect FBA products for defective qualities. First, the Ninth Circuit Court of Appeals, in its investigation of Amazon, found that Amazon relies on FBA sellers' representations regarding the contents of the packages sent to Amazon.<sup>129</sup> The Ninth Circuit seems to imply that Amazon's determination of unsuitability halts after checking for obvious defects to the product's packaging. Considering nearly all companies sell their products in some type of packaging,<sup>130</sup> Amazon is probably not capable of conducting more than a

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125. *Id.* at 629 (noting that Do It Best Corp. "never owned or possessed the [product]").

126. *Rickettson*, *supra* note 1, at 333.

127. *BSA*, *supra* note 69, § F-7.2.

128. *Id.* § F-3.2.

129. *State Farm Fire and Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213, 216 (9th Cir. 2020).

130. Joshua Conran, *Why Your Product's Packaging Is as Important as the Product Itself*, INC. (Sept. 22, 2014), <https://www.inc.com/joshua-conran/why-your-product-s-packaging-is-as-important-as-the-product-itself.html> [<https://perma.cc/T3UE-HJV4>] (claiming that all companies desire to utilize packaging for their products); *see also* Elizabeth Segran, *The \$900 Billion*



superficial once-over on many products. Second, while Amazon states it checks for unsuitable products, its definition of unsuitability spreads beyond defective products to include mundane negative qualities, such as mislabeling.<sup>131</sup> Therefore, Amazon's true motivation for reserving the right to reject unsuitable units could be simply to crack down on obviously damaged and mislabeled products that create a headache for employees in the warehouse. Ultimately, even though Amazon gives itself the right to inspect and reject any third-party products it receives, no evidence exists that Amazon does inspect those products—it is only a logical inference from a section of the BSA. Since Amazon also does not take title to products sold via Amazon.com at any time, and only engages in temporary possession of the products, factor one likely weighs against finding that Amazon is a seller.

## 2. Factor Two

Factor two should weigh in favor of finding that Amazon is a seller of FBA products. This factor considers whether the entity is responsible for damage to the product during transit or provides a warranty for the product's quality.<sup>132</sup> Amazon's A-to-Z Guarantee guarantees a product's safe transit.<sup>133</sup> Thus, Amazon is responsible for damage to the product during transit.

Since factor two holds two disjunctive conditions, the analysis could stop there.<sup>134</sup> In the alternative, courts could also analyze whether Amazon

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*Packaging Industry Is Booming*, FAST CO. (Aug. 5, 2019), <https://www.fastcompany.com/90384929/the-900-billion-packaging-industry-is-booming> [<https://perma.cc/N2P3-HNL3>] (commenting that packaging is such a large industry because companies appreciate the benefit of using packaging to safely transport their products across the planet).

131. BSA, *supra* note 69, § FBA Definitions.

132. *See Grubb v. Do It Best Corp.*, 279 P.3d 626, 628–29 (Ariz. Ct. App. 2012).

133. *A-to-Z Guarantee*, *supra* note 71.

134. This Comment concludes that factor two's conditions are disjunctively joined rather than two separate factors. In *Grubb*, the court referenced its opinion in *Antone*—which considered whether the entity in question provided a warranty as to the product's condition—and *Dillard*—which considered whether the entity in question was responsible for a product lost or damaged in transit. The court then combined these considerations in its analysis into one sentence, concluding that an absence of evidence that the entity in question provided a warranty for the product *or* would have been responsible if it had been lost or damaged in transit suggests the entity is not a seller for the purposes of strict products liability. *See Grubb*, 279 P.3d at 628–29. The court's language suggests that courts should analyze these two conditions together and that evidence satisfying either one would weigh in favor of finding the entity in question is a seller for the purposes of strict products liability. Furthermore, the court analyzed in separate sentences each of the other relevant considerations, with the exception of ownership and possession which this Comment combines into one factor as well. Combining these two considerations together implies that the two are similar in nature and, if analyzing either component on its own, it should not receive the same weight as the other identified factors. For these reasons, these two considerations should be disjunctively joined in one factor, rather than analyzed in separate factors.

provides a warranty for the product's quality. Amazon likely meets this condition as well because the A-to-Z Guarantee not only establishes Amazon's responsibility for the product during transit, but it also likely provides an express warranty for the product's quality. In arriving at this conclusion, one must consider that Amazon's BSA expressly disclaims any warranties for products sold on Amazon.com.<sup>135</sup> Thus, to resolve the second inquiry under factor two, one must determine how Arizona law interprets the creation of express warranties and their interaction with concurrent disclaimers.

Arizona adopted the Uniform Commercial Code provision regarding express warranties. Under Arizona law, "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."<sup>136</sup> The buyer need not show they relied on the warranty to weave it into the fabric of the sale agreement.<sup>137</sup>

The above definition, however, uses the term "seller;" only a seller may create an express warranty with the buyer of a product. Recognizing that the entire purpose of this Comment is to determine whether Amazon is a seller of third-party products, it is important to note that the definitions of seller for strict products liability and for a sale-of-goods transaction (governing express warranties) are not the same. Seller, for the purposes of a sale-of-goods transaction, is defined as "a person who sells or contracts to sell goods."<sup>138</sup> Therefore, courts will consider whether an entity sold the goods in question to determine if the entity is a seller under Section 47-2103.<sup>139</sup>

This Comment recognizes that although Arizona courts have never ruled on the issue of Amazon's status as a seller under Section 47-2103, many scholars have argued that Amazon is not a seller for sale-of-goods transactions.<sup>140</sup> Their argument turns on the definition of seller requiring a "sale" of goods. Arizona Revised Statutes section 47-2106 defines a sale as "the passing of title from the seller to the buyer for a price."<sup>141</sup> Since Amazon never takes title to FBA products, they could not have engaged in a sale, and

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135. *State Farm Fire and Cas. Co., v. Amazon.com, Inc.*, 835 F. App'x 213, 216 (9th Cir. 2020).

