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SUBJECT

Product liability: electronic retail marketplaces

DIGEST

This bill, with certain exceptions, deems electronic retail marketplaces, as defined, to be retailers for purposes of strict products liability law.

EXECUTIVE SUMMARY

The rise of e-commerce, accelerated by the COVID-19 pandemic, has radically altered the modern retail experience, giving consumers instant access to products across the world with a few taps on a smartphone or clicks of a mouse. Online marketplaces offer consumers numerous benefits, but can also be portals for dangerous, defective, or illegal products that would not otherwise enter this state's stream of commerce. When such a product causes an injury, plaintiffs are often left without recourse against the seller because they are unavailable or insolvent.

Under existing law, if a brick-and-mortar retailer sells defective products — regardless of whether they exercised due care — they are strictly liable for injuries caused by the product as long as it was used as intended. This doctrine is based on policy considerations of enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among defendants. However, the doctrine's application to products sold by third parties on electronic marketplaces is unsettled.

This bill seeks to align the letter of strict liability law with its spirit by placing online retailers on equal footing with their brick-and-mortar competitors. Specifically, the bill, except for specified circumstances, deems electronic retail marketplaces to be retailers for purposes of strict liability law, regardless of whether the marketplace takes possession of the product.

The bill is sponsored by the California Teamsters Public Affairs Council, Consumer Attorneys of California, and United Food and Commercial Workers Union Western States Council, and is supported by a broad coalition of organizations.

The bill is opposed by a broad coalition of organizations, including Computing Technology Industry Association, Internet Association, TechNet, Civil Justice Association of California, and Chamber of Commerce. Additionally, eBay and Etsy take an oppose-unless-amended position, arguing that the bill, in applying to their businesses, goes too far.

PROPOSED CHANGES TO THE LAW

Existing federal law, the Consumer Product Safety Act, authorizes the United States Consumer Product Safety Commission 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.)

Existing state law:

- 1) Establishes, in judicial precedents, the doctrine of strict products liability. (*Greenman v. Yuba Power Prods., Inc.* (1963) 59 Cal. 2d 57, 62 [“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”].) Extends this doctrine beyond manufacturers to anyone identifiable as “an integral part of the overall producing and marketing enterprise” (*Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262 [*Vandermark*]), including in some circumstances in which the defendant arranged for the sale but did not take possession of the product (*Canifax v. Hercules Powder Co.* (1965) 237 Cal.App.2d 44, 52 [*Canifax*]). Exempts businesses without a “special position vis-a-vis the original manufacturer” and those that 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 [*Tauber-Arons*].)
- 2) 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 & Saf. Code § 108044 (a).)

- 3) Deems a product to be unsafe for purposes of 2), 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. (*Id.* at (b).)

This bill:

1) Finds and declares that:

- a) Over the past 10 years, online sales of consumer goods have increased from less than 5 percent of retail sales to more than 15 percent of all retail sales in the United States. In recognition that the percentage of retail sales that are online is expected to continue to increase and that over \$600 billion in online sales occurred in 2019 in the United States, increasing dramatically during the COVID-19 pandemic, it is clear that electronic retail marketplaces play a substantial role in the distribution of goods to consumers in the State of California, whether or not they ever take physical possession of those goods. Furthermore, when manufacturers of products sold online are located in foreign countries, those manufacturers could be outside of the jurisdiction of the courts of the State of California. Under these circumstances, the consumer could be left with no recourse for damages caused by defective products made by foreign manufacturers unless the electronic retail marketplace that distributed the product is subject to liability for the defective product.
- b) Under existing law a manufacturer, seller of goods, or other entity that is engaged in the business of distributing goods to the public is strictly liable in tort if a product they manufacture, sell, or distribute proves to have a defect that causes injury to a human being.
- c) The purpose of that liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers, sellers, and other entities that are engaged in the business of distributing goods to the public, rather than by the injured consumers.
- d) 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.

- e) There is uncertainty how to apply strict product liability law to electronic retail marketplaces. As a result, some injured consumers who purchase products through electronic retail marketplaces are unable to obtain compensation for their injuries from the entities that manufactured, distributed, or sold the products, thereby defeating the compensatory purpose of strict liability law.
 - f) 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, distributors, and sellers will emphasize electronic retail 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 or profited from the manufacture, sale, or distribution of the defective product. Furthermore, the electronic retail marketplace may be the only member of the enterprise reasonably available to the injured consumer. In other cases the electronic retail marketplace may be in a position to exert pressure on manufacturers to ensure that their products are safe. In this way, strict liability of the electronic retail marketplace serves as an incentive to safety and the lack of such liability creates an increased risk of defective products being sold to consumers. Strict liability on the manufacturer and the electronic retail marketplace alike affords maximum protection to the injured plaintiff and works no injustice to the electronic retail marketplace or manufacturer as they can adjust the costs of such protection between them in the course of their business relationship.
- 2) Makes an electronic retail marketplace strictly liable for all damages caused by defective products placed into the stream of commerce to the same extent that a retailer of that defective product would be liable and deems the electronic retail marketplace a retailer for purposes of California strict liability law.
- a) Provides that the liability of an electronic retail marketplace is equal to, but not greater than, the liability of a retailer as provided in *Vandermark, supra*, 61 Cal.2d 256.
 - b) Provides that all defenses to strict liability that are available to a retailer under California law are preserved for an electronic retail marketplace.
- 3) Provides that an electronic retail marketplace is not liable under the principles described above if any of the following conditions are met:
- a) The product that caused the damage was one of the following:

- i. Preowned or used and predominantly described or prominently advertised on the electronic retail marketplace as preowned or used at the time it was purchased by the consumer.
 - ii. Handmade, defined as a product that conforms to all applicable state and federal consumer health and safety laws and is made by the vendor in the primary residence of the vendor, so long as the vendor's sales of handmade products generate less than \$50,000 per year in revenues.
 - b) The electronic retail marketplace did not receive a direct or indirect financial benefit from the sale of the defective product that caused the injury.
 - c) The sale or transaction of the product occurred by auction and is exempt from strict liability, as described in *Tauber, supra*, 101 Cal.App.3d 268.
- 4) Provides that an electronic retail marketplace is strictly liable for the sale of preowned, used, handmade, or auctioned defective products if the electronic retail marketplace to the same extent that a retailer, because of its actions, would be liable for the sale of those goods. Provides that those actions include, but are not limited to, promoting the product or leading a reasonable consumer to believe that the product is safe for its intended use.
- 5) Defines "electronic retail marketplace" as an electronic place or internet website that is engaged in the business of placing products into the stream of commerce in this state, regardless of (1) whether the vendor (defined as the manufacturer, distributor, seller, or supplier of the product), product, or marketplace has a physical presence in the state or (2) whether the electronic retail marketplace ever takes physical possession of the product, as described in *Canifax, supra*, 237 Cal.App.2d 44, 52. Includes in this definition any subsidiaries or related party companies, as specified.
- 6) Defines "product" as a tangible good that is subject to strict product liability law.
- 7) States that it does not limit the provisions of existing law that make manufacturers, distributors, sellers, retailers, and suppliers of consumer products strictly liable for the safety of those products and prohibit the sale of products that violate state or federal health or safety laws.

COMMENTS

1. Purpose of the measure

Several investigations of e-commerce sites have found an alarming number of dangerous products:

- Last year, a *Wall Street Journal* investigation found over 4,000 items for sale on Amazon.com 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."¹ The products included medications, sleeping wedges for babies, toys, helmets, and electronics.²

- According to the BBC, a consumer watchdog recently examined 100 toys from Amazon, 50 from eBay and 50 from another site called AliExpress.³ The watchdog found that 44 toys were unsafe: some had bits of plastic or stuffing that could come off easily and could be swallowed, especially by younger children.⁴
- *Business Insider* reports that a UK nonprofit found a selection of “potentially deadly” items sold on Amazon’s, eBay’s, and Wish’s marketplaces. “In the most extreme example, a hairdryer purchased on Wish’s site set alight when Electrical Safety First tested what would happen if it restricted its airflow.”⁵
- A CNBC investigation found that third-party sellers were also shipping expired food items to customers.⁶
- Other reports have found counterfeit goods on e-commerce sites, an issue Congress recently began investigating.⁷

Additionally, some reports have found that unscrupulous sellers can evade security protections in product review systems and create hundreds of fake product reviews to dupe unsuspecting buyers into believing they are purchasing a safe, quality product.⁸

For their part, online marketplaces can and do monitor and police goods being trafficked on their sites. Many of the above reports note that the marketplaces responded swiftly when notified of the issues. Proponents of the bill contend that the

¹ 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 (Aug. 16, 2020).

² *Id.*

³ *Experts warn that some toys sold on sites like Amazon and eBay are unsafe* (Jun. 20, 2019) BBC website, <https://www.bbc.co.uk/newsround/48705982> (Aug. 16, 2020). Another 70 toys which weren’t obviously dangerous, didn’t have proper labels, didn’t have an address of where the toy was made or didn’t show that the toy had been tested for safety.

⁴ *Id.* See also *Amazon and eBay ‘listing unsafe toys for sale’* (Nov. 20, 2019) BBC website, <https://www.bbc.com/news/business-50478221> (Aug. 16, 2020).

⁵ Mary Hanbury, *An investigation found ‘potentially deadly’ products like exploding hairdryers sold on the ‘Wild West of Amazon, Wish, and eBay* (Nov. 27, 2019) <https://www.businessinsider.com/amazon-wish-ebay-faulty-electrical-products-2019-11> (Aug. 16, 2020).

⁶ Annie Palmer, *Amazon is shipping expired food, from baby formula to old beef jerky, scaring customers and putting big brands at risk* (Oct. 22, 2019) CNBC website, <https://www.cnbc.com/2019/10/20/amazon-is-shipping-expired-baby-formula-and-other-out-of-date-foods.html> (Aug. 16, 2020).

⁷ Daphne Howland, *Bezos faces US House Judiciary Committee over marketplace fairness, counterfeits*, (Jul. 30, 2020) <https://www.retaildive.com/news/bezos-faces-us-house-judiciary-committee-over-marketplace-fairness-counter/582587/> (Aug. 16, 2020).

⁸ Hannah Walsh, *How eBay’s review system is promoting fake, counterfeit and even dangerous products* (Mar. 13, 2019) Which? website, <https://www.which.co.uk/news/2020/03/ebay-customer-reviews/> (Aug. 16, 2020).

status quo is insufficient. A coalition of consumer protection groups, in support, note that in 2015, Amazon had approximately 60,000 hoverboard listings from thousands of sellers, in contrast to big-box retailers like Target, which had just a handful of suppliers. As a result, sellers of defective hoverboards listed on Amazon easily avoided accountability for unsafe products that could catch fire or explode. According to the *Wall Street Journal*, “[i]n many of the Amazon-fire related incidents, government investigators couldn’t figure out who made or imported the devices – information that helps facilitate safety measures such as recalls.”⁹ Consumer Reports, which supports the bill, concludes that while Amazon has taken more steps to police sellers, in general platforms “simply aren’t doing enough to keep harmful products off their sites.”

When defective products sold through online marketplaces have resulted in lawsuits over major injuries and death, the marketplaces have characterized their operations as fundamentally different from sellers. In a recent products liability case, for instance, Amazon “compare[d] itself variously to a shopping mall landlord, a credit card issuer, a trucking company, an Internet search provider, or a newspaper running classified advertisements.”¹⁰ In cases across the country, such arguments have frequently succeeded,¹¹ as the doctrine of strict products liability was developed by courts, beginning in the 1950s, with traditional brick-and-mortar manufacturers, retailers, and distributors in mind.

This can further harm injured plaintiffs by leaving them without recourse. Proponents of the bill note that major portions of online marketplace businesses are conducted by third-party sellers who are often judgment-proof, whether through insolvency, absence, or jurisdictional limitations.¹² This bill would apply strict liability principles to

⁹ Alexandra Berzon, *How Amazon Dodges Responsibility for Unsafe Products: The Case of the Hoverboard*, *Wall Street Journal* (Dec. 5, 2019) <https://www.wsj.com/articles/how-amazon-dodges-responsibility-for-unsafe-products-the-case-of-the-hoverboard-11575563270> Aug. 16, 2020.

