Date of Hearing: May 11, 2020

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 3262 (Mark Stone) – As Amended May 4, 2020

SUBJECT: STRICT LIABILITY: ELECTRONIC MARKETPLACES

KEY ISSUE: SHOULD EXISTING LAW BE UPDATED SO THAT ELECTRONIC MARKETPLACES, JUST LIKE TRADITIONAL BRICK-AND-MORTAR RETAILERS AND DISTRIBUTORS, ARE STRICTLY LIABLE FOR INJURIES CAUSED BY DANGEROUS OR DEFECTIVE CONSUMER PRODUCTS THEY SELL?

SYNOPSIS

Longstanding California law allows injured consumers to recover for their injuries caused by dangerous and defective products without having to prove negligence by manufacturers and others in the product's supply chain. But there are limits to this doctrine. Although California law imposes strict product liability on manufacturers, marketers, retailers, and distributors of dangerous products, courts have exempted from strict liability businesses without a special position vis-a-vis the original manufacturer and those which play no more than a random and accidental role in the distribution of the product. Similarly, case law holds that when title to a product passes directly from the manufacturer to the buyer, and the distributor does not alter, inspect, test, or operate the product, the distributor cannot necessarily be held strictly liable for the product's defect.

While California courts have not definitively resolved the issue, it is possible that electronic marketplaces that connect buyers and sellers and have fleeting possession (if at all) of the products that are sold on their websites currently may not be strictly liable under state law when those products turn out to be dangerous, or even deadly. Electronic marketplaces may argue that they are neither retailers nor distributors in the traditional sense. They could also argue that they do not have a special position vis-a-vis the original manufacturer. Or they could argue that they do not alter, inspect, test, or operate the products sold on their websites and therefore should not be held strictly liable for the products' defects. And they can always argue that they are not the "seller" of the product, just a conduit of a transaction between the buyer and the seller. Should a court agree with any of these arguments, the only recourse for an injured consumer—in the absence of a retailer, marketer, or distributor to be held responsible—would be to pursue the manufacturer, which could be difficult or impossible, especially when a manufacturer is located overseas, has attenuated contacts with California, and may not be solvent or even in existence by the time the consumer tries to find them and hold them accountable. Given how many products are sold on electronic marketplaces, and how many of those have proven to be dangerous, it is critically important to resolve these legal issues.

This bill updates California law to address the online sale of dangerous and defective goods: clarifying that the same longstanding strict product liability principles that apply to brick-and-mortar retailers and distributors also apply to electronic marketplaces. Given the ubiquity of online sales, especially during the ongoing COVID-19 public health crisis, when most brick-and-mortar retailers have been ordered to close, this seems both important and reasonable. The bill is co-sponsored by Consumer Attorneys of California, the California Teamsters Public Affairs

Council, and the United Food and Commercial Workers Union Western States Council. It is also supported by a number of other labor organizations. It is opposed by the Computing Technology Industry Association, Internet Association, and Technet, as well as the California Chamber of Commerce.

SUMMARY: Seeks to protect consumers from injuries caused by dangerous and defective products by holding electronic marketplaces, like traditional brick-and-mortar retailers and distributors of consumer products, strictly liable for the safety of such products. Specifically, **this bill**:

1) Finds and declares on the part of the Legislature all of the following:

    a) Under existing law a manufacturer, supplier, or seller of goods is strictly liable in tort if a product the company places on the market, knowing that it is to be used without inspection for defects by the consumer who purchased it, proves to have a defect that causes injury to a human being.

    b) The purpose of that liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers, suppliers, or sellers that put the products on the market rather than by the injured persons who are powerless to inspect the product and protect themselves before purchase.

    c) Under existing law, the elements of a strict liability action are all of the following:

        i) The product was used in an intended or reasonably foreseeable manner.

        ii) The product was in a defective condition when it left the defendant's possession.

        iii) The defective product was the legal cause of the plaintiff's injuries or damages.

    d) There is uncertainty as to how to apply strict product liability law to online marketplaces having a relationship with their customers beyond simply operating as a conduit between willing sellers of products and willing buyers. As a result, some injured consumers who purchase products through online marketplaces are unable to obtain compensation for their injuries from those that manufactured, supplied, or sold the products, thereby defeating the compensatory purpose of strict liability law.

    e) Unless this uncertainty is addressed in favor of compensating injured consumers, more and more companies will forego selling products through physical stores where strict product liability principles would require compensation. Instead, manufacturers, suppliers, and sellers will emphasize online marketplace sales of possibly defective and injurious products thereby increasing the financial burdens on consumers, public health systems, and private and public insurers who, alone or in combination, will unjustly have to pay for the cost of treating and healing injuries without contribution from those that actually caused the harm.

2) Provides that, except as provided in 3), below, a marketplace that is an electronic place or internet website shall be strictly liable for all damages proximately caused by defective products to the same extent as a retailer that is not an electronic place or internet website. This liability shall apply whether or not the electronic place or internet website marketplace

had physical possession of the defective product that caused the injury or took title to the defective product that caused the injury.

3) Provides that a marketplace that is an electronic place or internet website shall not be liable if it demonstrates by a preponderance of the evidence that either of the following conditions are met:

   a) The defective product that caused the injury was prominently described or prominently advertised on the electronic place or internet website marketplace as preowned or used.

   b) The marketplace did not receive compensation or payment from the consumer for the defective product that caused the injury whether by receiving a payment from the consumer or by receiving a share of compensation or payment obtained from the consumer by the manufacturer, supplier, or seller for the defective product that caused the injury.