136. ARIZ. REV. STAT. § 47-2313(A)(1) (2022).

137. U.C.C. § 2-313 cmt. 3 (AM. L. INST. UNIF. L. COMM'N 2022).

138. ARIZ. REV. STAT. § 47-2103(A)(4) (2022).

139. *See In re Minn. Breast Implant Litig.*, 36 F. Supp. 2d 863, 874 (D. Minn. 1998) (interpreting Arizona law to define "seller" for the purposes of express warranties).

140. *See, e.g., Amy Elizabeth Shehan, Note, Amazon's Invincibility: The Effect of Defective Third-Party Vendors' Products on Amazon*, 53 GA. L. REV. 1215, 1229 (2019) (arguing that Amazon is not a seller under UCC § 2-103); 1A THOMAS M. QUINN & BRYAN D. HULL, QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY & LAW DIGEST § 2-103[A][4] (Rev. 3d ed. 2022) (arguing that Amazon is not a seller under UCC § 2-103).

141. ARIZ. REV. STAT. § 47-2106(A) (2022).

therefore could not be a seller.<sup>142</sup> Although this argument is logical, this Comment asserts that the modern environment of online retail transaction compels a different conclusion.

In determining whether Amazon is a seller for sale-of-goods transactions, courts should consider the doctrine of estoppel. The doctrine of estoppel states that when a party justifiably relies on a representation made by the other party, that party is estopped from later acting contrary to that representation.<sup>143</sup> The scope of Amazon's influence on transactions made through its website and the way in which it holds itself out to consumers justify categorizing it as a seller by estoppel for the purposes of sale-of-goods transactions.<sup>144</sup> In FBA transactions, Amazon displays its logo prominently at many points during the process: on the Amazon.com home page, the product listing, the sale receipt, and the shipment's packaging. One may reasonably argue that Amazon's reputation drives most sales on its website.<sup>145</sup> To the extent that Amazon holds itself out as a seller through its involvement in the transaction and customer reliance on that representation, estoppel principles should hold Amazon responsible for creating an impression of responsibility for the transaction.<sup>146</sup>

Furthermore, the doctrine of estoppel is similar to strict liability in that it is rooted in the concept of fairness. From a policy perspective, courts should conclude that it is inherently unfair to the consumer to allow Amazon to hold itself out to consumers as a seller involved in the transaction but for purposes of liability reject the notion that it is a seller, especially where consumers have relied upon that representation. To do so is tantamount to leaving an injured consumer out in the cold after the consumer reasonably anticipated they would have a blanket. Furthermore, it is inherently unfair to traditional sellers to allow Amazon to reap the profits from consumers viewing it as a seller while avoiding the risk and liability. Such an arrangement gives Amazon a financial leg up on its competitors, allowing it to have its cake and eat it too. Should courts determine Amazon is a seller for sale-of-goods transactions, this would be the most likely justification.

As a seller by estoppel, Amazon creates an express warranty for the quality of the goods it delivers through the A-to-Z Guarantee. The Guarantee promises the product's safe transit and the quality of the product upon its

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142. See Shehan, *supra* note 140, at 1229; QUINN & HULL, *supra* note 140.

143. See, e.g., Bohonus v. Amerco, 602 P.2d 469, 471 (Ariz. 1979) ("As a general rule, it is essential to the existence of an estoppel that the representation be relied upon and that such reliance be justifiable."); Graham v. Asbury, 540 P.2d 656, 658 (Ariz. 1975) ("To invoke the doctrine [of estoppel], a person must have reasonably relied to his detriment on the acts, promises or representations of the adverse party.").

144. Edward J. Janger & Aaron D. Twerski, *Warranty, Product Liability and Transaction Structure: The Problem of Amazon*, 15 BROOK. J. CORP. FIN. & COM. L. 49, 63 (2020).

145. *Id.*

146. *Id.*

arrival.<sup>147</sup> Amazon also provides consumers who purchased a defective product with a refund for the cost of the product, original shipping, and the return shipping.<sup>148</sup> This creates an express warranty for the product's quality because Amazon is affirming that the product will be of good quality, or else Amazon will provide the consumer with a refund. In addition to taking responsibility for the product during transit, creation of this warranty further weighs in favor of finding Amazon is a seller for strict products liability purposes.

Concurrently, Amazon expressly disclaims any warranties for the products it sells on Amazon.com within its BSA.<sup>149</sup> Under Arizona Revised Statutes section 47-2316, “[w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction is unreasonable.”<sup>150</sup> According to the associated UCC Commentary, section 47-2316 seeks to protect a buyer from unexpected disclaimers by denying effect to language unreasonably inconsistent with the language of an express warranty.<sup>151</sup> Since consumers who shop on Amazon.com do not read the BSA—nor should Amazon expect them to because the agreement governs its relationship with the third-party seller and not the consumer—the policy behind section 47-2316 dictates that courts should find Amazon’s disclaimer of its express warranty inoperative. The disclaimer and the A-to-Z Guarantee cannot reasonably coexist since one guarantees the product’s quality and the other expressly disclaims responsibility for the product’s quality. To quote authors David G. Owen and Mary J. Davis, “[h]ow can an express warranty and words disclaiming it *ever* be consistent?”<sup>152</sup>

Factor two should weigh in favor of finding that Amazon is a seller of FBA products. Consumers’ justifiable reliance on Amazon’s involvement in FBA transactions make it a seller by estoppel for the purposes of creating an express warranty for the product’s quality via the A-to-Z Guarantee. Even if courts find Amazon is not a seller for the purposes of sale-of-goods transactions, Amazon ultimately remains responsible for the transit of each product as evidenced by its A-to-Z Guarantee. This conclusion ultimately makes factor two weigh in favor of finding that Amazon is a seller of FBA products.