¹⁰ *Bolger v. Amazon* (Aug. 13, 2020, No. D075738) ____ Cal.App.5th ____ at *35, fn 8. The court stated that “the obvious differences between Amazon and those entities do not need to be elucidated.” (*Id.*)

¹¹ See e.g. *Garber v. Amazon.com, Inc.* (N.D.Ill. 2019) 380 F. Supp. 3d 766, 781 (applying Illinois law); *Stiner v. Amazon.com, Inc.* (Ohio Ct. App. 2019) 2019-Ohio-586, 2019 WL 757822 (applying Ohio law); *Eberhart v. Amazon.com, Inc.* (S.D.N.Y. 2018) 325 F. Supp. 3d 393, 397-400 (applying New York law); *Allstate N.J. Ins. Co. v. Amazon.com, Inc.* (D.N.J. July 24, 2018) No. 17 C 2738, 2018 U.S. Dist. LEXIS 123081, 2018 WL 3546197, at *5-12 (applying New Jersey law); *Fox v. Amazon.com, Inc.* (M.D. Tenn. May 30, 2018) No. 16 C 3013, 2018 U.S. Dist. LEXIS 90101, 2018 WL 2431628, at *8 (applying Tennessee law); *Erie Ins. Co v. Amazon.com Inc.* (D. Md. Jan. 22, 2018) No 16 C 2679, 2018 WL 3046243, at *1-3 (applying Maryland law); see also *Milo & Gabby LLC v. Amazon.com, Inc.* (Fed. Cir. 2017) 693 F. App’x 879, 885. *Oberdorf v. Amazon.com, Inc.* (3d Cir. 2019) 930 F.3d 136, 142 applied strict liability principles to Amazon, but this case was vacated and sent back the Pennsylvania Supreme Court to resolve questions of state law. *Papataros v. Amazon.com, Inc.*, 2019 U.S. Dist. LEXIS 144253 (D.N.J., Aug. 26, 2019), which relied on *Oberdorf* in applying strict liability to Amazon has been stayed pending the outcome of that decision.

¹² “In the products liability context, merely placing a product into the stream of commerce, even with knowledge that the product might enter the forum state, is not a sufficient basis for personal jurisdiction over a nonresident defendant. [Citations.] On the other hand, “if the sale of a product of a manufacturer or distributor ... is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable

electronic retail marketplaces that provide for third-party sales to consumers. The author writes:

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.

2. The doctrine of strict products liability

Strict products liability “was created judicially because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and because of the limitations in the negligence and warranty remedies.” (*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 733.) It “arose from dissatisfaction with the wooden formalisms of traditional tort and contract principles in order to protect the consumer of manufactured goods.” (*Id.* at 735.) The scope of strict liability has been expanded, where necessary, to account for “market realities” and to cover new transactions in “widespread use . . . in today’s business world.” (*Price v. Shell Oil Co.* (1970) 2 Cal.3d 245, 252 (*Price*).)

The California Supreme Court has “given [the] rule of strict liability a broad application.” (*Price, supra*, 2 Cal.3d at 250.) “Such a broad philosophy evolves naturally from the purpose of imposing strict liability . . . Essentially the paramount policy to be promoted by the rule is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them.” (*Id.* at 251, fn. omitted.) Moreover, by extending strict liability to entities further down the stream of commerce than the manufacturer, the policy of compensating injured plaintiffs is preserved, and retailers and distributors remain free to seek indemnity from the manufacturer. (*Edwards v. A.L. Lease & Co.* (1996) 46 Cal. App. 4th 1029, 1034.)

Under the strict products liability doctrine, “[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, supra*, 59 Cal.2d 57, 62.) This ensures “that the costs of injuries resulting from

to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.’ [Citation.]” (*Jayone Foods, Inc. v. Aekyung Industrial Co. Ltd.* (2019) 31 Cal.App.5th 543, 559.)

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.” (*Id.* at 63.)¹³

Vandermark, supra, 61 Cal.2d 256 extended the rule articulated in *Greenman* to retailers. The California Supreme Court’s rationale was as follows:

Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. [Citation.] In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end: the retailer’s strict liability thus serves as an added incentive for safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.

(*Id.* at 262.)

Courts have generally applied the doctrine of strict products liability to entities “involved in the vertical distribution of consumer goods,” where the policies of the doctrine support its application. (*Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 773 [*Bay Summit*].) “Although these defendants were not necessarily involved in the manufacture or design of the final product, each was responsible for passing the product down the line to the consumer. Thus, the parties were ‘able to bear the cost of compensating for injuries’ [citation] and ‘play[ed] a substantial part in insuring that the product [was] safe or . . . [were] in a position to exert pressure on the manufacturer to that end.’” (*Id.*) “Beyond manufacturers, anyone identifiable as ‘an integral part of the overall producing and marketing enterprise’ is subject to strict liability.” (*Arriaga v. CitiCapital Commercial Corp.* (2008) 167 Cal.App.4th 1527, 1534 (*Arriaga*).)

Strict liability also applies where a nonmanufacturing party is “outside the vertical chain of distribution” of the product, but plays “an integral role in the ‘producing and marketing enterprise’ of a defective product and profit[s] from placing the product into the stream of commerce.” (*Bay Summit, supra*, 51 Cal.App.4th at 773.) “Imposing strict

¹³ “[R]ecovery under the doctrine of strict liability is limited solely to ‘physical harm to person or property.’ [Citation.] Damages available under strict products liability do not include economic loss, which includes “‘damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits – without any claim of personal injury or damages to other property’” (*Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 482.)

liability under these circumstances is 'an expression of policy that once an entity is instrumental in placing a defective product ... into the stream of commerce, then liability [should] attach[] without regard to conduct (fault).' " (*Id.*) The court in *Kasel v. Remington Arms Co.* (1972) 24 Cal.App.3d 711 elaborated on this as follows:

[...] One of the policy considerations in developing the enterprisal concept of liability was the very reason that in some cases a manufacturer, or other logically suable component of an enterprise, would not be amenable to suit through lack of jurisdiction or other reason, by an injured plaintiff. [Citing *Vandermark, supra*, 61 Cal.2d at 252.] Where one of the integral members of the enterprise is amenable to California jurisdiction and the injured is a California citizen, California has a strong interest in insuring that that member bears the cost of such injuries and spreads it among his consumers, particularly when the law of the competing jurisdiction would afford no recovery to the injured California citizen.

(*Id.* at 737.)