EXISTING LAW:

1) Pursuant to existing federal law, the Consumer Product Safety Act, authorizes the United States Consumer Product Safety Commission (CPSC) to establish and enforce product safety standards that are necessary to protect against an unreasonable risk of injury, and for a remedial repair, replacement, or refund program, also known as a recall. (15 U.S.C. 2051 *et seq.*)

2) Pursuant to case law, provides that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." (*Greenman v. Yuba Power Prods., Inc.* (1963) 59 Cal. 2d 57, 62.)

3) Pursuant to the Product Recall Safety and Protection Act, prohibits the manufacture, remanufacture, retrofit, distribution, or sale of a product that is unsafe knowing that the product is unsafe, and that no commercial dealer, manufacturer, importer, distributor, wholesaler, or retailer shall manufacture, remanufacture, distribute, sell at wholesale or retail, contract to sell or resell, lease, or sublet, or otherwise place into the stream of commerce, a product that is unsafe, knowing that the product is unsafe. (Health and Safety Code Section 108044 (a).)

4) Deems a product to be unsafe for purposes of 3), above, only if it meets one or both of the following criteria:

   a) The product has been recalled because it does not conform to state or federal laws and regulations setting forth standards for the product.

   b) The product has been recalled for any safety hazard reason in cooperation with the federal Consumer Product Safety Commission or its staff, or voluntarily recalled for any safety hazard reason by the product's commercial dealer, manufacturer, importer, distributor, or wholesaler, and the recall has not been rescinded. (Health and Safety Code Section 108044 (b).)

5) Defines, for purposes of 3), above, the following terms (among others):

a) "Distributor" and "wholesaler" means any person, other than a manufacturer or retailer, who sells or resells, or otherwise places into the stream of commerce, a product.

b) "Product" means any article, or component part thereof, produced or distributed (1) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (2) for personal use, consumption, or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, but excludes food, drugs, cosmetics, pesticides, medical devices, firearms and ammunition, boats, motor vehicles, motor vehicle equipment, aircraft, or tobacco and tobacco products.

c) "Retailer" means any person other than a manufacturer, distributor, or wholesaler who sells, distributes, sublets, or leases consumer goods of any kind.

d) "Sell" or "sale" means a transfer for consideration of title or of the right to use, by lease or sales contract, including, but not limited to, transactions conducted through sales outlets, catalogs, or the internet or any other similar electronic means. (Health & Safety Code Section 108042.)

6) Defines "marketplace" to mean a physical or electronic place, including, but not limited to, a store, booth, internet website, catalog, television or radio broadcast, or a dedicated sales software application, that sells or offers for retail sale services or tangible personal property for delivery in this state and has an agreement with a marketplace seller to make retail sales of services or tangible personal property through that marketplace, regardless of whether the tangible personal property or the marketplace has a physical presence in the state. (Civil Code Section 1749.7 (d)(1).)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: This bill seeks to protect consumers from dangerous and defective products by holding electronic marketplaces, like traditional brick-and-mortar retailers and distributors, strictly liable for injuries caused by such products. In doing so, it will level the playing field for all types of retailers and distributors, regardless of how their products are sold and delivered to consumers.

According to the author:

> It is time to hold online distributors to the same standard as the corner store when it comes to accountability for dangerous and defective products that kill or injure consumers. AB 3262 clarifies that the same longstanding product liability standards that apply to brick-and-mortar retailers and distributors also apply to online marketplaces that distribute products. By doing so, AB 3262 will help level the playing field for all types of distributors--something that is particularly important after the COVID-19 pandemic has pushed brick and mortar retailers and distributors to (and over) the edge of fiscal solvency--and protect American consumers from dangerous and defective products.

California has led the nation in products liability laws to protect consumers. As a general rule, "[e]veryone is responsible, not only for the result of [their] willful acts, but also for an injury occasioned to another by [their] want of ordinary care of skill in the management of [their] property or person, except so far as the latter has, willfully or by want of ordinary care, brought

the injury [on themselves]." (Civil Code Section 1714 (a).) According to the California Supreme Court, Section 1714 embodies a fundamental principle of liability for failure to exercise such care, and that "it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by Civil Code Section 1714, no such exception should be made unless clearly supported by public policy." (*Rowland v. Christian* (1968) 69 Cal. 2d 108, 112.)

One important public policy exception to the rule of negligence allows injured consumers to recover for injuries caused by *dangerous and defective products* without having to prove negligence by manufacturers and others in the products' supply chains. The landmark decision of *Greenman v. Yuba Power Prods., Inc.* (1963) 59 Cal. 2d 57, firmly established that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." (*Id.* at 62.) In *Greenman,* the plaintiff was seriously injured when a piece of wood thrown from the Shopsmith multi-use power tool he was using hit him in the head. The California Supreme Court explained why the injured plaintiff was not required to prove that the Shopsmith was unreasonable dangerous or that its manufacturer violated an express warranty regarding its safety:

> The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best. . . Implicit in the machine's presence on the market, however, was a representation that it would safely do the jobs for which it was built. . . . It should not be controlling whether the details of the sales from manufacturer to retailer and from retailer to plaintiff's wife were such that one or more of the implied warranties of the sales act arose. (Civ. Code, § 1735.) . . . To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use. (*Greenman v. Yuba Power Products, Inc., supra,* 63-64.)

Strict liability in tort is not based on the law of warranty, either express or implied, nor is it based on negligence. Its purpose is to insure that the costs of injuries resulting from defective products be borne by the makers of the products rather than the injured individual. (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31.)