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147. *A-to-Z Guarantee*, *supra* note 71.

148. *Id.*

149. *State Farm Fire and Cas. Co. v. Amazon.com, Inc.*, 835 F. App’x 213, 216 (9th Cir. 2020).

150. ARIZ. REV. STAT. § 47-2316(A) (2022).

151. U.C.C. § 2-316 cmt. 1 (AM. L. INST. UNIF. L. COMM’N 2022).

152. OWEN & DAVIS, *supra* note 12, at 141.

### 3. Factor Three

Factor three should weigh against finding that Amazon is a seller of FBA products. This factor considers whether the entity is providing a service to others in the stream of commerce or specific goods to the public.<sup>153</sup> In *Dillard*, the Arizona Court of Appeals ruled that an entity that brings a retailer and a manufacturer together “essentially provides a service to retailers, rather than specific goods to the public.”<sup>154</sup> Likewise, in *Antone*, the court found that an auctioneer who auctions goods that dealers bring to it also provides a service to parties in the chain of distribution.<sup>155</sup> Finally, in *Grubb*, the court ruled that an entity provides a service to another entity by permitting it to order from a third-party manufacturer and collecting its payments into a single invoice.<sup>156</sup>

These three cases indicate that Amazon likely provides a service to others within the stream of commerce rather than specific goods to the public. Like the entity in *Dillard*, Amazon brings consumers together with manufacturers—essentially providing a service to the manufacturer. A manufacturer could sell directly to the consumer, but instead the intermediary provides the service by making the manufacturer known to the consumer. Like an auctioneer, Amazon lists a seller’s goods, takes possession of them, and delivers them to consumers who purchase them. Additionally, like the entity in *Grubb*, Amazon collects the consumer’s payment and consolidates it into a single bill for the third-party manufacturer. Again, these are steps the manufacturers could take themselves, but Amazon does for them.

These analogies show that Amazon provides value to the third-party manufacturer through its actions. Therefore, it likely provides a service. Although the cases above do not discuss what it means to provide specific goods to the public, they do identify three examples of entities that do not fit that description: an entity responsible for bringing retailers and manufacturers together, an auctioneer, and an entity that processes orders on behalf of third-party manufacturers. These three examples closely resemble Amazon’s operations. Thus, it is safe to conclude that factor three should weigh against finding that Amazon is a seller of FBA products.

### 4. Factor Four

Factor four should weigh in favor of finding that Amazon is a seller of FBA products. This factor considers whether the entity levies fees to cover

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153. See *Grubb v. Do It Best Corp.*, 279 P.3d 626, 628–29 (Ariz. Ct. App. 2012).

154. *Dillard Dep’t. Stores, Inc. v. Associated Merch. Corp.*, 782 P.2d 1187, 1191 (Ariz. Ct. App. 1989).

155. *Antone v. Greater Ariz. Auto Auction, Inc.*, 155 P.3d 1074, 1079–80 (Ariz. Ct. App. 2007).

156. See *Grubb*, 279 P.3d at 629.

its operation costs or to make a commission or profit from the transaction.<sup>157</sup> Courts will consider whether an entity makes a commission, profit, or directly benefits from any specific transaction resulting in a buyer's purchase.<sup>158</sup> Flat fees that cover employee salaries and operating costs generally suggest the entity is not a seller.<sup>159</sup> Also, retaining a small percentage of a fee that the entity largely uses to cover the cost of business does not tip the factor analysis towards finding the entity is a seller.<sup>160</sup>

Foreseeably, Amazon's fees primarily cover its costs to conduct transactions. The storage and fulfillment fees cover the expense of maintaining the third-party's product prior to a consumer ordering it, as well as the cost to deliver it. Also, the return-processing fee covers the cost for Amazon to do exactly that: process a return. Furthermore, the seller fee likely covers the cost for Amazon to list the third-party's product on its site and maintain that listing. However, the referral fee does not cover a specific cost.

Amazon deducts the referral fee from the proceeds passed on to the third-party from sales of its products on Amazon.com. It is not a flat fee; the percentage Amazon retains depends on the type of product and its total sales price.<sup>161</sup> Amazon would argue that the benefit it receives from each transaction is small, suggesting that it has a limited interest in each transaction.<sup>162</sup> To a certain extent, this argument seems persuasive. To a large company like Amazon, retaining a fraction of the sales price of any retail item in any specific transaction is likely not of interest at all. However, to focus on Amazon's interest in each transaction in a vacuum is to miss the forest for the trees.

In the aggregate, these fees contribute significantly to Amazon's profitability. The estimated value of the total U.S. e-commerce retail sales during the second quarter of 2021 was \$222.5 billion.<sup>163</sup> Amazon's marketplace—conservatively—accounts for 37% of all U.S. e-commerce.<sup>164</sup> This equates to roughly \$82 billion in revenue. Third-party sales account for 58% of Amazon's sales through Amazon.com.<sup>165</sup> That amounts to roughly \$47 billion in revenue. Amazon then collects a referral fee on each of the

157. *See id.* at 628–29.

158. *See Dillard*, 782 P.2d at 1191.

159. *Antone*, 155 P.3d at 1079.

160. *See Grubb*, 279 P.3d at 629.