Nevertheless, imposition of strict liability based on this stream of commerce or marketing enterprise theory is not limitless. The strict liability doctrine derives from judicially perceived public policy considerations, i.e., enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among the defendants. (*Vandermark, supra*, 61 Cal.2d at 262-263; *Bay Summit, supra*, 51 Cal.App.4th at 774.) Where these policy justifications are not applicable, courts have refused to hold the defendant strictly liable even if that defendant could technically be viewed as a "link in the chain" in getting the product to the consumer market. (*Bay Summit, supra*, 51 Cal.App.4th at 774.) In other words, the facts must establish a sufficient causative relationship or connection between the defendant and the product so as to satisfy the policies underlying the strict liability doctrine. (*Id.* at 776.)

In *Bay Summit*, the court set forth the factors required to establish such a causative relationship or connection. The court concluded that to hold a defendant strictly liable under a marketing enterprise theory, the plaintiff must demonstrate that: "(1) the defendant received a direct financial benefit from its activities and from the sale of the product; (2) the defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process." (*Id.* at 778; *Arriaga, supra*, 167 Cal.App.4th at 1534-1535.)

A defendant will not be held strictly liable unless doing so will enhance product safety, maximize protection to the injured plaintiff, and apportion costs among the defendants." (*Arriaga, supra*, 167 Cal.App.4th at 1537.) "The application of strict liability in any particular factual setting is determined largely by the policies that underlie the

doctrine.” (*Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564, 576; *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 270.) Courts have thus 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, supra*, 101 Cal.App.3d at 284.) Similarly, it has been held that when title to a product passes directly from the manufacturer to the buyer, and an auctioneer labels the product “as is” and does not alter, inspect, test, or operate the product, the auctioneer cannot be held strictly liable for the product’s defect. (*Brejcha v. Wilson Machinery, Inc.* (1984) 160 Cal.App.3d 630, 639-41 [“There can be no breach of a warranty that does not exist”].) Additionally, the doctrine does not apply to the occasional seller of a product who is not engaged in the business of selling. (See e.g. *Garcia v. Becker Bros. Steel Co.* (2011) 194 Cal. App. 4th 474, 482.)

3. Recent California strict liability cases involving Amazon

Within its online marketplace, Amazon plays multiple roles. Roughly 40 percent of products sold on Amazon’s website include products sourced and sold directly to customers by Amazon. As such, Amazon operates like a retailer and distributor and is generally subject to strict liability like its brick-and-mortar counterparts.

The other 60 percent of products sold on Amazon’s website are by third-party sellers who select, source, and price their products, and use Amazon’s website as a portal to customers. For this privilege, they pay a monthly or per-item fee. Amazon operates as an intermediary with the customer, collecting payment, deducting fees, and remitting payment to the seller. Some third-party sellers use the “Fulfilled by Amazon” program, in which Amazon warehouses and ships a third party’s product using its labeling and packaging and acts as an intermediary between the buyer and the seller that facilitates the transaction. Others directly ship their products to the seller and Amazon does not take possession of the product.

Courts across the country have found that Amazon is not liable for defective products sold on its marketplace under various state laws.¹⁴ In California, a federal court in *Carpenter v. Amazon.com, Inc.* (N.D.Cal. Mar. 19, 2019) 2019 U.S. Dist. LEXIS 45317 granted summary judgement against a family whose house was burned down by a defective hoverboard. Although the Carpenters were not home, their two family dogs were in the house and perished in the fire. The third-party seller in this case shipped the hoverboard directly to the plaintiffs after consummating the transaction on Amazon’s website. Upon learning of a rash of similar incidents, Amazon removed hoverboard offers from its site and emailed affected customers regarding the potential danger. (*Id.* at *3-4.)

¹⁴ See fn 11, *supra*.

The Carpenters alleged, among other things, strict liability based on manufacturing defect, design defect, and failure to warn. The court applied the *Bay Summit* test, holding that the Carpenters had failed to satisfy the second prong – whether defendant’s conduct was a necessary factor in bringing the product to the initial consumer market – by providing “no evidence that but for Amazon’s conduct, the initial consumer market for Paradise 00’s hoverboards would not have existed.” (*Carpenter v. Amazon.com, Inc, supra*, 2019 U.S.Dist.LEXIS 45317, at *12-13.) This case is being appealed.

Just last week, the Fourth District Court of Appeal held that strict liability principles are applicable to a defective product sold by a third party through the “Fulfilled by Amazon” program. (*Bolger v. Amazon* (Aug. 13, 2020, No. D075738) ___Cal.App.5th___.) The product, a laptop battery, exploded several months later, causing severe burns to the plaintiff. She sued multiple parties including the seller, Lenoge, who had used a fictitious name, and did not appear in court. Amazon moved for summary judgment, claiming it was an “online marketplace” that did not distribute, manufacture or sell the product. The trial court granted the motion, but the Court of Appeal reversed, holding that the record did not demonstrate as a matter of law that Amazon could not be held strictly liable for defects in third-party products sold through its website under those circumstances. (*Id.* at *41.) The court stated:

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

(*Id.* at *3.) Reviewing the principles underlying the doctrine of strict products liability, the court continued:

Those principles compel the application of the doctrine to Amazon under the circumstances here. As noted, Amazon is a direct link in the chain of distribution, acting as a powerful intermediary between the third-party seller and the consumer. *Amazon is the only member of the enterprise reasonably available to an injured consumer in some cases, it plays a substantial part in ensuring the products listed on its website are safe, it can and does exert pressure on upstream distributors (like Lenoge) to enhance safety, and it has the ability to adjust the cost of liability between*

itself and its third party sellers. Under established principles of strict liability, Amazon should be held liable if a product is sold through its website turns out to be defective. [Citing *Vandermark, supra*, 61 Cal.2d at 262.]”

(*Id.* at *4, emphasis added.)¹⁵

The court found two cases particularly relevant. The first, *Canifax, supra*, 237 Cal.App.2d 44, addressed a plaintiff who was injured when an alleged defective dynamite fuse caused an accidental explosion. The defendant arranged for the manufacturer to ship the fuse directly to the supplier. (*Id.* at 48.) The court held that the rule of strict products liability applies “to ‘any person engaged in the business of selling,’ and therefore applies not only to manufacturers but ‘to any wholesale or retail dealer or distributor.’” Thus, with the operations of [the defendant] described, it should undoubtedly be included within the rule. The fact that it chooses to delegate the manufacture of [the] fuse to another and that it causes the manufacturer to ship the product directly to the consumer cannot be an escape hatch to avoid liability.” (*Id.* at 52, quoting Rest.2d Torts, § 402A, com. f.)