The doctrine has been extended to others in the retail supply chain. One year after *Greenman* established the doctrine of strict product liability for manufacturers, the doctrine was extended to retailers because retailers "are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products." (*Bay Summit Community Organization v. Shell Oil* (1996) 51 Cal.App.4th 765, 772 [citations omitted]).) And the doctrine has been further extended to any other party who is identifiable as "an integral part of the overall producing and marketing enterprise." (*Arriaga v. CitiCapital Commercial* (2008) 167 Cal.App.4th 1527.) In order to determine who is "integral" in the overall enterprise, courts look at several factors, including: (1) whether the entity received a direct financial benefit from its activities and from the sale of the product; (2) whether the entity's role was integral to the business enterprise such that the entity's conduct or participation was a necessary factor in bringing the product to the initial consumer market; and (3) whether the entity had control over,

or a substantial ability to influence, the manufacturing or distribution process. (*Bay Summit Community Assn., supra,* 51 Cal.App.4th at p. 762 [citations omitted].)

> … California courts have further recognized the doctrine extends to nonmanufacturing parties, outside the vertical chain of distribution of a product, which play an integral role in the "producing and marketing enterprise" of a defective product and profit from placing the product into the stream of commerce. … In applying this stream of commerce theory, the courts have eschewed legal labels and have taken a very practical approach, focusing on the actual connection between the defendant's activities and the defective product. (*Bay Summit Community Organization v. Shell Oil, supra,* at pp. 773-74.)

Almost ten years after *Greenman,* the California Supreme Court clarified, in *Cronin v. J.B.E. Olson Corp*. (1972) 8 Cal. 3d 121, that an injured plaintiff is not required to prove that a defect in the product that injured them made the product "unreasonably dangerous" to the user or consumer. To impose such a requirement on the plaintiff, according to the *Cronin* court, would impose a burden of presenting evidence similar to what is required to prove ordinary negligence, which conflicts with the purpose of strict products liability: to relieve injured plaintiffs of the burden of presenting such evidence. (*Id.* at pp. 134-35.)

Codification of strict products liability principles in California statutes. The Legislature has embraced and codified this strict products liability case law. Civil Code Section 1714.45, setting forth the *exceptions* to strict liability for inherently unsafe products, common consumer products intended for personal consumption (other than tobacco products), and the sale and distribution of tobacco products by retailers and distributors, explicitly embraces the holding of *Cronin, supra,* in the wording of its subdivision (d):

> (d) This section is intended to be declarative of and does not alter or amend existing California law, including *Cronin v. J.B.E. Olson Corp.* (1972), 8 Cal.3d 121, and shall apply to all product liability actions pending on, or commenced after, January 1, 1988.

Limitations of existing law as it applies to online commerce of dangerous goods. Although California law imposes strict products liability on manufacturers, marketers, retailers, and distributors of dangerous products, courts have exempted businesses without a "special position vis-a-vis the original manufacturer" and those which play "no more than a random and accidental role in the distribution of the [product]" from strict liability. (*Tauber-Arons Auctioneers Co. v. Superior Court* (1980) 101 Cal.App.3d 268, 284.) Similarly, case law holds that when title to a product passes directly from the manufacturer to the buyer, and the distributor does not alter, inspect, test, or operate the product, the distributor cannot be held strictly liable for the product's defect. (*Brejcha v. Wilson Machinery, Inc.* (1984) 160 Cal.App.3d 630, 639-40.)

While the courts have not definitively resolved the issue, it is *possible* that electronic marketplaces that connect buyers and sellers and have fleeting possession (if at all) of the products that are sold on their websites *may not be* strictly liable when those products turn out to be dangerous, or even deadly. Electronic marketplaces may argue that they are neither retailers, nor distributors in the traditional sense and should not be strictly liable for defects in the products sold on their websites. They could argue that they do not have a "special position vis-a-vis the original manufacturer" and therefore should not be strictly liable under the rationale of *Tauber-*

Arons Auctioneers Co., supra. Or they could also argue that they do not alter, inspect, test, or operate the products sold on their websites and therefore should not be held strictly liable for their defects under the rationale of *Brejcha, supra.* If a court agreed, the only recourse for an injured consumer—in the absence of a retailer, marketer, or distributor to be held responsible—would be to pursue the manufacturer. But as explained below, that is often impossible, especially in the case of goods that are manufactured overseas and manufacturers who may or may not be in business (at least in their original form) by the time an injured plaintiff tries to hold them accountable.

Distant manufacturers may not have minimum contacts with California consumers. In order to be held strictly liable in a California court for the injuries caused by their dangerous and defective products, a manufacturer must have minimum contacts with the state. Generally, a state court has the power to compel absent defendants to defend suits brought in state courts only when the defendant has certain minimum contacts with the forum state, so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. (*See International Shoe Co. v. Washington* (1945) 326 U.S. 310; *Pavlovich v. Superior Court* (2002) 29 Cal. 4th 262, 268.) California's "long-arm" jurisdictional statute provides that the courts of this state can exercise jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States" (Code Civ. Proc. Section 410.10; *See Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal. 4th 434, 444–45.)

In products liability litigation, the most common dispute over whether or not personal jurisdiction exists concerns plaintiffs' allegations that the nonresident defendant's participation in the manufacture and/or marketing of products is a basis of California jurisdiction. When a nonresident defendant challenges personal jurisdiction, the burden shifts to the plaintiff to demonstrate, by a preponderance of the evidence, that all necessary jurisdictional criteria have been met. (*Hoffman-La Roche v. Superior Court* (2005) 130 Cal.App.4th 782, 794.)