161. *Referral Fees, AMAZON SELLER CENT.*, [https://sellercentral.amazon.com/gp/help/external/GTG4BAWSY39Z98Z3?language=en\\_US&ref=efph\\_GTG4BAWSY39Z98Z3\\_cont\\_200336920](https://sellercentral.amazon.com/gp/help/external/GTG4BAWSY39Z98Z3?language=en_US&ref=efph_GTG4BAWSY39Z98Z3_cont_200336920) [<https://perma.cc/4HU7-EWHD>].

162. *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213, 216 (9th Cir. 2020).

163. U.S. CENSUS BUREAU, U.S. DEP'T COM., CB21-126, QUARTERLY RETAIL E-COMMERCE SALES: 2ND QUARTER 2021 (2021), <https://www2.census.gov/retail/releases/historical/ecommm/21q2.pdf> [<https://perma.cc/7DUR-546Y>].

164. Rickettson, *supra* note 1, at 332.

165. Sprague, *supra* note 2, at 255.

transactions contributing to this amount.<sup>166</sup> Amazon collects between 3% and 45% of a product's total cost to the buyer, depending on the type of product and its total sales price.<sup>167</sup> Oftentimes, Amazon collects 15%.<sup>168</sup> Assuming a 15% retention—while considering this is an extremely rough calculation done with public data—Amazon collected approximately \$7.1 billion in referral fees in the second quarter of 2021. In a year, this amount would become over \$28 billion. Although Amazon may argue its disinterest in the referral fee from each individual transaction, in the aggregate these referral fees reach a sizable sum. Revenue of over \$28 billion annually establishes a direct benefit that Amazon receives by levying the referral fees—one cannot reasonably argue Amazon's disinterest in a figure of this magnitude. Thus, factor four should weigh in favor of finding Amazon is a seller of FBA products.

### 5. Factor Five

Factor five is not conclusive. This factor considers whether the entity has a “special relationship” with the manufacturer such that it may influence the safety or design of the product.<sup>169</sup> A continuing service contract—as opposed to processing transactions with different parties on an ad-hoc basis—is indicative of a special relationship.<sup>170</sup> However, a continuing service contract, alone, does not establish a special relationship. A service provider's ability to stop carrying a vendor's products, by itself, does not create a special relationship.<sup>171</sup> The entity must have the ability to alter the manufacturer's design or packaging.<sup>172</sup>

Amazon's BSA likely establishes a continuing service contract with third-party manufacturers. Amazon also retains the discretion to stop carrying a vendor's products according to the BSA. Therefore, a court may find that Amazon's relationship with FBA manufacturers is indicative of a special relationship. However, Amazon does not design or manufacture any FBA products; rather the third-party vendors it contracts with manufacture them.<sup>173</sup> Although Amazon may remove products from its site that it deems unsafe, it cannot unilaterally make a design or packaging change to a third party's product.<sup>174</sup> Therefore, Amazon would argue that it does not have a special

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166. *See Referral Fees, supra* note 161.

167. *Id.*

168. *See id.*

169. *See Grubb v. Do It Best Corp.*, 279 P.3d 626, 628–29 (Ariz. Ct. App. 2012).

170. *Antone v. Greater Ariz. Auto Auction, Inc.*, 155 P.3d 1074, 1079 (Ariz. Ct. App. 2007).

171. *See Grubb*, 279 P.3d at 629.

172. *See id.*

173. *Rickettson, supra* note 1, at 348.

174. *Id.*

relationship with any of the FBA manufacturers because it does not possess the ability to alter a manufacturer's design or packaging.

However, this Comment suggests that courts should also consider the argument for Amazon's indirect market power influence. Some authors have argued for the existence of a special relationship between Amazon and its third-party manufacturers by emphasizing the indirect market pressures on manufacturers to concede to any demands that Amazon makes.<sup>175</sup> Having a relationship with Amazon provides a financial advantage to third-party sellers, which indicates a degree of influence.<sup>176</sup> Amazon's ability to permanently withhold any payments from a third party it deems to have sold defective products through Amazon.com likely threatens the profits of third-party manufacturers and induces them into abiding by Amazon's rules.

An example of Amazon's indirect influence on third-party sellers' behavior is the boom in trademark applications upon the launch of the Amazon Brand Registry. In 2017, Amazon launched its Brand Registry in an effort to curb counterfeiters and limit unauthorized resellers on its platform.<sup>177</sup> Amazon offers the Registry to its sellers free of charge but first requires that the seller obtain a trademark registration or submit a trademark application.<sup>178</sup> Members of the registry obtain benefits, such as access to predictive automation technology based on reports of suspected intellectual property infringement and text and image search tools to discover unauthorized use of their mark.<sup>179</sup> Since 2017, 440,000 brands worldwide have enrolled in the Brand Registry<sup>180</sup>—presumably to obtain the positive, yet non-essential, benefits it offers.

Based on this example, one can argue that Amazon's unilateral actions have an impact on the actions of third-party sellers due to Amazon's market power providing immense benefits to those sellers. Amazon wanted to reduce the number of counterfeit product listings by unauthorized sellers on its site, so it offered a free-to-join program that provides sellers with tools to combat

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175. See, e.g., Aaron Doyer, Note and Comment, *Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond*, 28 J.L. & POL'Y 719, 752 (2020).

176. *Id.* at 752–53.

177. See Michael Waters, *Amazon Briefing: Why Brand Registry Has Yet to Become a Ubiquitous Seller Tool*, MODERNRETAIL (Oct. 21, 2021), <https://www.modernretail.co/platforms/amazon-briefing-why-brand-registry-has-yet-to-become-a-ubiquitous-seller-tool/> [<https://perma.cc/5FGN-C389>].

