

ASSEMBLY THIRD READING  
AB 2408 (Cunningham and Wicks)  
As Amended May 4, 2022  
Majority vote

## SUMMARY

Makes social media platforms, as defined, civilly liable for negligently addicting child users.

### Major Provisions

- 1) Establishes a duty for a social media platform to not negligently addict child users, including by any of the following means:
  - a) The use or sale of a child user's personal data or;
  - b) The development, design, implementation, or maintenance of a design, feature, or affordance.
- 2) Authorizes a civil cause of action for a person authorized to assert the legal rights of a child user who suffers injury as a result of a violation of the bill's provisions, and allows for recovery of any of the following relief:
  - a) Actual damages, including in a class action where the amount of damages awarded must be at least \$1,000 per member of the class;
  - b) A civil penalty of up to \$25,000 per violation;
  - c) Injunctive relief;
  - d) Punitive damages;
  - e) Litigation costs and no more than twice the amount of reasonable attorney's fees;
  - f) Any other relief that the court deems proper; and
  - g) An additional penalty of up to \$250,000 for a knowing or willful violation.
- 3) Establishes liability for a social media platform that, before January 1, 2023, developed, designed, implemented, or maintained features that were known, or should have been known, by the platform to be addictive to child users, for all damages to child users that are, in whole or in part, caused by the platform's features, including, but not limited to, suicide, mental illness, eating disorders, emotional distress, and costs for medical care, including care provided by licensed mental health professionals. Allows a social media platform to avoid liability under this clause if, by April 1, 2023, the platform ceases development, design, implementation, or maintenance of features that were known, or should have been known, by the platform to be addictive to child users.
- 4) Offers a safe harbor provision whereby a social media platform will not be subject to a civil penalty under 2), above, if the operator does both of the following:

- a) Instituted and maintained a program of at least quarterly audits of its practices, designs, features, and affordances to detect practices or features that have the potential to cause or contribute to the addiction of child users; and
- b) Corrected, within 30 days of the completion of the audit, any practice, design, feature, or affordance discovered by the audit to present more than a de minimis risk of violation of the provisions of this bill.

## COMMENTS

Social media has become so common place in our society, that it is rare to find someone who does not have any social media presence. We use it for all sorts of endeavors, from party planning and dating, to marketing businesses. For many, social media is a vital way to connect with the world around them and engage in our increasingly global society. Particularly over the last decade, social media has seen astounding growth. As can be true for anything, the development of new products is accompanied by potential pitfalls and dangers, a risk which in the case of social media is particularly acute for minors and young adults.

In an attempt to address concerning mental health data, this bill would create civil liability for social media platforms who negligently addict child users.

*This bill* clarifies a standard of care for social media platforms not to addict child users. Under the provisions of this bill, a social media platform that negligently addicts a child user either through use or sale of the users data or through development or implementation of a new feature or design could be liable. A claimant would be able to recover a number of civil remedies, including up to \$25,000 per violation in civil penalties, as well as actual and punitive damages. Further, a claimant who successfully demonstrates that the platform knew or intended to addict children could subject the platform to an additional \$250,000 civil penalty.

*The applicable standard for liability.* This bill incorporates existing statutory language from Civil Code Section 1714, which imposes liability "not only for the results of [ones] willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." (Code of Civil Procedure (CCP) Section 1714(a).) Applied to the circumstances contemplated by this bill, therefore, a social media platform may be held liable for addicting child users, if the addiction arose as a result of negligent behavior by the social media platform. A parent or guardian would not be able to recover under this bill simply by demonstrating that their child was addicted to a social media platform. Instead, the claimant would also need to demonstrate that the platform's negligent acts resulted in the addiction, including, for example, a failure to research or investigate potential harmful results of a new feature. This is consistent with existing law, and arguably imposes no more heightened risk of liability than these companies already face under existing CCP Section 1714.