In the second case, *Barth v. B.F. Goodrich Tire Co.* (1968) 265 Cal.App.2d 228 (Barth), a woman was killed and her passengers injured when the station wagon the woman was driving crashed, allegedly as a result of a defective tire. The tire was purchased through an intermediary from the manufacturer, but was ultimately fulfilled by the defendant, a wholesale and retail distributor, who retrieved two tires from its inventory and installed them on the station wagon. The defendant sent an invoice, which included a service charge, to the manufacturer, who, in turn, billed the intermediary who had processed the initial purchase order.

The court rejected the defendant’s argument that “it was not a ‘seller’ of the tire to [the employer] but only served as a conduit for the sale,” holding that “neither the transfer of title to the goods nor a sale is required” for strict liability to apply. (*Id.* at 251-252.) “[T]he reasons for placing losses due to defective products on the manufacturers and suppliers are to provide maximum protection for the consumer and the fact that the

¹⁵ The court elaborated on the importance of ensuring that an injured plaintiff has recourse:

There is, of course, a risk that the upstream supplier and other entities in the chain of distribution will be insolvent or unavailable. But that circumstance is precisely why the doctrine of strict liability has been expanded to include the entire chain of distribution, including retailers, where the policies of the doctrine are otherwise served. (See *Vandermark, supra*, 61 Cal.2d at p. 262.) The risk of nonpayment, in such a circumstance, should fall on an entity that benefited from the sale of the product rather than the injured plaintiff. (*Id.* at pp. 262-263; *Greenman, supra*, 59 Cal.2d at p. 63.) Amazon can choose how to absorb that risk. Nothing in the record supports its assertions that it would be forced to indiscriminately raise its fees on “millions of faultless third-party sellers who have never sold a defective or dangerous product,” or that the burden of such a hypothetical fee increase would ultimately fall on Amazon customers rather than be absorbed by sellers themselves in form of reduced profits. (*Id.* at *39.)

overall producing and marketing enterprise is in a better position to insure against the liability and to distribute it to the public by adding the cost thereof to the price of the product." (*Id.* at 253.) Citing *Canifax*, the court pointed out, "It is established that a wholesaler distributor who neither manufactures the product nor has possession of the goods can be held to the doctrine of strict liability." (*Id.*) In general, "all suppliers in the chain of getting goods from the manufacturer to the consumer should be held" strictly liable. (*Id.*)

The court in *Bolger* stated that "[l]ike the defendant in *Barth*, Amazon was a link in the chain of product distribution even if it was not a seller as commonly understood. Pursuant to a contract with the seller, Amazon retrieved the product from its warehouse and supplied it to the consumer. And again, Amazon went further. Its business model compels the consumer to interact directly with Amazon, not the seller, to place the order for the product and pay the purchase price." (*Bolger, supra*, ___ Cal.App.5th___ at *23-24.) "Law, as an instrument of justice, has infinite capacity for growth to meet changing needs and mores. Nowhere is this better illustrated than in the recent developments in the field of products liability. The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping legal principles abreast of the times. Ancient distinctions that make no sense in today's society and that tend to discredit the law should be readily rejected as they were step by step in *Greenman* and *Vandermark*." (*Id.* at *40, quoting *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 227.)

4. Deems an electronic retail marketplace a retailer for purposes of strict liability

This bill makes an electronic retail marketplace strictly liable for all damages caused by defective products placed into the stream of commerce to the same extent that a retailer of that defective product would be liable and deems the electronic retail marketplace a retailer for purposes of California's strict liability law. The bill requires that the liability of an electronic retail marketplace be equal to, but not greater than, the liability of a retailer as provided in *Vandermark, supra*, 61 Cal.2d 256. The bill provides that all defenses to strict liability that are available to a retailer under California law are preserved for an electronic retail marketplace.

The bill provides that an electronic retail marketplace is not liable under the principles described above if any of the following conditions are met:

- The product that caused the damage was one of the following:
 - Preowned or used and predominantly described or prominently advertised on the electronic retail marketplace as preowned or used at the time it was purchased by the consumer.¹⁶

¹⁶ Under existing precedents, a seller of used or secondhand products cannot be held in strict liability in tort, unless the seller rebuilds or reconditions the product. (*Arriaga, supra*, 167 Cal. App. 4th at 1540.) The rationale is that a commercial dealer in used goods has no continuing business relationship with the

- Handmade, defined as a product that conforms to all applicable state and federal consumer health and safety laws and is made by the vendor in the primary residence of the vendor, so long as the vendor's sales of handmade products generate less than \$50,000 per year in revenues.
- The sale or transaction of the product occurred by auction and is exempt from strict liability, as described in *Tauber-Arons, supra*, 101 Cal.App.3d 268, which held that a used-machinery auctioneer should not be held strictly liable for a defect attributable to the initial manufacturing process, where the defendant had no special position vis-a-vis the original manufacturer and in fact played no more than a random and accidental role in the distribution of the product. (*Id.* at 284.)

The bill provides that, notwithstanding these exemptions, an electronic retail marketplace is strictly liable for the sale of preowned, used, handmade, or auctioned defective products if the electronic retail marketplace, to the same extent that a retailer, because of its actions, would be liable for the sale of those goods. The bill further provides that those actions include, but are not limited to, promoting the product or leading a reasonable consumer to believe that the product is safe for its intended use.

The bill also provides an exemption from strict liability if the electronic retail marketplace did not receive a direct or indirect financial benefit from the sale of the defective product that caused the injury. This provision is intended to cover advertisement websites such as Craigslist. As described in Comment 7 below, the author has agreed to amend the bill to make this intent more express.

