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Danny O'Connor

ALL OF THE PRODUCTS, NONE OF THE LIABILITY: EXAMINING THE SUPREME COURT OF OHIO'S DECISION IN *STINER V. AMAZON.COM, INC.*

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I. INTRODUCTION

In the twenty-seven years since Jeff Bezos launched Amazon out of his garage, the company has evolved into a retail behemoth of unprecedented magnitude. According to a 2019 survey analyzing the behaviors of over 2,000 Amazon customers, the company has captured 52.4% of the total e-commerce market in the United States, with all signs indicating that number will continue to rise in future years.[1] In September 2019 alone, over 150 million consumers in the United States accessed Amazon's mobile shopping app, nearly twice as many as the second most used Walmart app.[2] In the world of retail commerce, and certainly in the United States, Amazon is a ubiquitous presence.

But what happens when a product purchased on Amazon's online marketplace injures or even kills a customer? Which entity does the bereaved consumer sue for redress? The answer to these questions largely depends on the state in which the injury occurs. In Ohio, the only clear answer is that liability does not fall on Amazon.

In October 2020, the Supreme Court of Ohio dealt a decisive blow to a plaintiff seeking to hold Amazon liable under the state's products liability statute in its decision in *Stiner v. Amazon.com, Inc*.[3] The state's high court held that Amazon was not a "supplier" as defined by the Ohio Product Liability Act and therefore could not be held liable for the death of plaintiff's 18-year-old son.[4] This outcome placed Ohio squarely on the side of several other state and federal courts that have declined to hold Amazon liable for injuries caused by products sold on its online marketplace by third-party vendors. By doing so, the court effectively shielded the company from the reach of products liability law.

This Note examines the ramifications of the Supreme Court of Ohio's decision in *Stiner* and compares the majority's approach with those taken by other federal and state courts. Part II of this Note examines the

1. FEEDVISOR, THE 2019 AMAZON CONSUMER BEHAVIOR REPORT (2019), https://fv.feedvisor.com/rs/656-BMZ-780/images/Feedvisor-Consumer-Survey-2019.pdf.

2. *Most Popular Mobile Shopping Apps in the United States as of September 2019*, STATISTA (Sept. 2019), https://www.statista.com/statistics/579718/most-popular-us-shopping-apps-ranked-by-audience/.

3. Stiner v. Amazon.com, Inc., 164 N.E.3d 394 (Ohio 2020).

4. *Id.* at 396.

common law development of products liability in Ohio, culminating in the passage of the Ohio Product Liability Act.[5] Finally, Part II examines the federal and state court opinions that represent a major divide in characterizing Amazon's role in the modern retail market. Part III argues that the Supreme Court of Ohio did not sufficiently account for the primary policy goals of products liability law and effectively barred Ohio consumers from seeking legal redress when harmed by a defective product bought from a third-party vendor on Amazon's online marketplace. Part III will also analyze the approaches taken by California courts to demonstrate the Supreme Court of Ohio's pointed reliance on statutory interpretation ran contrary to the objective of protecting Ohio consumers from the pitfalls of the modern retail marketplace. Part III concludes by demonstrating that the express language of the OPLA, in conjunction with Ohio common law, provides a sufficient mechanism through which Amazon can be found liable for injuries caused by third-party vendor products. Part IV concludes by assessing the current landscape of products liability law in the twenty-first century and reasserting the need for the Supreme Court of Ohio to play a more active role in providing legal protection to injured Ohio consumers.

II. BACKGROUND

A. Development of Products Liability Law in Ohio

Prior to the twentieth century, and well before the formal recognition of a distinct products liability doctrine in Ohio, numerous forms of action, based on theories of negligence and breach of warranty, existed to provide consumers legal relief for injuries caused by defective products.[6] In the early twentieth century, the seminal decision in *MacPherson v. Buick Motor Co.* led to a nationwide evolution in products liability law.[7] In *MacPherson*, the plaintiff was injured after his Buick's tires broke down, launching him from the vehicle.[8] The New York Court of Appeals disposed of the old common law rule that required contractual privity between a consumer and manufacturer as a prerequisite to bringing a tort action against the manufacturer of a defective product.[9] Writing for the majority, Judge Cardozo opined that the manufacturer of a chattel that is

5. OHIO REV. CODE §§ 2307.71-2307.80.

6. Stephen J. Werber, *An Overview of Ohio Product Liability Law*, 43 CLEV. ST. L. REV. 379, 382 (1995).

7. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100 (1960).

8. Macpherson v. Buick Motor Co., 111 N.E. 1050, 1051 (1916).

9. *Id.* at 1054.

"inherently dangerous" is strictly liable for injuries caused by that chattel.[10] Throughout the next several decades, many states followed New York's lead and began carving out a separate doctrine for addressing injuries suffered by consumers at the hands of negligent manufacturers.

Ohio went a step further when it recognized the first semblance of its own products liability doctrine in the Supreme Court of Ohio's decision in *Rogers v. Toni Home Permanent Co*.[11] The case arose from plaintiff's hair suffering severe damage after using a home permanent set sold by defendant.[12] The court held that the plaintiff sufficiently stated a cause of action sounded in both negligence and breach of express warranty.[13] Significantly, the court also held that contractual privity did not need to exist for an injured consumer to pursue a cause of action against the manufacturer of a defective and not inherently dangerous product, paving the way for such actions to arise exclusively in tort.[14] Twenty years later, the court fully eliminated any requirement of contractual privity for tort-based strict liability against manufacturer-sellers by adopting the requisite provision of the Restatement (Second) of Torts.[15]

In January 1988, the Ohio General Assembly passed the Ohio Product Liability Act (OPLA).[16] The OPLA transformed products liability relief into a statutorily derived cause of action.[17] At the time of its passage, the OPLA effectively served as a codification of common law principles,[18] creating four theories of relief that had previously received judicial recognition: injuries caused by defects in manufacture or construction;[19] design or formulation defects;[20] defects in warning or instructions;[21] and failure to conform to representation.[22] The OPLA was amended in 2005 to clarify that §§ 2307.71 through 2307.80 "are intended to abrogate all

10. *Id.* at 1055.