178. Aman Ghataura, *Amazon Brand Registration and Its Benefits*, NUOPTIMA (Oct. 7, 2021), <https://nuoptima.com/blog/the-ultimate-guide-to-brand-registry-on-amazon> [<https://perma.cc/S57C-2LGL>]; see also Eric Eagle Hartmans, *Trademark Registration Requirements for Amazon Brand Registry*, HARTMANS L. CORP. (July 22, 2021), <https://hartmanslaw.com/trademark-registration-requirements-for-amazon-brand-registry/> [<https://perma.cc/4BPJ-SMQH>].

179. Hartmans, *supra* note 178; see also Ghataura, *supra* note 178 (providing a detailed breakdown of the Amazon Brand Registry's offerings).

180. Waters, *supra* note 177.



unauthorized seller listings, and 440,000 sellers assented to the program. Many companies depend on Amazon to grow their business and reach millions of consumers worldwide.<sup>181</sup> Therefore, one can understand why many third parties would take advantage of opportunities provided by Amazon and presumably conform to regulations Amazon implements—selling on Amazon is vitally important to their bottom line.

Overall, it is unclear exactly how tangible Amazon's influence is on third-party sellers. While it is true that Amazon's launch of the Brand Registry encouraged many third parties to obtain trademarks, experts disagree as to Amazon's ability to reach all sellers in its marketplace with such a program.<sup>182</sup> It is thus unclear how influential of a relationship Amazon has with its sellers and whether it can actually influence third-party product safety or design. Ultimately, it is unclear how Arizona courts would rule on this factor. Thus, factor five is inconclusive.

## 6. Factor Six

Factor six should weigh in favor of finding that Amazon is a seller of FBA products. This factor considers whether consumers rely on the entity's presence to verify the product's quality.<sup>183</sup> Where a third-party seller ships a product directly to the purchaser while a separate entity guarantees the purchaser's payment to the third-party seller, the guaranteeing entity does not necessarily create consumer reliance in its participation.<sup>184</sup> An entity that does not directly interact with the end-purchaser during that purchaser's transaction does not create consumer reliance as to the type of product or its quality.<sup>185</sup> However, an entity that possesses a certain degree of control over a product, whether by making warranties or representations as to its condition or safety, taking title to the product, or inspecting the product, can be said to foster consumer reliance as to the product's quality.<sup>186</sup>

Amazon would argue that it lists the third-party seller's name on the product's Amazon.com listing; therefore, it could not foster consumer reliance because a reasonable consumer would assume it is purchasing the

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181. See Alexej Pikovsky, *Pros and Cons of Selling on Amazon*, NUOPTIMA (Oct. 10, 2021), <https://nuoptima.com/blog/pros-and-cons-of-selling-on-amazon> [<https://perma.cc/28BR-KT2D>]; see also Ghataura, *supra* note 178.

182. See Waters, *supra* note 177 (reporting that many experts viewed 440,000 third-party sellers participating in the Brand Registry as an indication of Amazon's enduring struggles to create action to combat counterfeit sales, since that statistic indicated that over 60% of Amazon's active sellers worldwide do not participate in the Brand Registry).

183. See *Grubb v. Do It Best Corp.*, 279 P.3d 626, 628–29 (Ariz. Ct. App. 2012).

184. See *id.*

185. See *Dillard Dep't Stores, Inc. v. Associated Merch. Corp.*, 782 P.2d 1187, 1188–89, 1191 (Ariz. Ct. App. 1989).

186. *Antone v. Greater Ariz. Auto Auction, Inc.*, 155 P.3d 1074, 1079 (Ariz. Ct. App. 2007).

product solely from the entity listed.<sup>187</sup> Any likelihood of creating consumer reliance is further diminished by the third-party's name appearing at the checkout screen and on the transaction receipt.<sup>188</sup> However, this perspective undersells the prominence with which Amazon displays itself throughout the consumer's transaction.

Although it displays the third-party seller's name in certain places, Amazon also places its logo on every page of the Amazon website, the sales receipt, and the packaging in which the product arrives. Modern consumers accept products by relying on the reputation of the trademark associated with them.<sup>189</sup> Thus, including the third-party seller's name in the listing and on the receipt should not eliminate the existence of consumer reliance on Amazon.

As mentioned before, Amazon provides a warranty for the delivery and condition of FBA products through its A-to-Z Guarantee. Thus, consumers rely on Amazon to remedy their situations when products become damaged in transit or the conditions of the products are poor. Amazon also holds out Amazon.com as the consumer's go-to for post-sale customer support and refunds. Should a consumer want to ask the third-party seller a question, they must contact the seller over Amazon's messaging platform.<sup>190</sup> Therefore, the consumer relies on Amazon's involvement to address the third-party seller if the product has an issue. If the third-party seller is unreachable, Amazon provides a refund.<sup>191</sup> Again, in that scenario the consumer relies on Amazon to remedy their situation. Ultimately, one could argue that Amazon's representations and warranties to the consumer regarding their purchase sufficiently fosters consumer reliance as to the product's quality.

Furthermore, public policy encourages courts to hold Amazon responsible for any amount of consumer reliance fostered by its involvement. Amazon, financially, is in a much better position, compared to the average consumer, to engage in lawsuits with third-party sellers regarding compensation for defective products, especially when the third-party seller is

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187. See *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213, 216 (9th Cir. 2020).

188. *Id.* But see 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, 268 (2020) (arguing that the only meaningful indication that the buyer receives of who is selling the product is the seller's name listed in the product listing itself).

189. *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring).

190. *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 608 (Ct. App. 2020).

191. *A-to-Z Guarantee*, *supra* note 71; see also *Request an A-to-Z Guarantee Refund*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GSZAYH7K2C2NVNC9> [<https://perma.cc/4V4N-BMLD>].

an obscure entity based in a foreign country.<sup>192</sup> Amazon's A-to-Z Claims Process implies as much. The Claims Process, by offering to resolve the consumer's claim in exchange for the consumer assigning their claim to Amazon, represents to the consumer that Amazon may accept responsibility for a defective product and is then capable of obtaining relief from the third-party seller. It is only natural to allow a consumer to rely on this representation because it is a reasonable interpretation of how the policy functions.