The bill defines “electronic retail marketplace” as an electronic place or internet website that is engaged in the business of placing products into the stream of commerce in this state, regardless of (1) whether the vendor (defined as the manufacturer, distributor, seller, or supplier of the product), product, or marketplace has a physical presence in the state or (2) whether the electronic retail marketplace ever takes physical possession of the product, as described in *Canifax, supra*, 237 Cal.App.2d 44, 52. That case states: “In ‘Comment f’ [2 Rest., 2d Torts § 402A, p. 350] the rule stated is said to apply to ‘any person engaged in the business of selling,’ and therefore applies not only to manufacturers but ‘to any wholesale or retail dealer or distributor.’ . . . The fact that [the distributor] chooses to delegate the manufacture of [product] to another and that it causes the manufacturer to ship the product directly to the consumer cannot be an escape hatch to avoid liability.” The bill includes in this definition any subsidiaries or related party companies, as specified.

The bill defines “product” as a tangible good that is subject to strict product liability law. The bill also states that it does not limit the provisions of existing law that make

manufacturer through which the dealer can adjust the cost of protection from strict liability. (*Tauber-Arons, supra*, 101 Cal. App. 3d 268, 283.)

manufacturers, distributors, sellers, retailers, and suppliers of consumer products strictly liable for the safety of those products and prohibit the sale of products that violate state or federal health or safety laws.

5. Application to “peer-to-peer” marketplaces

Etsy and eBay, self-styled “peer-to-peer” marketplaces, as distinguished from what they describe as “blended marketplaces,” meaning Amazon, oppose the bill unless it is amended to exclude their operations. Etsy is often associated with handmade artisanal crafts, eBay with auctions of secondhand goods.

With regard to such business models, the bill exempts from strict liability certain preowned, used, handmade, or auctioned products, as well as circumstances in which the marketplace does not receive a financial benefit from the sale, which is intended to exclude websites like Craigslist, a classified advertisement service.

However, the bill creates an exception to the exemptions for preowned, used, handmade, or auctioned defective products if the electronic retail marketplace to the same extent that a retailer, because of its actions, would be liable for the sale of those goods. Such actions include, but are not limited to, promoting the product or leading a reasonable consumer to believe that the product is safe for its intended use. Opponents have argued that this provision is confusing and inapt, as brick-and-mortar retailer operations generally entail possession and control of a product. As described in more detail in Comment 7, the author has agreed to amend this provision to clarify that it is intended to be consistent with the longstanding principles underlying strict liability.

Another criticism leveled at these exemptions is the bill’s definition of “handmade,” which is defined as a product that conforms to all applicable state and federal consumer health and safety laws and is made by the vendor in the primary residence of the vendor, so long as the vendor’s sales of handmade products generate less than \$50,000 per year in revenues. Although, technically speaking, this definition does not require that the product be made by hand, the idea is to create a carve-out for products that are not mass-produced. Opponents have argued that it is difficult to know in advance whether a product complies with applicable laws and how much money the vendor’s sales actually generate. Going forward, the author may wish to explore ways to enable marketplaces to confirm that these factors apply. This could enable marketplaces to proactively focus on products that are intended to be covered by the bill.

However, Etsy and eBay’s concerns are not limited to these issues. They write:

[...] Extending product liability to Etsy and eBay along with dozens of other peer-to-peer marketplaces would severely limit selling opportunities for small businesses impacted by COVID-19. With the mass closure of brick-and-mortar

stores in California, the bill could also significantly increase costs and limit access for consumers.

Our coalition represents pure peer-to-peer marketplaces that provide a neutral platform to connect buyers and sellers while empowering thousands of small businesses in California and beyond. We enable Californian sellers, small and large, to sell new, used, homemade, vintage, and consignment products across the globe. Peer-to-peer marketplaces have a responsibility to promote consumer safety which we take very seriously, while operating within the capabilities of operating a purely third-party marketplace. That's why we invest considerable resources in our trust and safety infrastructure to provide buyers with tools to assess seller quality via ratings, reviews, location information, and direct and unhindered buyer-seller communication opportunities. All these features on our platforms equip the buyer-seller communication opportunities. This is an integral part of how we strive to consistently enforce our policies to hold our sellers accountable, build trust in our community, and to maintain the integrity of our platforms.

[...] AB 3262 does not appear to provide exemptions for innovative business models in which marketplace platforms do not take possession of inventory, do not hold, inspect or distribute products, and cannot account for any defects. In some of our marketplaces, sellers often produce custom products directly for buyers. Further, this bill goes beyond the product liability standards that already exist for sellers or other business, creating an uneven playing field for ecommerce. The issue of *control* is central to strict liability standards for retailers and our peer-to-peer marketplaces have no 'control' over the product, the description of the product listed, the price, distribution, or shipping.

(Emphasis in original.)

The issue of control is indeed a substantial factor in strict liability cases, as it is relevant to determining if the policies underlying strict liability are met. Ultimately, "the policy to be promoted by the rule is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them." (*Price, supra*, 2 Cal.3d at 251.) "Thus the accepted rationale of strict liability in California is that the responsibility for the consequences of defective products should rest on those who, as a class, are in the best position to make sure that such products never reach the consumer in the first place, but who can distribute the loss 'among the public as a cost of doing business' [citation] if they do." (*Young v. Aro Corp.* (1973) 36 Cal.App.3d 240, 247.) Liability falls in some proportion "on all parties who have mutually participated, in a dependent, interrelated way, in designing, assembling, and marketing the offending product." (*Gehl Bros. Mfg. Co. v. Superior Court* (1986) 183 Cal. App. 3d 178, 186.) "By extending liability to entities farther down the commercial stream than the manufacturer, the policy of compensating the injured

plaintiff is preserved, and retailers and distributors remain free to seek indemnity against the manufacturer of the defective product.” (*Edwards v. A.L. Lease & Co.* (1996) 46 Cal. App. 4th 1029, 1034.)

As one commentator has explained: “All those involved in the distribution chain play a part in stimulating consumer demand for the product through advertising and marketing techniques in order to enhance their own profits. By so doing, they necessarily increase the number of persons exposed to risk of injury from the product. Having increased the risk, they should bear the burden of resulting injuries.” (Zerne et al., *Cal. Practice Guide: Personal Injury* (The Rutter Group 2019) 2:1178.)