11. Rogers v. Toni Home Permanent Co., 147 N.E.2d 612, 613 (Ohio 1958).

12. *Id.*

13. *Id.* at 616.

14. *Id.* (The Court also commented on the relationship between the manufacturer of the product and the retailer that ultimately sells the product to the consumer: "…Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to the ultimate consumers are but conduits through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements." *Id.* at 615.).

15. Temple v. Wean United, Inc., 364 N.E.2d 267 (Ohio 1977).

16. Werber, *supra* note 6, at 382.

17. *Id.* at 382-83.

18. *Id.*

19. OHIO REV. CODE § 2307.74.

20. OHIO REV. CODE § 2307.75.

21. OHIO REV. CODE § 2307.76.

22. OHIO REV. CODE § 2307.77.

common law product liability claims or causes of action."[23]

By creating its own products liability doctrine in *Rogers* and almost thirty years later codifying the common law principles in the OPLA, Ohio signaled that it will not expect plaintiffs to bear the burden of their own injuries when manufacturers who distribute dangerous and faulty products are the appropriate party to brace responsibility for such harms. Almost thirty-five years after passage of the OPLA, this practice is complicated by globalized and modern e-commerce.

B. New Products Produce Competing Approaches to Amazon's Liability in the Modern Context

Amazon's business model defies characterization of its role in distributing products to customers through traditional retail industry labels such as "manufacturer," "seller," or "distributor." Much of the success of Amazon's online marketplace is driven by the myriad third-party vendors that list products on its site. According to Forbes, more than half of all products bought and sold through Amazon's marketplace come from third-party vendors.[24]

When third-party vendors elect to list and sell their products on Amazon's online marketplace, they are required to consent to the Amazon Business Solutions Agreement (BSA). The BSA provides numerous requirements that effectively distance Amazon from its third-party vendors. Such vendors are required to "source, offer, sell, and fulfill" the products they sell on the online marketplace.[25] The vendor is responsible for any non-conformity or defect in its product;[26] the vendor provides a product description to the buyer;[27] and the vendor is responsible for proper packaging of the product and ensuring that it complies with all applicable laws.[28]

The vendor may also elect to utilize Amazon's "Fulfillment by Amazon" program.[29] This program allows vendors to store their inventory in one of Amazon's fulfillment centers.[30] Amazon then

23. OHIO REV. CODE. § 2307.71(B).

24. Pamela Danzinger, *Thinking Of Selling On Amazon Marketplace? Here Are The Pros And Cons*, FORBES (Apr. 27, 2018, 1:55 PM), https://www.forbes.com/sites/pamdanziger/2018/04/27/pros-and-cons-of-amazon-marketplace-for-small-and-mid-sized-businesses/?sh=4a6c11996867.

25. Amazon Services Business Solutions Agreement, https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US (last visited Apr. 20, 2022).

26. *Id.* at § S-3.1.

27. *Id.* at § S-11.

28. *Id.* at § S-1.1.

29. *Id.* at §§ F-1-F-5.

30. *Id.*

packages and ships the product to the customer on the vendor's behalf.[31] In lieu of utilizing Amazon's logistics services, the vendor is responsible for holding its own inventory before it personally ships it to the buyer.[32]

Many of these vendors note the ease Amazon provides in getting their products listed and sold, making it an ideal choice for many small and medium-sized businesses to reach potential customers.[33] The proliferation of these third-party vendors, however, has raised questions about whether Amazon should be on the hook for injuries caused by third-party vendors' products.

One product in particular, the "hovering scooter," has drawn Amazon into extensive product liability litigation.[34] After enjoying a major surge of popularity during the 2015 holiday season, a string of explosions quickly led to nearly 500,000 scooter recalls across the United States by the Consumer Product Safety Commission.[35] The injured plaintiffs' ensuing claims produced varying approaches to classifying Amazon's role in the transactions that occur on its online marketplace.

Subparts 1 and 2 will discuss key holdings where the courts declined to extend liability to Amazon for such transactions. Subpart 3 will discuss the multiple approaches employed by the California Second District Court of Appeals for imposing liability on Amazon.

1. *Garber v. Amazon.com, Inc.*

Two federal cases in 2019 signaled a possible trend that Amazon would enjoy broad immunity for the faulty products sold by its third-party vendors. The first major case originated in the U.S. District Court for the Northern District of Illinois when a hoverboard, purchased through Amazon's online marketplace, caught fire in the plaintiffs' home and caused serious damage.[36] At summary judgment proceedings, the court closely examined the parameters of Amazon's BSA to determine the extent to which Amazon directly participated in the sale of the scooter.[37]

Applying Illinois law, the court relied on the Restatement (Second) of

31. *Id.*

32. *Id.* at § 2.1.

33. *Id.* ("Getting started is certainly easier than setting up your own website and warehousing infrastructure. Create your product listing, send inventory to an FBA (Fulfillment by Amazon) warehouse, and you are in business.").

34. Brad Stone, *Amazon's Marketplace Could Be Forever Changed by One Exploding Hoverboard*, BLOOMBERG (May 10, 2021, 6:45 AM), https://www.bloomberg.com/news/newsletters/2021-05-10/amazon-exploding-hoverboard-case-could-forever-change-company.

35. Camila Domonoske, *Half A Million 'Hooverboards' Recalled Over Risk Of Fire, Explosions*, NPR (Jul. 6, 2016, 6:11 PM), https://www.npr.org/sections/thetwo-way/2016/07/06/484988211/half-a-million-hoverboards-recalled-over-risk-of-fire-explosions.

36. Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766 (N.D. Ill. 2019).

37. *Id.* at 771.

Torts to advance two alternative arguments for declining to hold Amazon liable for the exploding scooter.[38] First, the court found that Amazon did not manufacture, supply, sell, or otherwise distribute the product in question, thus placing it outside of the "distributive chain," within which it would otherwise be liable.[39] The court next found that Amazon may still be liable, despite being outside the product's distributive chain, if it played "…an integral role in the marketing enterprise of an allegedly defective product and participat[ed] in the profits derived from placing the product in the stream of commerce."[40] Utilizing this standard, the court predicted that the Illinois Supreme Court would find no facts in dispute that could establish grounds for extending liability to Amazon. The majority emphasized that the third-party vendor set the price for the product, decided which warning labels to place on it, and transferred title to the buyers.[41] Additionally, it identified that Amazon had not assumed a duty to warn the plaintiffs that the scooter might be defective.[42] Accordingly, the court granted Amazon's motion for summary judgment.[43] In doing so, the Northern District of Illinois effectively concluded that the state's common law did not provide a sufficient basis for extending liability to Amazon for injuries caused by third-party vendor products sold on its marketplace.[44]

2. *Fox v. Amazon.com, Inc.*

A few months after *Garber*, the U.S. Court of Appeals for the Sixth Circuit considered an appeal presenting largely the same factual scenario. In *Fox v. Amazon.com, Inc.*, the plaintiff purchased a hoverboard supplied by the vendor W2M Trading Corp. from Amazon's online marketplace.[45] The lithium batteries in the hoverboard caught fire inside the plaintiff's home, resulting in severe injuries to the plaintiff and members of her family. Their home and most of their personal belongings were destroyed.[46]

38. *Id.* at 775.

39. *Id.* at 776. The court also outright dismissed plaintiffs contention that Amazon and its third-party vendor acted as "co-sellers" of the hoverboard.

40. *Id.* at 778-79.

41. *Id.* at 773 (the court also noted that the vendor did not utilize Amazon's fulfillment program, and thus Amazon never handled the product in any capacity other than processing the customer's payment).

42. *Id.* at 782.

43. *Id.* (the court did note it was undisputed that Amazon derived an economic benefit from the sale of the hoverboard, and thus "participated in the profits" of placing it in the stream of commerce, but nonetheless declined to hold them liable).

44. *Id.* at 781.

45. Fox v. Amazon.com, Inc., 930 F.3d 415, 421 (6th Cir. 2019).

46. *Id.*

The linchpin of the court's analysis was the meaning of the word "seller." The Sixth Circuit highlighted that under the Tennessee Products Liability Act (TPLA), a seller of a product is "any individual or entity engaged in the business of selling a product, including a retailer, wholesaler, or distributor, as well as a 'lessor' engaged in the business of leasing a product and a 'bailor' engaged in the business of bailment of a product."[47] The plaintiff urged an expansive interpretation of this provision, to which the court initially signaled its agreement.[48] While the court noted that Amazon was clearly the better positioned entity to compensate plaintiff for her extensive injuries, as W2M was judgment proof, it ultimately held that even an expansive interpretation of "seller" did not apply to Amazon under these facts.[49] The court ruled that Amazon did not exercise sufficient control over the hoverboard to have "sold" it to the plaintiff. Upon review of the factual record, the majority highlighted that Amazon did not choose to offer the hoverboard for sale, set its price, nor make any representations concerning the safety or specifications of the hoverboard on its online marketplace.[50] Accordingly, the Sixth Circuit affirmed the trial court's summary judgment ruling.[51] By doing so, the Sixth Circuit signaled that Amazon's degree of control over the products sold by its third-party vendors was crucial to the analysis of product liability claims brought against the company.

3. *Loomis v. Amazon.com LLC*

About a year after the decision in *Fox*, the California Second District Court of Appeals employed a sharply different approach against Amazon. Once again, the item in question was a hoverboard with exploding batteries. In 2015, the plaintiff bought a hoverboard on Amazon's online marketplace. The hoverboard was supplied by a third-party vendor called TurnUpUp, a brand name used by a Chinese-based company called SMILETO.[52] The plaintiff gifted the hoverboard to her son for Christmas and, about a week later, the hoverboard caught fire inside the plaintiff's home while plugged into an electrical-outlet.[53] The plaintiff suffered severe burns to her hands and feet in her effort to put out the blaze.[54]

In holding Amazon liable for the defective hoverboard, the court

47. *Id.* at 422.
48. *Id.* at 423.
49. *Id.* at 424-25.
50. *Id.* at 425.
51. *Id.*
52. Loomis v. Amazon.com LLC, 277 Cal. Rptr. 3d 769, 772 (2021).
53. *Id.*
54. *Id.*

accorded much weight to Amazon having known that a significant number of potentially dangerous and defective hoverboard products had been purchased through its marketplace during the 2015 holiday season.[55] Additionally, the court found no favor with Amazon's reliance on the Uniform Commercial Code's limited definitions of "seller,"[56] which the company cited to argue that it had not sufficiently participated in the transaction to incur liability for the plaintiff's injuries.[57] The court reasoned that products liability doctrine was a judicially created device to protect consumers in an ever-evolving marketplace.[58] As such, the court found its scope could be expanded as needed to account for unique business entities like Amazon.[59]

Next, relying on an extensive body of common law, the court advanced two theories upon which Amazon could be found liable for injuries caused by products sold on its marketplace by third parties.[60] The first focused on Amazon's role in the "vertical chain of distribution."[61] The court reasoned that, under this theory, Amazon placed itself squarely between TurnUpUp and the plaintiff throughout the entire course of their transaction.[62] Amazon had served as a conduit for payment and communication with the customer and collected significant fees from the ultimate sale.[63] Accordingly, Amazon was a direct link in the vertical chain of distribution such that it could incur liability under California's strict products liability doctrine.[64]

The court further held that Amazon could be found liable under the "stream of commerce" theory of products liability.[65] Under this approach, "no precise legal relationship" between Amazon and its third-party sellers would be required to impose liability.[66] Rather, the court focused on "the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and the enterprise that created consumer demand for and reliance upon the product."[67] The court held

55. *Id.* at 774 (according to the court, over 380,000 hoverboards were purchased through Amazon's online marketplace in 2015, the vast majority of them supplied by third-party vendors).