It is true that Amazon, with its superior resources, could pursue the third-party seller more easily than a consumer could. Assuming the court finds the third-party seller responsible for the defective product, Amazon could recover the amount it compensated the consumer. This approach provides an advantageous remedy for all parties involved: the injured consumer in need of expedited compensation, and Amazon, which can live without a sum of money for a period of time and is ultimately made whole. This approach can apply to a claim filed by a consumer through the court system as well. Amazon likely retains a breach-of-contract or breach-of-warranty claim against a third-party seller for any consequences of defective products to its consumers. Therefore, allowing a consumer to hold Amazon strictly liable for defective products in a court of law is just another avenue to the end result previously outlined.

Ultimately, with the tangible representations Amazon makes to consumers along with the public policy implications brought on by this analysis, a court should find that Amazon's actions within an FBA transaction foster consumer reliance on its involvement. Thus, factor six should weigh in favor of finding that Amazon is a seller of FBA products.

### C. Takeaway

On balance, Arizona courts should define Amazon as a seller of FBA products purchased through Amazon.com. Factors two, four, and six weigh in favor of finding Amazon is a seller of FBA products. Factor five is ultimately inconclusive. Factors one and three weigh against finding Amazon is a seller of FBA products, but ultimately the other factors outweigh them.

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192. See *Class Action Lawsuits Seem Good but Have a Lot of Drawbacks that Don't Make Them Very Ideal*, N.C. CONSUMERS COUNCIL (Dec. 9, 2021), <https://www.nccconsumer.org/news-articles-eg/class-action-lawsuits-sound-like-a-good-thing-but-they-arent-always-that-great-for-you.html> (commenting that large corporations are better financially situated to handle lawsuits than individuals); see also Claire Andre & Manuel Velasquez, *Who Should Pay? The Product Liability Debate*, MARKKULA CTR. FOR APPLIED ETHICS SANTA CLARA UNIV. (Nov. 20, 2015), <https://www.scu.edu/ethics/focus-areas/business-ethics/resources/who-should-pay-the-product-liability-debate/> [<https://perma.cc/4KVG-A2F9>] (arguing that justice requires that the party most able to pay for an injury is the party that should bear the injury's financial burden, especially in the case of companies who can preemptively build that cost into the price of products).

By defining Amazon as a seller of FBA products purchased through Amazon.com, courts should hold Amazon strictly liable for sales of defective FBA products.

#### IV. AMAZON'S FBM PROGRAM

This Section analyzes whether Amazon is a seller of the products listed for sale on Amazon.com through its FBM program. It begins by overviewing the FBM program and its operations, then it applies the *Grubb* factor test to those facts and explains why Arizona courts should not define Amazon as a seller of FBM products.

##### A. How It Works

Unlike the FBA program, Amazon's FBM program allows third-party sellers to operate on their own.<sup>193</sup> Third parties maintain their own products until a consumer places an order for the products through Amazon.com.<sup>194</sup> Then, the third party picks, packs, and ships the products ordered.<sup>195</sup> FBM sellers ship their products using their own packing materials; therefore, those materials do not feature Amazon branding.<sup>196</sup> Amazon still requires FBM sellers to assent to the BSA as well.<sup>197</sup> Like all other products, the A-to-Z Guarantee applies to FBM products.<sup>198</sup>

An important distinction between the two services relates to fees. Amazon only charges FBM sellers the standard referral and seller fees.<sup>199</sup> Upon Amazon's processing a return for a seller, Amazon charges a return fee.<sup>200</sup> Still, Amazon only processes an FBM customer's return if the seller is unreachable.<sup>201</sup>

##### B. Grubb Factor Analysis

The *Grubb* factor test is also helpful for determining whether Amazon is a seller of FBM products listed for sale on Amazon.com. Factors one, three, and six likely weigh against finding that Amazon is a seller of FBM products, while factors two and four weigh in favor of finding that Amazon is a seller of FBM products. Factor five is inconclusive.

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193. Rickettson, *supra* note 1, at 333.

194. Doyer, *supra* note 175, at 729.

195. *Id.*

196. *See* Bolger v. Amazon.com, LLC, 267 Cal. Rptr. 3d 601, 607 (Ct. App. 2020).

197. *Id.* at 608.

198. *Id.*

199. *See* Doyer, *supra* note 175, at 728–29.

200. Bolger, 267 Cal. Rptr. 3d at 608.

201. *A-to-Z Guarantee*, *supra* note 71; *see also Request an A-to-Z Guarantee Refund*, *supra* note 191.

### 1. Factor One

Factor one must weigh against finding that Amazon is a seller of FBM products. Again, this factor considers whether the entity owned, possessed, or inspected the defective product prior to it reaching the consumer.<sup>202</sup> The same rules outlined in Part III regarding possession, taking title, and inspection apply here.

Arguing that this factor weighs against finding Amazon is a seller of FBM products is easier here than in Part III. In the FBA setting, we considered Amazon's temporary possession of the product and questioned whether it inspected the product at any time during that possession. However, we need not consider either of those scenarios here because Amazon never takes possession of or inspects FBM products.<sup>203</sup> Because it also never takes title to FBM products, factor one must weigh against finding that Amazon is a seller of FBM products.

### 2. Factor Two

Factor two should weigh in favor of finding that Amazon is a seller of FBM products. Again, this factor considers whether the entity is responsible for damage to the product during transit or provides a warranty for the product's quality.<sup>204</sup> Since Amazon's A-to-Z Guarantee also applies to FBM products, Amazon is still responsible for damage to FBM products during transit. Thus, factor two should weigh in favor of finding that Amazon is a seller of FBM products.