Establishing jurisdiction could prove particularly challenging to a plaintiff seeking to establish jurisdiction over an overseas manufacturer who lists their products for sale on electronic marketplaces that then, in turn, sell the products to consumers not only in California, but other states, and nations all over the globe. The plaintiff would have to establish that the defendant's activities within California are extensive or wide-ranging, or substantial, continuous, and systematic enough to warrant jurisdiction for all causes of action. (See *Bristol-Myers Squibb Co. v. Superior Court* (2017) 582 U.S. ___, 137 S. Ct. 1773, 1781, 198 L. Ed. 2d 395; *Secrest Machine Corp. v. Superior Court* (1983) 33 Cal. 3d 664, 669.) Alternatively, the plaintiff could establish that the defendant's degree of relation to the plaintiff's injury, and the balance between the convenience of the parties and the interest of the state in asserting jurisdiction favors the exercise of California's jurisdiction over the defendant. (*Secrest Machine Corp., supra,* at p. 669.) In either case, establishing jurisdiction over a distant manufacturer could be difficult and costly, challenges that California courts and policy makers have sought to help plaintiffs injured by dangerous and defective products avoid.

Electronic marketplaces sporadically have been found to be "sellers" of products sold on their marketplaces by third parties and therefor held accountable for the safety of the products. The difficulty of holding electronic marketplaces—or *any* party in the supply chain of a dangerous product purchased on an electronic marketplace—responsible for the products sold on their websites has played out in state and federal courts, as the following cases demonstrate.

Oberdorf v. Amazon, Inc. (2019) 936 F.3d 136: On January 12, 2015, Heather Oberdorf returned home from work and took her dog for a walk. She put a retractable leash on her dog, but the dog lunged, causing the D-ring on the dog's collar (purchased on Amazon.com and sold by third-party seller, The Furry Gang) to break and the leash to recoil back and hit Oberdorf in her face and eyeglasses. As a result, Oberdorf was permanently blinded in her left eye. Oberdorf tried to sue the third-party seller of the dog collar, but neither Amazon nor Oberderf were able to locate a representative of The Furry Gang, which removed its account on Amazon.com in May of 2016. Oberdorf also sued Amazon, making claims for strict products liability and negligence, among others. The District Court found that, under Pennsylvania law, Amazon was not liable for Oberdorf's injuries as a "seller" because The Furry Gang, not Amazon, listed the collar on Amazon.com's online marketplace and shipped the collar directly to Oberdorf. (*Id.* at 143.) The appellate court disagreed, finding that, for policy reasons and in keeping with longstanding principles of strict products liability law, Amazon.com *was* a "seller" because (1) Amazon was the "only member of the marketing chain available to the injured plaintiff for redress"; (2) imposition of strict liability upon Amazon serves as an "incentive to safety"; (3) Amazon is "in a better position than the consumer to prevent the circulation of defective products"; and (4) Amazon can distribute the cost of compensating for injuries resulting from defects by charging for it in its business. (*Id.* at pp. 144-48.)

Papataros v. Amazon.com, Inc. (D.N.J. Aug. 26, 2019, No. 17-9836 (KM) (MAR)) 2019 U.S.Dist.LEXIS 144253: On September 28, 2015, Nicole Papataros purchased a scooter on Amazon.com (from a third-party vendor named Coolreall) for her son, a minor, who was later injured while riding the scooter that was allegedly defective. Nicole sued Amazon, who made an indemnification demand on Coolreall but received no response and asserted that Coolreall or others upstream in the chain of commerce were responsible for the safety of the scooter. (*Id.* at 7, 9-10). Amazon also argued that it was not a "seller" of the product under New Jersey law because, among other things, it never "listed" the scooter for sale on its website, and therefore was not strictly liable for injuries caused by the scooter. (*Id.* at p. 11.) The district court disagreed, finding that Amazon's control of the product, its relationship with the third-party sellers, and the structure of the Amazon marketplace all weighed in favor of finding that Amazon was a seller, not a mere broker or facilitator, in relation to the purchase of the scooter. (*Id.* at pp. 44-45.)

Fox v. Amazon.com, Inc. (6th Cir. 2019) 930 F.3d 415: On January 9, 2015, Matthew Fox was playing with his new hoverboard while the rest of the family was away from the home. He stopped playing with the hoverboard and left it on the first floor of the family's two-story home. The hoverboard exploded, causing a fire. When Matthew's father arrived home, the home was engulfed in flames. Matthew and his sister Hailey were trapped on the second floor, escaping sure death only by breaking windows and jumping into their father's arms. As a result of the fire, the members of the Fox family suffered various physical and psychological injuries, and their home, along with virtually all of the personal property contained therein, was destroyed. The district court granted Amazon's summary judgment motion and the appellate court affirmed the order. It found that because Amazon did not choose to offer the hoverboard for sale, did not set the price of the hoverboard, and did not make any representations about the safety or specifications of the hoverboard on its marketplace, it was not a "seller" under Tennessee law, and therefore not strictly liable for the hoverboard's safety. (*Id.* at p. 425.)