56. U.C.C. § 2-103 (AM. L. INST. & UNIF. L. COMM'N 1994). "Seller" means a person who sells or contracts to sell goods.

57. *Loomis*, 277 Cal. Rptr. 3d at 778-79.

58. *Id.*

59. *Id.*

60. *Id.* at 779.

61. *Id.*

62. *Id.* at 780 (the court firmly rejected Amazon's assertion that it was nothing more than an online storefront for TurnUpUp to sell its wares).

63. *Id.*

64. *Id.*

65. *Id.* at 781.

66. *Id.*

67. *Id.*

that Amazon could be found liable under this approach because it received a direct financial benefit from the sale of the hoverboard, played an integral role in bringing the product to the consumer market, and had the ability to influence the manufacturing and distribution process under the BSA.[68]

As evidenced in these starkly different approaches to determining Amazon's liability for faulty products distributed by third-party vendors on its online marketplace, courts tend to emphasize statutory meanings of "seller," "distributor," and the like, and Amazon's role in issuing these products. Though Amazon remains the same platform with the same relative involvement in each sale for third-party vendors, courts tend to disagree on the characterization of these important considerations. As the next Section demonstrates, Ohio tends to side with the *Garber* and *Fox* courts in holding Amazon is too far removed from the distribution process to be held liable for dangerous products sold by third-party vendors on its platform.

C. Pure Caffeine Powder and the Ohio Approach

Amazon plays a substantial role in Ohio's retail market. One source estimated that, in 2018 alone, Amazon collected approximately $310 million dollars in sales taxes, all of which will be directly paid back to the state of Ohio.[69] Put another way, if Amazon conducted zero business in Ohio, the statewide sales tax rate would have to be increased from 5.75% to 5.95% to make up for the lost revenue.[70] As is the case in most of the United States, Amazon facilitates sales of an innumerable amount of products to Ohio consumers.

In May of 2014, a series of tragic events thrust Ohio into the Amazon product liability debate. Logan Stiner, an 18-year-old high school student from Lorain County, was found dead in his home by his brother.[71] The county coroner later determined he died from irregular heartbeat and seizures induced by consuming a lethal dose of pure caffeine-powder.[72] Logan apparently obtained the caffeine powder from a friend (identified throughout the case literature as "K.K.") who purchased the powder, branded as a pre-workout product, from Amazon's online marketplace.

68. *Id.*

69. Rich Exner, *Amazon's huge impact on Ohio's sales tax base: Numbers Behind the News,* CLEVELAND.COM (June 4, 2019), https://www.cleveland.com/datacentral/2019/06/amazons-huge-impact-on-ohios-sales-tax-base-numbers-behind-the-news.html.

70. *Id.*

71. Kristin Anderson, *Caffeine overdose ruled cause of prom king's death*, USA TODAY (Jul. 1, 2014, 8:20 AM), https://www.usatoday.com/story/news/nation-now/2014/07/01/caffeine-overdose-prom-king/11863631/.

72. *Id.*

The powder was sold by a third-party vendor, incorporated in Arizona, called Tenkoris.[73] Several months after Stiner's death, Amazon removed caffeine-powder listings from its online marketplace in response to an FDA advisory warning to consumers about the dangers of pure caffeine-powder products.[74]

Shortly after his death, Logan's father brought causes of action against Amazon, various Amazon affiliates, Tenkoris, and several other companies involved in the manufacturing and shipping of the caffeine product.[75] Mr. Stiner originally asserted 12 causes of action, all of which were later dropped, except for his causes of action against Amazon under the OPLA and the Ohio Pure Food and Drug Act.[76] Amazon prevailed in its motion for summary judgment on these claims in the trial court, and Mr. Stiner timely appealed to the Ohio Ninth District Court of Appeals.[77]

The Ninth District noted that Mr. Stiner did not challenge that Amazon was not the "manufacturer"[78] of the product as that term is used in the OPLA.[79] Instead, Mr. Stiner asserted that Amazon, as a supplier of the product, was required to assume liability in place of the absent manufacturer.[80] The OPLA imposes liability on the supplier of a dangerous product, in the place of the actual manufacturer, in various statutorily defined circumstances.[81] Two such circumstances include when the manufacturer is not subject to judicial process in Ohio[82] or the manufacturer is judgment proof.[83] Mr. Stiner argued that either of these provisions of the statute should apply to Amazon, because Amazon fit the statutory definition of "supplier."[84]

The OPLA defines supplier in both positive and negative terms.[85] A supplier *is* a person that "sells, distributes, leases, prepares, blends, packages, labels, *or otherwise participates in the placing of a product in*

73. Stiner v. Amazon.com, Inc., 164 N.E.3d 394 (Ohio 2020).

74. *Id.*; *see also FDA Warns Consumers About Pure and Highly Concentrated Caffeine*, U.S. FOOD & DRUG ADMIN. (Apr. 13, 2018), https://www.fda.gov/food/dietary-supplement-products-ingredients/fda-warns-consumers-about-pure-and-highly-concentrated-caffeine.

75. *Stiner*, 164 N.E.3d at 396.

76. *Id*. at 397.