Furthermore, the same rules regarding express warranties and disclaimers outlined in Part III apply here. The analysis conducted in Part III regarding Amazon's status as a seller by estoppel for sale-of-goods transactions remains the same as to this factor. In the context of warranties, the A-to-Z Guarantee still guarantees the product's safe transit and quality.<sup>205</sup> Amazon still provides purchasers of defective FBM products with a refund of the product's cost, the original shipping cost, and the return product cost if necessary.<sup>206</sup> Also, Amazon's disclaimer of express warranties in its BSA still applies.<sup>207</sup> Following the reasoning from Part III, the disclaimer and the A-to-Z Guarantee cannot reasonably coexist since one guarantees the product's quality and the other expressly disclaims responsibility for the product's

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202. See *Grubb v. Do It Best Corp.*, 279 P.3d 626, 628–29 (Ariz. Ct. App. 2012).

203. Doyer, *supra* note 175, at 729.

204. See *Grubb*, 279 P.3d at 628–29.

205. See *A-to-Z Guarantee*, *supra* note 71.

206. *Id.*

207. *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213, 216 (9th Cir. 2020).

quality. Thus, factor two should weigh in favor of finding that Amazon is a seller of FBM products.

### 3. Factor Three

Factor three should weigh against finding that Amazon is a seller of FBM products. Again, this factor considers whether the entity is providing a service to others in the stream of commerce or specific goods to the public.<sup>208</sup> The same rules regarding identifying an entity that provides a service to other entities outlined in Part III apply here.

Once more, the analysis conducted in Part III remains the same as to this factor. Sellers seek out Amazon to list their products on its website and to utilize Amazon's billing services. While sellers could list their products on their own website for consumers to purchase, Amazon provides that service for them. Therefore, factor three should weigh against finding that Amazon is a seller of FBM products.

### 4. Factor Four

Factor four should weigh in favor of finding that Amazon is a seller of FBM products. Again, factor four considers whether the entity levies fees to cover its operation costs or to make a commission or profit from the transaction.<sup>209</sup> The same rules regarding what qualifies as a direct benefit outlined in Part III apply here.

Unlike FBA transactions, the only fees Amazon routinely collects from FBM sellers are seller and referral fees.<sup>210</sup> Although Amazon still levies a processing fee for necessary returns, and the seller fee presumably covers the cost for Amazon to list the third-party's product on its site and maintain that listing, the referral fee for each item sold does not cover a specific cost, making it a profit-generating fee. Without charging the seller a storage and fulfillment fee, the referral fee foreseeably makes up a larger portion of the fee Amazon collects from FBM sellers. This makes Part III's argument regarding Amazon's interest in each transaction a little more palatable for the skeptical reader because a larger percentage of what Amazon is collecting from third-party sellers is for its direct benefit. Taking this into account while still considering Amazon's interest in the aggregate amount of referral fees, one can conclude Amazon is directly benefitting from the fees it levies on FBM sellers. Therefore, factor four should weigh in favor of finding that Amazon is a seller of FBM products.

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208. See *Grubb*, 279 P.3d at 628–29.

209. See *id.*

210. See *Doyer*, *supra* note 175, at 728–29.



come in the same Amazon-branded packaging as the FBA products. The net result is that Amazon does not represent itself as part of the sales process as much as it does with FBA transactions.

The public policy arguments explored in Part III still apply here, but perhaps the reader, at this point, should consider a counterargument: should the injured party's subjective belief regarding the entities involved in the transaction be the dispositive factor in this analysis? Is it fair to hold Amazon liable for a defective product that it has never possessed or inspected knowing it holds questionable influence over the design and manufacture of that product? Is Amazon truly responsible when it could not have known of the product's defective qualities?<sup>214</sup> Is the consumer, ordering from a clearly identified third-party from a listing that does not show Amazon's involvement with the product, reasonable in their expectation that Amazon can prevent the product's defective nature?

The difference between the analysis here and the analysis in Part III turns on Amazon's capability to respond to defective products and the consumer's reliance on Amazon's ability to do so. "[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."<sup>215</sup> In an FBA setting, where Amazon has tangible access to the product it is sending the consumer, it seems much more reasonable for a consumer to rely on Amazon's ability to address the product's defective qualities. Amazon might inspect the product and, if necessary, withhold the inventory and profits from a third-party seller if it found that the product was defective, or pursue other solutions. The point is, Amazon has more leverage than a consumer in that situation. An FBM transaction possesses no such qualities. At that point, could one effectively argue that affixing responsibility to Amazon for those transactions is the best way to prevent the defective product from reaching the marketplace?

It is up to the courts to form their own opinion regarding the public policy associated with factor six. Ultimately, this Comment argues that, because Amazon represents its transactional involvement less to the consumer, it is likely that courts would find that Amazon lacks a degree of

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*Mimikyu EX Box*, AMAZON, [https://www.amazon.com/Pokemon-TCG-Mimikyu-ex-Box/dp/B0BSCFX5YN/ref=sr\\_1\\_31?crid=22YZ4HJH6ISQ3&keywords=pokemon&qid=1678764618&s=toys-and-games&sprefix=pokemon%2Ctoys-and-games%2C151&sr=1-31](https://www.amazon.com/Pokemon-TCG-Mimikyu-ex-Box/dp/B0BSCFX5YN/ref=sr_1_31?crid=22YZ4HJH6ISQ3&keywords=pokemon&qid=1678764618&s=toys-and-games&sprefix=pokemon%2Ctoys-and-games%2C151&sr=1-31) [https://perma.cc/A56U-WRYU] (omitting Amazon's name from the listing and only displaying the Amazon logo in the top right corner of the webpage, which is standard for most subheadings on the Amazon page).