Injuries caused by products sold on electronic marketplaces are serious and widespread. There seems to be ample evidence of unsafe consumer products being sold on electronic

marketplaces. In fact, an investigation by the Wall Street Journal last year highlighted a particularly dramatic case. In January of 2016, the Carpenter family of Santa Rosa, California, watched in horror as their family home burned to the ground. The source of the fire was a hoverboard that Kim Carpenter purchased on Amazon.com for her twelve year old daughter. The device spontaneously combusted while charging, and within minutes, the fire engulfed the home. Kim Carpenter rushed home to discover firefighters on her front lawn, struggling to revive the family's two dogs who had been trapped inside the house when the fire broke out. The fire, sparked by the defective hoverboard, destroyed the Carpenter family home and devastated the family. (Berzon, Alexandra, The Wall Street Journal, *How Amazon Dodges Responsibility for Unsafe Products: The Case of the Hoverboard; Courts are starting to challenge the idea that big tech companies are mere platforms connecting buyers and sellers* (Dec. 5, 2019).)

The tragic outcome of this defective hoverboard is just one example of a much wider problem: many products available on electronic marketplaces are not safe. The 2019 Wall Street Journal (Journal) investigation found 4,152 products on Amazon that had been "declared unsafe by federal agencies, are deceptively labeled or are banned by federal regulators — items that big-box retailers' policies would bar from their shelves." (*Ibid.*) The cases, according to the investigation, include the following:

- Items falsely marked as "FDA-approved," including an eyelash-growth serum.
- Listings for the pain reliever oral benzocaine that lacked labels warning not to administer to children under age 2 years of age.
- More than 1,400 electronics listings that falsely claimed to be UL certified, meaning the product met voluntary safety standards.
- Listings for toys that include magnetic balls, which Amazon explicitly prohibits, and which the Consumer Product Safety Commission has called a "substantial product hazard."
- Listings for helmets that had failed federal safety tests. (*Ibid.*)

The Journal said it reported these listings to Amazon, which then removed or altered the wording for 57 percent of the listings. (*Ibid.*) But it is unclear whether, if not for the report, when and if Amazon would have found and removed the items (before they potentially injured or killed someone). It is also unclear whether Amazon has continued to monitor the safety of the products it sells in a regular and systematic manner since then.

Based upon the Wall Street Journal report, as well as other similar consumer safety investigations of Amazon (*see* Frontline, "Amazon Empire: The Rise and Reign of Jeff Bezos" February 18, 2020, available at https://www.pbs.org/wgbh/frontline/film/amazon-empire/), it is unclear whether Amazon, as the world's largest electronic marketplace operator, is able to effectively police its massive marketplace to ensure that the products sold there are safe. According to another Wall Street Journal report, Amazon has evolved "like a flea market," exercising "limited oversight over items listed by millions of third-party sellers, many of them anonymous, made in China, some offering scant information." (Berzon, Alexandra, et al. "Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products." *The Wall Street Journal*, Dow Jones & Company, 23 Aug. 2019, www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990.) It is also concerning that, according to the

Journal, dozens of the dangerous or mislabelled products in its investigation carried the "Amazon's Choice" label, which arguably implies that Amazon endorses the item. (*Ibid.*)

For its part, Amazon goes out of its way to distance itself from manufacturers and "vendors" who list products for sale on its site by suggesting that only vendors and manufacturers are responsible for the safety of products sold on its marketplace. They did so in all of the cases – *Oberdorf, Papataros,* and *Fox*—discussed above. Yet the electronic marketplace still attempts to reassure customers that it monitors the safety of products it sells, saying the following on its website:

> **About Product Safety at Amazon**
> The Product Safety Team at Amazon works to protect Amazon customers from risks of injury associated with products offered on Amazon by looking into and taking action on reported safety complaints and incidents.
>
> **Product Safety**
> Amazon monitors the products sold on our website for product safety concerns. In concerning situations, we may remove the product from the website, reach out to sellers and manufacturers for additional information, place relevant warnings on the product detail page, or take other actions depending on the situation.
>
> We may also report product safety concerns to applicable government agencies in order to bolster their safety data and help facilitate any necessary recalls.
>
> **Recalls**
> Amazon monitors public recalls alert websites and also learns of recalls directly from manufacturers and vendors. When we learn of a recall, we suspend all impacted product offerings from our website and quarantine any related inventory in our fulfillment centers. We also reach out to any customers that previously purchased impacted products (and any seller that may have offered such products) to inform them about the recall.

Tech industry arguments—that the seller, not the electronic marketplace is responsible for defective products—leave injured consumers empty handed, without anyone to hold responsible for their injuries. The tech industry opponents to this bill argue that the bill "reflects an unprecedented expansion of strict liability and a radical departure from decades of well-established product-liability law in California" because it "attempts to make online marketplaces liable for sales by other sellers where physical environment marketplaces would not be," giving the examples of auction houses, open air markets, and shopping malls.

But given the disruption that online sales have caused to the brick-and-mortar retail industry, it may be more accurate to say the opposite. It is not a radical or new idea to hold those who are in the product supply chain liable for product safety. Rather, it is the attempt by electronic marketplaces to break the centuries' old concept of strict products liability established by common law by disavowing the responsibility of a marketplace for the safety of its goods, which is radical, unprecedented, and dangerous.

The tech industry opponents dispute that injured consumers are unable to obtain compensation for their injuries from those that manufactured, supplied, or sold the products. They assert that "[s]elling through an online 'marketplace,' as opposed to a physical store, does not insulate a

manufacturer, supplier, or seller from liability. To the contrary, courts uniformly and routinely hold those entities liable for products sold through a myriad of online marketplaces."