77. *Id.*

78. OHIO REV. CODE ANN. § 2307.71(B). Under the OLPA, manufacturer means "a person engaged in a business to design, formulate, produce, make, create, construct, assemble, or rebuild a product or a component of a product."

79. Stiner v. Amazon.com, Inc., 120 N.E.3d 885, 890 (Ohio Ct. App. 2019).

80. *Id.*

81. OHIO REV. CODE ANN §2307.78(B)(1-8).

82. *Id.* at (B)(1)

83. *Id.* at (B)(2)

84. *Stiner* at 890.

85. OHIO REV. CODE ANN. § 2307.71(A).

the stream of commerce."[86] A supplier is *not* a manufacturer, a seller of real property, a provider of professional services who uses the product in a way incidental to the sales transaction, or "any person who acts only in a financial capacity with respect to the sale of the product."[87] The court concluded there were no facts under which any part of that definition could apply to Amazon and affirmed the trial court's summary judgment ruling.[88] Furthermore, because Amazon was not considered a supplier, the court held that Mr. Stiner did not have standing to sue Amazon in place of the absent manufacturer.[89] After a second loss in Ohio's Ninth District Court of Appeals, Mr. Stiner appealed to the Supreme Court of Ohio. The justices initially declined to review the case but later accepted the appeal upon reconsideration.[90] The remainder of this Part closely examines the Supreme Court of Ohio's holding in *Stiner*, along with the concurrence by Justice Donnelly.

1. The Majority Opinion

In *Stiner*, the justices considered two questions limited exclusively to Mr. Stiner's product liability claims.[91] The first question considered whether Ohio courts must apply public policy considerations when an internet provider, such as Amazon, acts in a capacity beyond that of a neutral platform for third-party sales of deadly products.[92] The second question focused on determining whether Amazon participated in placing the deadly caffeine-powder into the stream of commerce, such that it was a "supplier" of the product.[93]

The court first considered whether Amazon fell under the definition of "supplier" in the OPLA.[94] Turning to the requisite statutory provision, the justices applied the canon of ejusdem generis to determine its meaning.[95] Directed by the canon, they reasoned the phrase "…otherwise participates

86. *Id.* (emphasis added).

87. *Id.* at (A)(15)(b)(i)-(iv).

88. *Stiner* at 894.

89. *Id.*

90. Stiner v. Amazon.com, Inc. 125 N.E.3d 911 (Ohio 2019).

91. Stiner v. Amazon.com, Inc., 164 N.E.3d 394, 397 (Ohio 2020).

92. *Id.* (the court further elaborated that such policy considerations included incentivizing safety and shifting risk away from consumers in determining which entities should be deemed a supplier of a product).

93. *Id.*

94. *Id.* at 398.

95. When interpreting legal texts, courts employ *ejusdem generis* where a statute includes a catchall phrase at the end of an enumeration of specific items. The canon directs that when such a convention is used by legal drafters, the meaning of the catchall phrase only applies to persons or things of the same general class as those enumerated items. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 169 (2012).

in the placing of a product in the stream of commerce" had to be read in conjunction with the preceding list of phrases in R.C. 23071.71(A)(15).[96] According to the majority, Amazon had not taken any action analogous to selling, leasing, preparing, blending, packaging, or labeling the caffeine-powder, meaning it had not participated in placing the product in the stream of commerce and therefore was not a supplier under the OPLA.[97] The fact that it had otherwise been involved in the sales transaction was insufficient to impose strict liability.[98] The court cited the Sixth Circuit's holding in *Fox* for support, noting that Amazon had not exercised a sufficient degree of control over the product at any point in the transaction to fall under the OPLA's definition of "seller."[99]

After establishing that Amazon was not a supplier of the caffeine-powder, the justices considered whether products liability policy objectives, derived from the common law, would otherwise justify imposing liability on Amazon.[100] The court reviewed its decision in *Anderson v. Olmstead Util. Equip., Inc.* to determine what actions constituted placing a product into the stream of commerce prior to the passage of the OPLA.[101] In *Anderson*, the Supreme Court of Ohio assessed whether a company that had repaired an aerial device, which later failed during use in a construction project, could be held liable under the OPLA.[102] The court concluded that the company could be liable, even though they were neither the original manufacturer nor seller of the device.[103] Rather, the court found the company had negligently refurbished the device, which was sufficient to establish that it had participated in placing the product into the stream of commerce, and was therefore strictly liable for any injuries attributable to the device's malfunctioning.[104]

The *Stiner* court ultimately declined to analogize the company's actions in *Anderson* to those of Amazon.[105] The majority explained that the *Anderson* court relied exclusively on the policy considerations in the Restatement (Second) of Torts to determine which parties were liable. Conversely, *Stiner* was decided in light of the Ohio General Assembly's

96. *Stiner*, 164 N.E.3d at 398.; *see also* Fraley v. Est. of Oeding, 6 N.E.3d 9 (Ohio 2014) (noting that the court considers a catch-all phrase in a statute to only embrace things of a similar character as the words preceding it).

97. *Id.* at 399.

98. *Id.* at 400.

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

100. *Id.*

101. *Id.*

102. Anderson v. Olmstead Util. Equip., Inc., 573 N.E.2d 626 (1991).

103. *Id.* at 629.

104. *Id.* at 630.

105. *Stiner*, 164 N.E.3d at 401.

