

## ASSEMBLY THIRD READING

AB 3262 (Mark Stone)

As Amended May 4, 2020

Majority vote

**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, strictly liable for the safety of the products they sell.

**Major Provisions**

- 1) Finds and declares on the part of the Legislature all of the following about existing law, including 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.
- 2) Provides that, except as provided in 3), below, 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.

**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.

*California has led the nation in products liability laws to protect consumers.* 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. . . . 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. . . . 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.)

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.)

*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.

*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.

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.

#### **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.

#### **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." 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. 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.

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.

**FISCAL COMMENTS:**

None

**VOTES:****ASM JUDICIARY: 8-3-0**

**YES:** Mark Stone, Chau, Chiu, Gonzalez, Holden, Kalra, Maienschein, Reyes

**NO:** Gallagher, Kiley, Obernolte

**UPDATED:**

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