But this statement – that multiple entities in the product supply chain are liable for defective products – belies the fact that vendors and manufacturers who sell their products on electronic marketplaces routinely are located and headquartered offshore, are out of business, and/or are unavailable by the time injured consumers (and sometimes even the marketplace itself) come looking for them. The vendor of the defective dog collar with the cute name—The Furry Gang—was nowhere to be found when the collar broke and Oberdorf was permanently blinded in her left eye. Likewise, when Nicole Papataros sued Amazon because her child was injured on a defective scooter, Amazon made an indemnification demand to Coolreall, but they received no response. In the case of the exploding hoverboards, described above, the products were purchased on Amazon, but technically sold and fulfilled by a company based in China. Amazon put the product on its website, collected the money from its customers on behalf of the Chinese company, and took a percentage of the purchase price as a fee. Yet the Chinese vendors and manufacturers were not and could not be held accountable. They may have shut down their business or just re-formed (or renamed) themselves as new companies. And those vendors may very well be selling products on Amazon.com now, while their past and future victims may be without recourse. As a result, the tech industry's claims that injured consumers can *always* obtain compensation from multiple sources in the product supply chain simply is not accurate.

The tech industry opponents argue that it is unfair to hold electronic marketplaces strictly liable when physical marketplaces that "occupy the same role between buyers and sellers, such as auction houses, auction events, open air markets, shopping malls, etc." are exempt. They assert that both enterprises –online marketplaces and physical ones—"create comparable risks." This may be a faulty comparison and conclusion. If one purchased dangerous, illegal, or defective goods—such as a poisonous candy, toys coated in lead paint, or exploding hoverboards, for example—at a swap meet or an open air market, the injured consumer would have a myriad of legal options and avenues available for punishment, sanction, compensation, and public safety, including by means of filing reports with local law enforcement and public health officials, and seeking relief by means of civil suit and state consumer safety laws. Most importantly, the consumer would know *who* sold them the product, *how* the vendor did business, and *where* they likely could be located in order to be sued, arrested, or fined. By contrast, electronic marketplaces bring many third-party sellers, who may or may not be trustworthy, into the consumer market. As discussed above, these third parties are often nowhere to be found when someone gets hurt, leaving consumers with no options to pursue for compensation, public safety, or punishment.

Furthermore, the location of a transaction (i.e. online or in person) is less important to the determination of whether a marketplace is strictly liable for the products sold there, than the nature and function of the marketplace itself. The key to whether an electronic marketplace is a "seller" for purposes of state strict products liability law, according to the courts that have looked at the issue, is control. In *Oberdorf,* for example, the court discussed how and why "financial lessors" who, in exchange for a commission, merely accept orders and arrange for product shipments, were not strictly liable when those products turned out to be defective.

> [T]he financial lessor's "participation in the chain of events was tangential," in such a way that it "was not able to, nor would it have been in a position to, effect or oversee the safety of the product." . . . [A] finance lessor is not in the business of selling or marketing

> merchandise, but rather it "is in the business of circulating funds." (*Oberdorf, supra*, 930 F.3d at 149 [citations omitted].)

In contrast, the court found that Amazon's role extends beyond that of a sales agent:

> Amazon not only accepts orders and arranges for product shipments, but it also exerts substantial market control over product sales by restricting product pricing, customer service, and communications with customers. Amazon's involvement, in other words, resembles but also exceeds that of the sales agent labeled a "seller" [in another case]. (*Ibid.*)

Therefore, the nature of the businesses in the supply chain and the nature of their relationship to each other, to the consumer, and with the goods that are sold matters more than whether the site of the marketplace is online or in the open air. Certainly some courts have found that an electronic marketplace (specifically Amazon.com) sometimes qualifies as a "seller" for purposes of state strict liability law because it serves as an integral party in the supply chain. This bill proposes to codify such decisions in order to ensure that, for both legal and policy reasons, a consumer injured by a defective product sold in an electronic marketplace has recourse against *at least one party in the supply chain*: the marketplace itself.

The bill would clarify that electronic marketplaces are responsible for dangerous and defective products sold on their marketplaces. This bill updates California law to address the online sale of dangerous and defective goods, clarifying that the same longstanding strict product liability principles that apply to brick-and-mortar retailers and distributors also apply to online marketplaces.

Given the ubiquity of online sales, especially during the ongoing COVID-19 public health crisis when most brick-and-mortar retailers have been ordered to close, this bill seems important, reasonable, and timely. If the electronic marketplace were not considered to be a distributor or seller, and were to successfully argue that only third-party manufacturers or "sellers" were responsible for product safety (even though the marketplace connects the seller with the buyer and prohibits them from having direct contact), injured consumers could be out of luck. Not only could they be uncompensated for their losses, but the basic premise of strict products liability actions—that injured consumers should be able to obtain complete recovery from any entity in the product supply chain without having to prove the degree to which each link in that chain is responsible for a defective product—would be eviscerated. Allowing electronic marketplaces to evade responsibility by cutting off all links in the chain of liability between the manufacturer and the consumer would leave some injured consumers unable to obtain compensation for their injuries from those that manufactured, supplied, or sold the products, thereby defeating the compensatory purpose of strict liability law.

In keeping with these longstanding principles of strict products liability, this bill would appropriately hold electronic marketplaces strictly liable for defective products they offer for sale. Electronic marketplaces certainly bear responsibility for passing consumer products down the line to the consumer, especially when they exert a tremendous amount of control over the third-party sellers with whom they contract, and are in the best position to influence safe manufacturing and distribution.