Proponents counter that Etsy and eBay’s operations have expanded beyond their initial business models. Twenty-two billion dollars worth of goods were bought and sold on eBay’s marketplace platforms in the fourth quarter of 2019 alone.¹⁷ Eighty percent of goods sold on eBay are new.¹⁸ Seventy-two percent of its sellers are outside of the U.S. In 2019, 940,000 sellers used eBay’s “promoted listings” feature on over 250 million listings to boost their listings visibility and sales.¹⁹ Proponents also note that eBay has presented itself publicly as having transitioned into a standard retail experience.²⁰ Proponents similarly argue that “Etsy in 2013 quietly began permitting mass manufactured items to be sold if the product was ‘designed’ by an Etsy seller,” quoting an article that stated Etsy is “unable or unwilling to weed out sellers of mass-manufactured goods. And having sellers who are able to move nearly a million dollars of product a year is great for Etsy’s bottom line.”²¹

The application of strict liability under this bill will continue to depend on the facts of the particular case before the court, which will ultimately make a holistic determination in view of the basic principles underlying strict products liability. Proponents argue that factors such as those described above, which suggest that the business models of these companies are, in effect, the modern reality of the consumer retail experience, compel the application of strict liability.

¹⁷ Ying Lin, *10 eBay Statistics You Need to Know in 2020*, Oberlo website, <https://www.oberlo.com/blog/eBay-statistics> (Aug. 16, 2020.)

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Ina Steiner, *eBay’s Version of Amazon’s 60 Minutes TV Special* (Dec. 11, 2013) <https://www.ecommercebytes.com/2013/12/11/eBays-version-amazons-60-minutes-tv-special/> (Aug. 16, 2020) (quoting the head of eBay Marketplaces: “Any time something goes wrong, we have a rock-solid eBay guarantee, and they’ll call us up and they’ll get their money back, period, no questions asked. ... That’s been really important to turn eBay from in essence a peer to peer marketplace to a retail standard experience”).

²¹ Larry Washburn, *How Etsy Alienated its Crafters and Lost Its Soul* (Feb. 19, 2015), <https://www.wired.com/2015/02/etsy-not-good-for-crafters/> (Aug. 16, 2020).

6. Additional stakeholder positions

a. 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:

The rise of online retailing has directly called into question the continued effectiveness of strict product liability as a way of protecting your constituents from harmful products sold without any inspection, review, or accountability. Courts applying doctrines from half a century ago, before the Internet, when the only way for a retailer to sell a product was to take physical possession of it, are struggling with how to apply it to retailers that do not exist in a physical sense yet occupy an identical role in the “stream of commerce” in selling products to consumers. Some have recognized the need to extend strict liability, some have said it is up to the Legislature to do so.

AB 3262 simply applies the same law of product liability applicable even to the smallest corner store to online sellers by clarifying that the law applies regardless of whether an online retailer whose store exists only as a series of 1s and 0s takes possession or title to a product. Under AB 3262, the same means exactly that – no less liability is imposed, but no more either. All of the defenses available to a brick-and-mortar store are under the bill identically available to online retailers.

A coalition of public interest and community-based organizations argues:

This bill will ensure that California law does not continue to subsidize the operations of Amazon – a company with a record of firing workers who blow the whistle on unsafe practices or seek to unionize, whose warehouse workplace safety records are among the worst in the industry, whose warehouse businesses practices are often inhumane, that engage in conduct that has destroyed or imperiled small retail businesses, and whose very business model is market dominance – at the literal expense of injured Californians.

b. Opposition

A coalition of organizations headed by the Civil Justice Association of California jointly argue that (1) both physical and online sellers are strictly liable for defective products under current law, and thus this bill does not create equal treatment between physical and online marketplaces; (2) many online marketplaces function like physical counterparts that are not subject to strict liability, such as shopping malls, auction houses, open air markets, antique malls; (3) the problem of judgment-proof sellers is not limited to online sellers; (4) the definition of “marketplace” is unduly expansive and

could apply in circumstances not contemplated; and (5) the bill will exacerbate the current crisis by harming consumers and small businesses who rely upon online marketplaces.

Additionally, NetChoice submitted a legal analysis of the bill. The first argument is that the bill is preempted by Section 230 of the federal Communications Decency Act. This argument was rejected by the court in *Bolger, supra*, ___ Cal.App.5th___ at *4, which stated that Section 230 “generally prevents internet service providers from being held liable as a speaker or publisher of third-party content. It does not apply here because Bolger’s strict liability claims depend on Amazon’s own activities, not its status as a speaker or publisher of content provided by [the third party seller] for its product listing.” (*Id.*)

The second argument is that the bill is unconstitutional under the equal protection clause of the 14th Amendment to the United States Constitution. NetChoice notes that, as economic legislation, the bill is subject to the deferential “rational basis test.” Under this test, according to the case they cite, legislation must be upheld as long as “‘there is any reasonably conceivable state of facts that could provide a rational basis’” for the challenged law. [Citation.] The government is not required to substantiate its reasoning with facts. ‘In an equal protection case of this type . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.’ [Citation.]” (*Merrifield v. Lockyer* (9th Cir. 2008) 547 F.3d 978, 989.) NetChoice argues that this test is met here because “[u]nder the guise of consumer safety, the bill seeks to protect brick-and-mortar retailers at the expense of their online competitors.” In fact, the purpose of the bill is to cease protecting online retailers at the expense of consumers and brick-and-mortar retailers. This argument also appears to conflict with *Bolger*, which held that strict liability principles are applicable to Amazon for a defective product sold through its website by a third party.

7. Amendments

“‘The constant theme of strict tort liability has been ‘to elevate justice and equity above the exact contours of a mathematical equation. . . .’” (*Kaminski, supra*, 175 Cal.App.3d at 457.) To determine whether the doctrine of strict products liability should be applied in a situation that has not been considered by previous precedents, California courts primarily look to the purposes of the doctrine. (*O’Neil v. Crane Co.* (2012) 53 Cal.4th 335, 362.) “The strict liability doctrine derives from judicially perceived public policy considerations, i.e., *enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among the defendants.* [Citations.] Where these policy justifications are not applicable, the courts have refused to hold the defendant strictly liable even if that defendant could technically be viewed as a “‘link in the chain’” in getting the product to the consumer market. [Citation.]” (*Arriaga, supra*, 167 Cal.App.4th at 1535 [emphasis added].)

