
THIRD READING

Bill No: AB 3262
Author: Mark Stone (D), et al.
Amended: 8/24/20 in Senate
Vote: 21

SENATE JUDICIARY COMMITTEE: 7-0, 8/18/20

AYES: Jackson, Durazo, Lena Gonzalez, Monning, Stern, Umberg, Wieckowski

NO VOTE RECORDED: Borgeas, Melendez

ASSEMBLY FLOOR: 54-14, 6/11/20 - See last page for vote

SUBJECT: Product liability: electronic retail marketplaces

SOURCE: California Teamsters Public Affairs Council
Consumer Attorneys of California
United Food and Commercial Workers Union Western States
Council

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

Senate Floor Amendments of 8/24/20 (1) replace language that states, for purposes of this bill's exemption for marketplaces that do not receive a financial benefit from the sale of the product, that a financial benefit does not include a fee that is exclusively for an advertisement, with intent language that instead states that revenue accepted for online advertisements that are the equivalent of advertisements accepted by magazines, newspapers, or broadcasters, without further facilitation of the placement of products into the stream of commerce, is not considered a financial benefit for purposes of this bill; (2) clarify that all defenses to strict liability are available to an electronic retail marketplace, instead of defenses specific to retailers; and (3) clarify that the role of the marketplace vis-à-vis the product may include facilitating its placement into the stream of commerce in this state.

ANALYSIS:

Existing 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”].)
- 2) 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 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*]).
- 3) Exempts from strict liability businesses without a “special position vis-a-vis the original manufacturer” or that play “no more than a random and accidental role in the distribution of the [product].” (*Tauber-Arons Auctioneers Co. v. Superior Court* (1980) 101 Cal.App.3d 268 [*Tauber-Arons*].)
- 4) Establishes that the policy considerations underlying strict liability are “enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among the defendants. [Citations.]” (*Arriaga v. CitiCapital Commercial Corp.* (2008) 167 Cal.App.4th 1527, 1535 [*Arriaga*].)

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.

- g) Under existing law, magazines, newspapers, and broadcasters are not subject to strict products liability when they accept revenue for advertisements for products that are defective and cause harm. Therefore, it is the intent of the Legislature that revenue accepted for online advertisements that are the equivalent of advertisements accepted by magazines, newspapers, or broadcasters, without further facilitation of the placement of products into the stream of commerce, is not considered a financial benefit for purposes of this act.
- 2) Makes, 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 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 under California law are preserved for an electronic retail marketplace.
- 3) Provides that an electronic retail marketplace is not liable under the provisions 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.¹
- c) 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.
- 4) Provides that an electronic retail marketplace is strictly liable for the sale of preowned, used, handmade, or auctioned defective products if the application of strict liability to the electronic retail marketplace is consistent with the policy considerations underlying strict liability.
- 5) Defines “electronic retail marketplace” as an electronic place or internet website that is engaged in the business of placing or facilitating the placement of 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.

¹ The recent amendment to add (1)(g), above, which indicates the Legislature's intent to exclude from strict liability classified advertising services such as Craigslist, clarifies the limited scope of this exemption.

Background

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.² When such a product causes an injury, plaintiffs can be left without recourse against the vendor who sold the product thorough the marketplace, as the vendor may be insolvent or unavailable.³

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. “‘The constant theme of strict tort liability has been ‘to elevate justice and equity above the exact contours of a mathematical equation. . . .’” (*Kaminski v. Western MacArthur Co.* (1985) 175 Cal.App.3d 445, 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.) However, the doctrine’s application to products sold by third parties on electronic marketplaces is unsettled.⁴

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. However, application of

² For example, 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.” (Berzon, Alexandra, et al. *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products* (Aug. 23, 2019) The Wall Street Journal, Dow Jones & Company, available at www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990 (Aug. 16, 2020).)

³ “A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” (Code. Civ. Proc. § 410.10.)

⁴ For more details, see the Senate Judiciary Committee’s analysis of the bill.

strict liability under the bill's provisions must continue to be guided by the longstanding principles underlying strict liability of enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among defendants

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 8/25/20)

California Teamsters Public Affairs Council (co-source)

Consumer Attorneys of California (co-source)

United Food and Commercial Workers Union Western States Council (co-source)

Amazon

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

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: (Verified 8/25/20)

1stDibbs
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
Poshmark
Silicon Valley Leadership Group
Simi Valley Chamber of Commerce
Specialty Equipment Market Association
TechNet
Tulare Chamber of Commerce
Western Growers Association

ARGUMENTS IN SUPPORT: 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.”

Amazon writes: “[W]e agree it is time for legislation that makes it clear that customers can seek remedies from any store where they buy products. Those customer protections should apply to all online marketplaces regardless of their particular business models.”

ARGUMENTS IN 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.

ASSEMBLY FLOOR: 54-14, 6/11/20

AYES: Bauer-Kahan, Berman, Bloom, Boerner Horvath, Bonta, Calderon, Carrillo, Cervantes, Chau, Chiu, Chu, Cooley, Cooper, Cunningham, Megan Dahle, Diep, Eggman, Frazier, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gloria, Gonzalez, Grayson, Holden, Jones-Sawyer, Kalra, Kamlager, Levine, Limón, Low, Maienschein, Mayes, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Santiago, Smith, Mark Stone, Ting, Weber, Wicks, Wood, Rendon

NOES: Bigelow, Brough, Chen, Choi, Flora, Fong, Gray, Kiley, Lackey, Mathis, Obernolte, Patterson, Voepel, Waldron

NO VOTE RECORDED: Aguiar-Curry, Arambula, Burke, Daly, Gipson, Irwin, O'Donnell, Petrie-Norris, Quirk, Blanca Rubio, Salas

Prepared by: Josh Tosney / JUD. / (916) 651-4113
8/25/20 15:24:50

**** END ****