Ways that the bill could better identify the characteristics of an electronic marketplace that require that it be held strictly liable for the products it sells. Any party who is identifiable as

"an integral part of the overall producing and marketing enterprise" is strictly liable for the products sold in the course of that enterprise. (*Arriaga, supra,* 167 Cal.App.4th at p. 1527.) The California Chamber of Commerce agrees, but argues that the bill does not sufficiently distinguish between those online marketplaces which play an integral part in the supply chain (and therefore are strictly liable for the products sold in their marketplace), and those which do not. And they may have a point. Although the intention of the bill is clearly to hold liable only those electronic marketplaces that play an integral part in the supply chain, the bill may not be as specific as it could be in specifying the factors that make the electronic marketplace integral. *Therefore, as the bill moves forward, the author may wish to further define the qualities and characteristics that make the electronic marketplace an integral part of the product supply chain. The author may wish to consider the following factors (with accompanying legal citations to cases where the factors were considered) in determining what those qualities and characteristics are.*

1) The electronic marketplace conceals the identity, reliability, and location of the vendor who lists the product for sale from the purchaser, thereby depriving the purchaser of being able to ensure that they are buying a safe product from a reputable source who is likely to be available and accountable in the event that the product turns out to be defective.

   "[U]nder the Agreement, third-party vendors can communicate with the customer only through Amazon. This enables third-party vendors to conceal themselves from the customer, leaving customers injured by defective products with no direct recourse to the third-party vendor." (*Oberdorf, supra*, 936 F.3d at 145.)

2) The electronic marketplace does not take its own precautions to ensure that the third-party vendor is reputable, licensed, in good standing under the laws of the country in which it is located, and amenable to legal process in California so it is available and accountable in the event that the product turns out to be defective.

   "Amazon generally takes no precautions to ensure that third-party vendors are in good standing under the laws of the country in which their business is registered. In addition, Amazon had no vetting process in place to ensure, for example, that third-party vendors were amenable to legal process. After Oberdorf was injured by the defective collar, neither she nor Amazon was able to locate The Furry Gang. As a result, Amazon now stands as the only member of the marketing chain available to the injured plaintiff for redress." (*Oberdorf, supra*, 936 F.3d at 145.)

3) The online marketplace exerts substantial control over the marketplace by means of listing/sales agreements that give the marketplace unilateral discretion to determine which vendors are allowed to offer products for sale, and which products may be sold there.

   "Amazon exerts substantial control over third-party vendors. Third-party vendors have signed on to Amazon's Agreement, which grants Amazon "the right in [its] sole discretion to . . . suspend[], prohibit[], or remov[e] any [product] listing," "withhold any payments" to third-party vendors, "impose transaction limits," and "terminate or suspend . . . any Service [to a third-party-vendor] for any reason at any time." Therefore, Amazon is fully capable, in its sole discretion, of removing unsafe products from its website. Imposing strict liability upon Amazon would be an incentive to do so." (*Oberdorf, supra,* 936 F.3d at p. 146.)

"While Amazon never took title to the property, it adopted a proprietary stance with respect to the sale. It physically delivered the product, confirmed the sale with a "thank you for shopping with us" message, and allowed communication between the third-party vendor and the buyer only through Amazon's own website." (*Papataros, supra*, at p. 39.)

4) The online marketplace has a more than one-time, fleeting, or occasional business relationship with its vendor(s).

"[T]he potential for continuing sales encourages an on-going relationship between Amazon and the third-party vendors." (*Oberdorf, supra,* 936 F.3d at p. 146.)

5) The online marketplace receives feedback about the safety of the product or satisfaction of purchasers directly from the purchasers.

"Moreover, Amazon is uniquely positioned to receive reports of defective products, which in turn can lead to such products being removed from circulation. Amazon's website, which Amazon in its sole discretion has the right to manage, serves as the public-facing forum for products listed by third-party vendors. . . . Third-party vendors, on the other hand, are ill-equipped to fulfill this function, because Amazon specifically curtails the channels that third-party vendors may use to communicate with customers." (*Oberdorf, supra*, 936 F.3d at pp. 146-147.)

6) The online marketplace has the ability to spread the cost of accidents to vendors through its fee structure.

"Amazon may increase [the] fees it charges third-party vendors to account for the risk of defective products and make the price—particularly the portion of the price retained by Amazon—reflect that risk. Any such increase would no doubt flow through the vendors and be reflected in the listed price of products. That, as much as Amazon may object, represents the system working as intended." (*Papataros, supra*, at p. 42.)

7) The online marketplace allows foreign manufacturers and vendors, who may not have access to product safety information from U.S. product safety regulators, including recall information, to sell their products on the marketplace and does not have a system to review the safety of the products, remove products from the marketplace when they are recalled or otherwise found to be unsafe, or ensure that foreign manufacturers and vendors will be held accountable, in the State of California, if their products are unsafe.

"Amazon's customers are particularly vulnerable in situations like the present case. Neither the Oberdorfs nor Amazon has been able to locate the third-party vendor, The Furry Gang. Conversely, had there been an incentive for Amazon to keep track of its third-party vendors, it might have done so." (*Oberdorf, supra*, 936 F.3d at p. 147.)