2005 amendments to the OPLA, which expressly abrogated all common law product liability claims or causes of action and thereby limited the court's authority to find Amazon liable under the text of the statute.[106] Therefore, whether Amazon was a "supplier" that had "otherwise participat[ed] in the placing of a product in the stream of commerce" was strictly a matter of statutory interpretation and discerning legislative intent. As the justices already established, a close reading of the OPLA precluded Amazon from incurring supplier-based liability.[107]

Further expanding upon their dismissal of the policy objectives of the Restatement, the justices expressed their view that holding Amazon liable for Logan Stiner's death would not promote greater product safety.[108] According to the court, because Amazon did not have a relationship with the original manufacturer of the caffeine-power offered by Tenkoris, they lacked control over product safety.[109] While Amazon may be able to influence product safety by removing unscrupulous third-party vendors' listings from its online marketplace, the Ohio court was unconvinced that alone empowered Amazon to prevent injuries caused by such products.[110] Furthermore, the court reemphasized that Amazon never exercised a requisite degree of control over the caffeine-powder such that it could ensure its safety before it harmed Logan Stiner.[111]

In disposing of the remaining arguments advanced by Mr. Stiner, the court ruled that Amazon's status as a dominant retail company, best positioned to compensate him for his son's death, was irrelevant.[112] Such a public policy consideration, the court reasoned, was for the General Assembly to address.[113] The justices affirmed the Ninth District's holding, concluding the trial court had properly granted summary judgment to Amazon on Mr. Stiner's product liability claims.[114]

2. Justice Donnelly's Concurrence

In the only opinion written separate from the majority's, Justice Donnelly reluctantly joined the court in its unanimous decision but expressed reservations about its reasoning.[115] Notably, he pointed out that the OPLA was passed in the late 1980s, a time well before widespread

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 402 (Donnelly, J., concurring).

internet use, much less modern day e-commerce.[116] Letting Amazon escape liability for injuries caused by products sold by its third-party vendors, according to Justice Donnelly, frustrated the true purpose of products liability law, leaving Ohio consumers at the mercy of distant sellers that can easily make themselves unreachable for redress.[117] The true purpose of products liability law, Justice Donnelly opined, is to protect consumers from harm, particularly to protect them from suffering harm without legal recourse.[118]

Furthermore, Justice Donnelly argued that, even if Amazon was not a seller as originally conceived by the drafters of the OPLA, Amazon's all-encompassing role in the sales transactions of third-party sellers placed it squarely within the supply chain.[119] Because of the limitations Amazon's BSA places on its vendors, Amazon will nearly always be the entity most reachable by a customer for any matter, including products liability claims.[120] Additionally, Justice Donnelly asserted that because Amazon is extensively involved in the chain of distribution leading to the customer, it is especially well positioned to monitor its third-party vendors.[121] Just as brick-and-mortar retailers are in the best position to select safer products from their wholesalers, Amazon is best positioned to limit the availability of its marketplace to reputable third-party vendors that sell safe products.[122]

Finally, Justice Donnelly faulted the majority for focusing solely on what Amazon is not obligated to do under the OPLA, rather than what it *should be* obligated to do to protect Ohio consumers.[123] After advancing these arguments, however, Justice Donnelly ultimately rested on the central thesis of the majority: the Ohio General Assembly was the proper

116. *Id.* (Justice Donnelly further elaborated how Amazon acted as the face of the sale, published information about the product, engaged with the customer at every point of the sale, and taken payment from the customer. Such a distribution model was alien to the General Assembly that passed the OPLA).

117. *Id.*

118. *Id.* at 403; *see also* William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1122-23 (1960) [hereinafter Prosser, *The Assault upon the Citadel*] (explaining one of the principal arguments for broadly imposing strict liability on sellers of dangerous products:

> The public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves; and it justifies the imposition, upon all suppliers of such products, of full responsibility for the harm they cause, even though the supplier has not been negligent.)

119. *Stiner*, 164 N.E.3d at 403.

120. *Id.* at 404.

121. *Id.*

122. *Id.*

123. *Id.* ("[T]he fact that the limited wording of the act leaves a gap that allows e-commerce entities like Amazon to evade any obligation does not mean that there is a corresponding gap in the policy underlying the law; it means the act is failing to fully realize its purpose").

body to address these public policy concerns; the meaning of the OPLA could not be altered by judicial fiat.[124]

III. DISCUSSION

In concluding that Amazon is not a supplier under the OPLA, the Supreme Court of Ohio joined the coalition of state and federal judges unwilling to extend liability to the company for injuries caused by third-party vendor products sold on its online marketplace. By doing so, the justices effectively placed Amazon, and other e-commerce platforms engaged in facilitating third-party sales, beyond the statute's reach. The disinclination of the justices to consider the policy objectives of products liability signaled that their decision will remain the status quo pending further action by the Ohio General Assembly.[125] In the meantime, Ohio consumers are left to fend for themselves in the aftermath of injuries they suffer from faulty products proliferated by Amazon's third-party vendors, lest they successfully hail those vendors into court.

Part A of this Section will demonstrate that the Supreme Court of Ohio's dismissal of common law products liability principles constituted an abrupt departure from its traditional role adjudicating such claims. Part B will compare the Supreme Court of Ohio's approach in *Stiner* to the California Second District Court of Appeals' approach in *Loomis*. Part B will further illustrate that judicial consideration of public policy objectives is not only appropriate in the arena of products liability but essential to protect consumers in a modern retail market increasingly dominated by e-commerce platforms. Part C examines the Supreme Court of Ohio's invocation of ejusdem generis and proposes an alternative canon of statutory interpretation that would allow the OPLA, in its current form, to extend liability to Amazon for injuries caused by third-party vendor products.

A. The Stiner Court's Refusal to Account for Public Policy Objectives Ran Counter to the Supreme Court of Ohio's Traditional Role in Products Liability Law

While the Supreme Court of Ohio's decision in *Stiner* rested primarily on statutory interpretation, the opinion still took an opportunity to argue that the same result was required under common law principles predating the statute.[126] This conclusion, however, is dubious at best upon closer

124. *Id.*

125. *Id.* at 401.