214. See OWEN & DAVIS, *supra* note 12, at 181 (stating that opponents of the strict liability rationale criticize it for championing the absurdity of a duty to warn of the unknowable, to say nothing of its appearance of unfairness and untoward policy implications).

215. *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).



control significant enough that a consumer could rely on it. Thus, factor six should weigh against finding that Amazon is a seller of FBM products.

### C. Takeaway

On balance, Arizona courts should find that Amazon is not a seller of FBM products. Factors one, three, and six likely weigh against finding that Amazon is a seller of FBM products. Although factors two and four do weigh in favor of finding that Amazon is a seller of FBM products, the other arguments outweigh these conclusions. Without defining Amazon as a seller of FBM products purchased through Amazon.com, courts should not hold Amazon strictly liable for sales of defective FBM products.

## V. CONCLUSION

In the olden days of retail sales, many consumers knew with certainty crucial information about the retail transactions they engaged in, like from where and from whom they received the products they purchased.<sup>216</sup> For example, a consumer in 1970 purchasing a cutting-edge PortaVision television from Radio Shack<sup>217</sup> knew who to seek out if their brand-new piece of technology malfunctioned: Radio Shack. As the Internet evolved, retail supply chains evolved with it. However, the system of liability for entities within these supply chains has not progressed in lockstep. What should this mean for the consumer? Should it mean that purchasing a defective product from a third-party seller on an online platform is tantamount to riding a bike by oneself down a hill with no brakes?<sup>218</sup> What should this mean for the entities in the supply chain? Should the third-party seller gain immunity by making themselves difficult to identify or by being undercapitalized?<sup>219</sup> Should the online platform have the ability to step away from the transaction when it represented to the injured consumer that they could rely on its involvement?<sup>220</sup>

This Comment has argued that under Arizona law, Amazon fits the definition of a seller such that Arizona courts should hold it strictly liable for

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216. Janger & Twerski, *supra* note 188, at 260 (stating that before the advent of the Internet, real world signals ensured that the identity of the seller of certain goods was reasonably transparent).

217. See 1970 Radio Shack Catalog, RADIO SHACK CATALOGS, [https://www.radioshackcatalogs.com/flipbook/1970\\_radioshack\\_catalog.html](https://www.radioshackcatalogs.com/flipbook/1970_radioshack_catalog.html) [<https://perma.cc/43RB-KS7G>].

218. A possibility for injury exists, as well as the possibility that nobody will be around to help with one's injury.

219. Janger & Twerski, *supra* note 188, at 271 (arguing that immunizing Amazon from tort liability for defective products allows for many third-party sellers to remain difficult to identify or undercapitalized and may lead to a proliferation of dangerous products appearing for sale).

220. Referencing situations in which customers purchase FBA products.

defective products sold by Amazon itself and by third parties participating in the FBA program. The Ninth Circuit's decision in *State Farm* is not binding on the Arizona Supreme Court; therefore, the Court would likely conduct an independent analysis if presented the question. At such point, it may reach a conclusion similar to the one presented here. Given the complexity of this issue, the Ninth Circuit may have benefitted from certifying the question of Amazon's status as a seller to the Arizona Supreme Court during the *State Farm* litigation, as other circuits have done.<sup>221</sup> Alas, it is a matter of when, not if, this issue arises again. At that time, we shall see how the Arizona Supreme Court rules.

This Comment recognizes that its conclusion may appear unreasonable to the skeptical reader. Extending strict liability to Amazon for defective products sold by third parties participating in the FBA program would make it responsible for 94% of all third-party sellers on its platform.<sup>222</sup> This appears like an unmanageable amount of liability for any entity, even one as large as Amazon. While recognizing this legitimate concern, it is important to revisit the underlying purpose of the strict products liability doctrine, which is to ensure that the costs of injuries from defective products are borne by the products manufacturers or sellers rather than by the injured persons who are powerless to protect themselves.<sup>223</sup> “[P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them.”<sup>224</sup> Applying strict liability to Amazon affords maximum protection to the injured plaintiff and applies a minor burden to Amazon, who may adjust the costs of such protection between itself and the third-party manufacturer in the course of their continuing business relationship.<sup>225</sup> Therefore, in the interests of promoting justice under Arizona

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221. See, e.g., *Oberdorf v. Amazon.com, Inc.*, 237 A.3d 394, 394 (Pa. 2020) (accepting certification of the question: “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?”); *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 104 (Tex. 2021) (answering the certified question of “whether Amazon.com is a ‘seller’ under Texas law when it does not hold title to third-party products sold on its website but controls the process of the transaction and delivery”).

222. See James Anthony, *74 Amazon Statistics You Must Know: 2021/2022 Market Share Analysis & Data*, FINANCESONLINE, <https://financesonline.com/amazon-statistics/> [<https://perma.cc/2UFV-HW9F>].

223. See *Hazine v. Montgomery Elevator Co.*, 861 P.2d 625, 628 (Ariz. 1993) (“Strict products liability developed because other theories of recovery proved inadequate to protect injured users and consumers.”) (citing *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963)); see also *Kuhnke v. Textron, Inc.*, 684 P.2d 159, 161–62 (Ariz. Ct. App. 1984) (holding that Arizona applies strict liability to sellers as well as manufacturers of defective products).

224. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. L. INST. 1965); see also *Kuhnke*, 684 P.2d at 161–62 (ruling that Arizona follows § 402A of the Restatement).

225. *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 612 (Ct. App. 2020).

law, courts should hold Amazon strictly liable for defective products that it sells and for those sold by third parties participating in the FBA program.