ARGUMENTS IN SUPPORT*:* Co-sponsors Consumer Attorneys of California, the California Teamsters Public Affairs Council, and the United Food and Commercial Workers Union Western States Council write in support of the bill as follows:

AB 3262 levels the playing field and holds online marketplaces, like Amazon, to the same legal standard as traditional brick and mortar businesses when they place dangerous products

> in the stream of commerce. This bill will ensure that California law does not continue, in practical effect, to subsidize online commerce – one with a documented, spotty record of product and workplace – at the literal expense of injured Californians. This bill is particularly relevant and necessary in light of the Covid 19 crisis as most consumers are now purchasing most products online and safety is critical.
>
> . . .
>
> With a possibly history-breaking economic downturn on the horizon, the world's largest corporation with more than half of the online retail market should not be able to shift the costs of injuries to its customers to struggling households and public safety nets when its brick and mortar small and large business competitors would be liable under long standing consumer protection law.

ARGUMENTS IN OPPOSITION: The Computing Technology Industry Association, Internet Association, and Technet, in a joint letter opposing the bill, write that the bill "reflects an unprecedented expansion of strict liability and a radical departure from decades of well-established product-liability law in California."

> This bill attempts to make online marketplaces liable for sales by other sellers where physical environment marketplaces would not be. It's not that the law purports to treat online retailers the same as physical retailers. This bill threatens to treat online marketplaces with different rules than the ones that govern physical marketplaces.

At the same time, they also imply that the bill is unnecessary because "an online seller **is already uniformly liable** for strict product liability when it is the seller, i.e. when an online seller performs retail sales of items bought from vendors."

They also dispute that injured consumers who purchase products through online marketplaces are unable to obtain compensation for their injuries from those that manufactured, supplied, or sold the products.

> Selling through an online "marketplace," as opposed to a physical store, does not insulate a manufacturer, supplier, or seller from liability. To the contrary, courts uniformly and routinely hold those entities liable for products sold through a myriad of online marketplaces.
>
> The purported risk that suppliers and sellers will forego selling products in physical stores for websites in order to avoid strict liability is unfounded because strict liability principles apply with equal force whether an entity sells a product in a store or online.

These technology groups argue that the bill is unfair because it imposes *greater* liability on electronic marketplaces than those which are in place for physical marketplaces.

> This makes physical "marketplaces" that occupy the same role between buyers and sellers, such as auction houses, auction events, open air markets, shopping malls, etc., exempt. The stated goal of maximizing compensation for injured citizens is not furthered by exempting broad categories of enterprises that create comparable risks.

> . . .[U]under AB 3262, the liability of an auction or a realtor, or any of California's thousands of travel agents, would be drastically disparate depending on whether a third party seller (e.g., of air travel, rental cars, accommodations, dining reservations, etc.) was made through an enterprise's physical, as opposed to Internet, infrastructure.
>
> In conclusion, AB 3262 seeks to treat putting sellers and buyers together differently than the same activity done in a physical environment.

The California Chamber of Commerce writes, in opposition to the bill, that it does not sufficiently distinguish between those online marketplaces that play an integral part in the supply chain (and therefore likely already are strictly liable for the product), and those which do not play such a part:

> To the extent an existing online platform or marketplace meets the factors identified above and satisfies the public policy concern for strict liability, courts already have discretion and authority to impose liability for a defective product. AB 3262 eliminates that judicial discretion and mandates liability on all online platforms, regardless of whether the platform is "integral" and satisfies any of the factors listed above.
> . . .
>
> [A] marketplace that is an electronic platform that simply allows a seller a forum to advertise their products for consumers to purchase, is not necessarily an integral part in the supply/distribution of the product and should not be subject to products liability. Expanding such liability could severely limit the opportunity for small businesses and sellers to get their products out to a broader group of consumers and could also significantly increase costs for consumers.

Prior Similar Legislation: AB 496 (Koretz, Chap. 906, Stats. 2002) provides that the design, distribution or marketing of firearms and ammunition is not exempt from the general duty to use ordinary care or skill required by Civil Code Section 1714, the statute that imposes liability in tort for intentional and negligent actions.

AB 1860 (Huffman, Chap. 569, Stats. 2008) prohibits the manufacture, remanufacture, retrofit, distribution, or sale of a product that is unsafe knowing that the product is unsafe.

SB 155 (Padilla, Chap. 512, Stats. 2013) prohibits auto manufacturers from taking adverse action against an auto dealer for selling or leasing a vehicle to a customer who exported the vehicle to a foreign country or resold the vehicle in violation of an export or resale prohibition, unless the prohibition was provided to the dealer in writing prior to the sale or lease, and the dealer knew or reasonably should have known of the customer's intent to export or resell the vehicle, as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

California Teamsters Public Affairs Council (co-sponsor)
Consumer Attorneys of California (co-sponsor)
United Food and Commercial Workers Union Western States Council (co-sponsor)

Athena
California Conference Board, Amalgamated Transit Union
California Conference of Machinists
Consumer Federation of California
Engineers and Scientists of California, IFPTE Local 20, AFL-CIO
Gig Workers Rising
Inlandboatmen's Union of the Pacific (IBU)
Inland Empire Labor Council, AFL-CIO
Los Angeles Alliance for a New Economy
Monterey Bay Central Labor Council, AFL-CIO Napa-Solano Labor Council, AFL-CIO
North Bay Labor Council, AFL-CIO Partnership for Working Families
Professional and Technical Engineers, IFPTE Local 21, AFL-CIO
San Francisco Labor Council, AFL-CIO, San Mateo Labor Council, AFL-CIO
South Bay Labor Council, AFL-CIO
Unite Here International Union, AFL-CIO
Utility Workers of America
Warehouse Workers Resource Center
Working Partnerships USA

Opposition

California Chamber of Commerce
Computing Technology Industry Association
Internet Association
Technet -- Technology Network

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