126. *Id.* ("But even if we were to consider the policy objectives of products-liability law predating the Act, Stiner has not demonstrated that holding Amazon liable would promote product safety").

inspection of those principles. In *Anderson v. Olmstead Util. Equip., Inc*., the Supreme Court of Ohio explicitly rejected that exchange of title between seller and buyer was a prerequisite to establishing that a product had been "sold."[127] In direct contrast to the *Stiner* court's reasoning, the *Anderson* court explained that such an overly technical construction of "seller" or "supplier" would ignore the realities of modern business transactions, which themselves are constantly evolving.[128] The *Anderson* court further noted that the objectives of strict products liability would be defeated if they were forced to rely exclusively on technical definitions of commercial sales transactions.[129]

In a critical contribution to strict products liability theory, Professor William Prosser argued that American state courts should analogize the roles played by traditional players in the consumer retail market with those played by newer entrants.[130] In an especially compelling section of the article, Prosser described why wholesalers, a relatively new type of retail business at the time of his publication, should incur liability for injuries caused by the products sold to consumers by their downstream vendors:

> [A]ll of the valid arguments supporting strict liability—the public interest in the utmost safety of products, the demand for the maximum protection of the consumer, the implied assurance in placing the goods upon the market for human use, the consumer's reliance upon the apparent safety of a thing that he finds upon the market because the defendant has put it there, the fact that the consumer is the seller's ultimate objective, the desirability of avoiding circuity of action and allowing recovery directly against earlier sellers—all of these apply with no less force against the wholesaler.[131]

Prosser further noted how, at that time, the large wholesaler was emerging as the dominant force in bringing retail goods to consumers; there was no valid reason for courts to single out one particular entity in the supply chain as being removed from the purview of products liability law.[132]

By declaring itself constrained by its own interpretation of the OPLA,

127. Anderson v. Olmstead Util. Equip., Inc., 573 N.E.2d 626, 629 (Ohio 1991).

128. *Id.*

129. *Id.* at 630 (quoting Perfection Paint & Color Co. v. Konduris, 258 N.E.2d 681, 686 (Ind. 1970)):

> The rule is really one of liability to the seller for defective goods which the seller places in commerce. A technical and complete sales transaction, while being a common and easily recognizable commercial transaction, is not the only commercial transaction which comes within the purview of the rule of 'strict liability'. To limit the rule to only those situations in which there has been an actual sale would be to circumscribe the rule to such an extent that its purpose might be defeated.

130. Prosser, *Assault upon the Citadel*, *supra* note 118, at 1141-42.

131. *Id.*

132. *Id.*

the Supreme Court of Ohio ignored both its historical role in developing products liability doctrine as well as the central purposes underlying products liability law, both to the detriment of Ohio consumers.

B. The Loomis Decision Provides Superior Reasoning for How to Characterize Amazon's Role in Facilitating Third-Party Vendor Sales on its Marketplace

Although the *Stiner* court was correct in stating that Amazon did not directly store, ship, or touch the caffeine-powder that killed Logan Stiner,[133] the majority's insistence that Amazon did not exercise a sufficient degree of control over the caffeine-powder to incur liability for its deadly consequences is unconvincing. As the California Court of Appeals explained in *Loomis*, Amazon exercises considerable control over the transactions that occur on its online marketplace.[134] As in *Stiner*, the consumer in *Loomis* looked to Amazon to find the product he desired to buy.[135] Amazon took the order, processed the payment, transmitted the order to the vendor, and collected a fee from the vendor and the consumer.[136] While Amazon characterized itself as an online mall providing online storefronts for its vendors, this proposition hardly passes logical muster. As the *Loomis* court explained, traditional malls do not serve as middlemen for payment and communication in every single transaction between buyers and storefront vendors, nor do they charge a per-item fee for every product sold by those vendors.[137] Rather, these actions indicate that Amazon's role in its third-party vendor sales are significantly more analogous to a retailer of consumer goods than a passive shopping mall owner.[138]

Building off this line of reasoning, the *Loomis* court presented a functional approach to analyzing the extent of Amazon's liability for third-party vendor transactions: the stream of commerce theory of strict liability.[139] According to this approach:

> [N]o precise legal relationship to the member of the enterprise causing the defect to be manufactured or to the member most closely connected with the customer is required before the courts will impose strict liability. It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that

133. Stiner v. Amazon.com, Inc., 164 N.E.3d 394 (Ohio 2020). .

134. Loomis v. Amazon.com LLC, 277 Cal. Rptr. 3d 769, 780 (Cal. Ct. App. 2021).

135. *Id.*

136. *Id.*

137. *Id*.

138. *Id.*

139. *See supra* Part II(B)(3).

> created consumer demand for and reliance upon the product (and not the defendant's legal relationship (such as agency) with the manufacturer or other entities involved in the manufacturing-marketing system) which calls for imposition of strict liability.[140]

Under this standard, the *Loomis* court determined that Amazon could be found liable for the sale of the hoverboard that caught fire in the plaintiff's home, notwithstanding the lack of direct physical interaction Amazon employees had with the product.[141]

Most significantly, the *Loomis* court reasoned that whether Amazon has a direct relationship with the upstream manufacturers of the products sold by its third-party vendors is irrelevant to assessing its ability to control the manufacturing process.[142] As the judges noted, Amazon's BSA requires a manufacturer safety certification, indemnification guarantees, and verification of liability insurance before permitting a vendor to list a product on its marketplace, indicating that it actually exerts substantial control over the manufacturing process.[143]

Applying this standard to Amazon's role in the sale of the caffeine-powder that killed Logan Stiner, Amazon should be held liable. Amazon received a direct financial benefit for the sale of the powder through collection of its standard, per-item fee that it charges for every third-party vendor sale.[144] Additionally, Amazon played an integral role in bringing Tenkoris products to the consumer market. Within two years of Amazon removing caffeine-powder products from its website,[145] Tenkoris sales plummeted, and it eventually filed chapter 11 bankruptcy in Arizona.[146] Finally, and in direct contradiction to the conclusion of the Supreme Court of Ohio, Amazon's BSA granted the company substantial control over the caffeine powder's manufacturing process. Notably, Tenkoris was required to provide a manufacturer's safety certification before its product was permitted for sale on Amazon's marketplace. The apparent lethality of the powder demonstrates a lack of diligence by Amazon in adequately assessing whether the product was indeed safe to sell to consumers.