As discussed above, strict liability is broadly applied and has evolved to meet the changing realities of commerce. Courts have begun to extend the doctrine to electronic retail marketplaces for defective products sold by third parties, affirming that its application in this context is a natural and logical extension of the principles that underlie the doctrine. It is likely that, if left to develop organically, case law will eventually apply strict liability to electronic retail marketplaces in a manner that truly protects consumers equally. This bill accelerates that process. However, in doing so, it is important to clarify that the application of strict liability in this context must continue to be consistent with the principles behind the doctrine.

To ensure that the bill is not applied in a manner inconsistent with these principles, the author has agreed to amend the bill to clarify that these principles continue to apply. The author has also agreed to amend the bill to expressly exempt classified advertisement websites such as Craigslist. The amendments would be made as follows:

Amendment

Amend Section 2 of the bill as follows:²²

SEC. 2. Section 1714.46 is added to the Civil Code, to read:

1714.46. (a) ~~Except as provided in subdivision (b),~~ Consistent with the policy considerations underlying the doctrine of strict products liability of enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among defendants, an electronic retail marketplace shall be strictly liable for all damages caused by defective products placed into the stream of commerce to the same extent that a retailer of that defective product would be liable and shall be deemed to be a retailer for purposes of California strict liability law. The liability of an electronic retail marketplace shall be equal to, but not greater than, the liability of a retailer as provided in *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, and all defenses to strict liability that are available to a retailer under California law shall be preserved for an electronic retail marketplace.

(b) An electronic retail marketplace shall not be liable as described in subdivision (a) if any of the following conditions are met:

(1) The product that caused the damage was one of the following:

²² These amendments may additionally include technical, nonsubstantive changes recommended by the Office of Legislative Counsel. They may also include the addition of co-authors.

(A) Preowned or used and prominently described or prominently advertised on the electronic retail marketplace as preowned or used at the time it was purchased by the consumer.

(B) Handmade.

(2) The electronic retail marketplace did not receive a direct or indirect financial benefit from the sale of the defective product that caused the injury. A fee that is exclusively for an advertisement is not a "financial benefit from the sale of the defective product".

(3) The sale or transaction of the product occurred by auction and is exempt from strict liability, as described in Tauber-Arons Auctioneers Co. v. Superior Court (1980) 101 Cal.App.3d 268.

(c) Notwithstanding subdivision (b), an electronic retail marketplace shall be strictly liable for the sale of preowned, used, handmade, or auctioned defective products ~~to the same extent that a retailer, because of its actions, would be liable for the sale of those goods. Those actions include, but are not limited to, promoting the product or leading a reasonable consumer to believe that the product is safe for its intended use.~~ if the application of strict liability to the electronic retail marketplace is consistent with the policy considerations underlying strict liability.

(d) As used in this section, the following definitions apply:

(1) "Electronic retail marketplace" means an electronic place or internet website that is engaged in the business of placing products into the stream of commerce in this state, regardless of whether the vendor, product, or the marketplace has a physical presence in the state or whether, as described in Canifax v. Hercules Powder Co. (1965) 237 Cal.App.2d 44, 52, the electronic retail marketplace ever takes physical possession of the product. "Electronic retail marketplace" includes any subsidiaries or related party companies, including, but not limited to, any company that would constitute an "affiliated group" under Section 1504 of the Internal Revenue Code.

(2) "Handmade" means a product that conforms to all applicable state and federal consumer health and safety laws and is made by the vendor in the primary residence of the vendor, so long as the vendor's sales of handmade products generate less than fifty thousand dollars (\$50,000) per year in revenues.

(3) "Product" means a tangible good that is subject to strict product liability law.

(4) “Vendor” means the manufacturer, distributor, seller, or supplier of the product. “Vendor” does not include the electronic retail marketplace.

(e) This section does not limit the provisions of existing law that make manufacturers, distributors, sellers, retailers, and suppliers of products strictly liable for the safety of those products and prohibit the sale of products that violate state or federal health or safety laws.

SUPPORT

California Teamsters Public Affairs Council (sponsor)

Consumer Attorneys of California (sponsor)

United Food and Commercial Workers Union Western States Council (sponsor)

Athena

California Coalition for Children’s Safety and Health

California Conference Board of The Amalgamated Transit Union

California Conference of Machinists

California Labor Federation, AFL-CIO

Children’s Advocacy Institute

Common Sense

Consumer Action

Consumer Federation of California

Consumer Reports

Consumer Watchdog

Consumers for Auto Reliability and Safety

Engineers and Scientists of California, IFPTE Local 20, AFL-CIO

Environmental Working Group

Gig Workers Rising

Inland Empire Labor Council, AFL-CIO

Inlandboatmen’s Union of The Pacific (IBU)

Los Angeles Alliance for a New Economy

Media Alliance

Monterey Bay Central Labor Council, AFL-CIO

Napa-Solano Labor Council, AFL-CIO

Natural Resources Defense Council

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

Silicon Valley Rising

South Bay Labor Council, AFL-CIO

UNITE-HERE International Union, AFL-CIO

Utility Workers of America

Warehouse Worker Resource Center
Working Partnerships USA

OPPOSITION

Auto Care Association
Automotive Parts Association
California Automotive Wholesaler's Association
California Business Roundtable
California Chamber of Commerce
California Grocers Association
California Retailers Association
Citizens Against Lawsuit Abuse
Civil Justice Association of California
Computing Technology Industry Association
eBay
Etsy
Houzz
Internet Association
Internet Coalition
National Federal of Independent Business
NetChoice
Silicon Valley Leadership Group
Simi Valley Chamber of Commerce
Specialty Equipment Market Association
TechNet
Tulare Chamber of Commerce
Western Growers Association

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 1790 (Wicks, Ch. 635, Stats. 2019) requires a marketplace, as defined, to ensure that its terms and conditions regarding commercial relationships with marketplace sellers meet specified requirements, including that the terms and conditions are drafted in plain and intelligible language. If a marketplace decides to suspend or terminate a marketplace seller based upon an alleged violation of law or a term, condition, or policy of the marketplace, the bill requires the marketplace to provide the marketplace seller with a written statement of reasons for that decision, as specified.

SB 155 (Padilla, Ch. 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.

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

AB 496 (Koretz, Ch. 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.

PRIOR VOTES:

Assembly Floor (Ayes 54, Noes 14)

Assembly Judiciary Committee (Ayes 8, Noes 3)