Relying heavily on the decisions in *Fox* and *Garber*, the *Stiner* court accorded much weight to Amazon being too far removed from the manufacturing process to have sufficiently "controlled" the product.[147] The majority's concept of control, however, turned a blind eye to the

140. *Loomis*, 277 Cal. Rptr. 3d at 780 (quoting Kasel v. Remington Arms Co., 101 Cal. Rptr. 314, 323 (Cal. Ct. App. 1972)).

141. *Id.* at 781.

142. *Id.* at 780.

143. *Id.*

144. *Id*.

145. *See* Stiner v. Amazon.com, Inc., 164 N.E.3d 394 (Ohio 2020).

146. *In re* Tenkoris, LLC, No. 16-07290 (Bankr. D. Ariz. 2016).

147. *Stiner*, 164 N.E.3d at 401.

realities of the modern retail market. As Justice Donnelly noted in his concurrence, applying pre-internet era concepts of product control to one of the most sophisticated product distribution systems in the retail world is inequitable, if not altogether illogical.[148]

While the majority bogged itself down with technical, outdated definitions of supplier, it ignored the inherently dangerous situation created by Amazon allowing Tenkoris to list an unsafe, *deadly* product on its marketplace. Anyone could have bought the product, and it found its way to an Ohio consumer. According to the Supreme Court of Ohio, however, that fact is a legal nullity under the current statutory regime.[149] In the *Stiner* court's view, Amazon is too far removed from third-party vendor transactions to incur liability under the OPLA.[150]

C. The OPLA Allows for Adoption of the Stream of Commerce Approach to Products Liability in its Current Form

While the Supreme Court of Ohio gave a cursory nod to the policy arguments adopted by the California Second District, it rejected Amazon's role as a supplier through intensive reliance on statutory interpretation.[151] Applying the canon of ejusdem generis to the OPLA definition of supplier, the justices deduced the catchall phrase "…otherwise participates in the placing of a product in the stream of commerce"[152] to mean a person who plays an analogous role to a person who sells, distributes, leases, prepares, blends, packages, or labels a product.[153] Amazon's supposed lack of control over the caffeine-powder, as the justices saw it, removed it from purview of the catchall phrase.[154]

The Supreme Court of Ohio's arbitrary imposition of ejusdem generis allowed for the decision's logical leap that Amazon did not control the sale of the caffeine-powder to such an extent that it "supplied" it. Yet, to say that Amazon does not sufficiently control the sales process of third-party vendor products renders the statute's catchall phrase virtually

148. *Id.* at 402 (Donnelly, J., concurring) ("The Act applies to a person with a role as minor as placing a sticker on a product but not to a person that controls every single aspect of placing a product in the stream of commerce except for transferring ownership or physically controlling the product. The Act applies to a mom-and-pop retail store with a small, exclusively local customer base, but not to a business that is responsible for hundreds of millions of dollars' worth of retail sales in Ohio. Indeed, the Act does not address many of the contemporary standards in technology, communications, and commerce—standards that have changed radically since 1988. The divide between the pre-Internet age and the current age is so profound that laws like this Act might as well have been written in the stone age").

149. *Id.* at 401.

150. *Id.*

151. *Id.* at 398.

152. *See* OHIO REV. CODE ANN. § 2307.71(A)(15).

153. *Stiner*, 164 N.E.3d at 398.

154. *Id.*

meaningless. To avoid this result, the justices could have used different canons of statutory interpretation without rewriting the statute.

A superior reading of the OPLA definition of supplier would invoke the surplusage canon: *verba cum effectu sunt accipienda*. This canon provides that, if possible, every word and provision of a legal text should be given meaningful effect, and none should be given an interpretation that causes them to have no consequence.[155] Employing this canon, the Supreme Court of Ohio could have read the catchall phrase to account for modern day e-commerce transactions that Amazon thoroughly dominates. The statute, verbatim, references persons that participate in placing products into the stream of commerce. The *Stiner* court was free to interpret the OPLA as encompassing the same policy arguments espoused by the *Loomis* court; Amazon does, in fact, participate in placing *every* product bought and sold on its online marketplace into the stream of commerce. To conclude that the Ohio General Assembly intended otherwise "…thwarts the purpose of products liability law, because it puts Amazon's customers at risk of being injured by a seller that can easily make itself unreachable for redress."[156] While the OPLA abrogates common law causes of action, the common law can still inform the meaning of the statute such that it accomplishes its central objectives.

IV. CONCLUSION

The Amazon debate will almost certainly continue. Amazon is so large and facilitates so many sales that consumers will inevitably continue to suffer injuries from products sold on its marketplace. While different state and federal courts continue to grapple with their understanding of Amazon's role in the modern retail market, the Supreme Court of Ohio has left the state's consumer base at the mercy of distant, practically non-existent third-party vendors. Until the court changes course, or the General Assembly amends the law, Ohio residents must shop on Amazon's marketplace at their own risk.

155. *See* SCALIA & GARNER, *supra* note 95, at 124. *See also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE AMERICAN UNION 58 (1868) ("The courts must…lean in favor of a construction that will render every word operative, rather than one which will make some idle and nugatory").

156. *Stiner*, 164 N.E.3d at 402 (Donnelly, J., concurring).