*The safe harbor provision.* The bill provides a safe harbor provision that would allow social media platforms to avoid liability for future violations if they implement a practice of regular audits to identify harmful practices or features and, within 30 days of identification, remove any potentially harmful practices or features. Under this language, a platform that develops and implements a feature in November may conduct a quarterly audit on December 1st at which the November feature is found to have potentially harmful effects. If the platform subsequently removes the feature by December 31st (30 days after identification), they may successfully avoid liability under this bill. This amendment would arguably be a significant tool to encourage the

development of a culture within the industry that prioritizes the health of their users. The proposed amendments read:

*Federal Preemption Concerns.* The opposition has posited that this bill is invalid on both constitutional and federal preemption grounds. Specifically, they state:

It is in many ways similar to regulations state and local governments have attempted to enact to protect minors from effects of playing violent video games. Such laws have repeatedly been found unconstitutional. [...] The bill directly interferes with expressive rights of both the minors who will be banned from social media services and the service providers themselves. [...] Children have First Amendment rights to both receive information and to express themselves. While protecting children from self-harm is an important interest, AB 2408 makes no attempt to even reasonably scope the restrictions on social media platforms to that goal, let alone to 'narrowly tailor' the law as the Constitution requires.

To bolster its argument, the opposition cites numerous court decisions in other jurisdictions. While tangentially related, these jurisdictions have not issued controlling case law on the validity of California law.

What the Judiciary Committee finds more convincing is the decision issued by the Ninth Circuit Court of Appeals in *Lemmon v. Snap, Inc.* In this matter, Snap attempted to argue that the Communications Decency Act immunized them from liability in a negligent design lawsuit, brought by parents whose children were killed in a car accident that the parents claim was a result of Snap's negligent design of a new feature. (*Lemmon v. Snap, Inc* (2021) 995 F.3d 1085.) In support of their position, Snap argued that the federal Communications Decency Act shielded them from liability for the publication of third party materials. (*Id.* at pp. 1090 – 1091.) The Ninth Circuit applied the three-pronged test set forth by *Barnes v. Yahoo! Inc.* (2009) 570 F.3d 1096, which held that a company is immunized if it is 1) a provider or user of an interactive computer service, 2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker, 3) of information provided by another information content provider. (*Id.* at p. 1091) The court ultimately decided against Snap "because the Parents' claim turns on Snap's design of Snapchat." (*Id.* at p. 1092).

This bill would arguably fall under the same analysis as the parents' litigation in *Lemmon*, as it focuses on social media platforms' internal manipulation of data and design, rather than third-party content. Further, recent amendments significantly narrow the scope of the bill, not only making it more closely aligned with the Ninth Circuit's decision in *Lemmon*, but also further protecting it from a claim of unconstitutionality. Finally, nothing in the bill suggests a limit on child users' ability to receive content. Any content that is otherwise available for consumption for child users would continue to be available to them. What this bill addresses is the strategies or tools used by social media platforms to encourage use of their products that may ultimately cause significant harm to minors.

#### **According to the Author**

American children and teens are in an unprecedented crisis. Over the past decade, rates of suicide, hospitalizations from self-harm, and depression have soared, with suicides and self-harm hospitalizations doubling in that short span. That sharp rise in the worst mental health problems afflicting teens and children coincides almost exactly with the rise in social media, especially Meta (formerly Facebook)-owned Instagram.

**Arguments in Support**

This bill is sponsored by CommonSense Media and the Children's Advocacy Institute at the University of San Diego. It is supported by a coalition of legal, child, and consumer advocate organizations. The supporters make comparisons between social media and tobacco companies, and claim a need for corresponding regulation of marketing practices. Additionally, supporters reference the marked increase of mental health struggles among young users of social media and a corresponding need for accountability measures as the basis for this bill. The Children's Advocacy Institute writes:

Nobody seriously contests that we are in an unprecedented teen and youth mental crisis. Suicides, self-harm, major depression are spiking in ways never before seen, especially among teen girls. An entire generation of future American citizens is at-risk.

We all claim that children are our top priority. If so, all doubts must be resolved in favor of urgently putting out the mental health fire that is currently engulfing our children.

None of the benefits of social media platform use by children and teens is dependent upon the techniques that most closely correlate to causing addiction among children and teens. Social media as a concept is not the problem. Sophisticated and studied neuroscientific techniques deployed by vast companies to keep children and teens on the platform against their will, no matter the cost to their mental health and that correlate with addiction, are the problem. (Footnote omitted.)

**Arguments in Opposition**

TechNet, NetChoice, the California Chamber of Commerce, and the Chamber of Progress oppose AB 2408, arguing that it would impose unmanageable civil liability on social media platforms in California, and additionally claim that the bill is unconstitutional. In particular, TechNet claims "[t]he bill directly interferes with expressive rights of both the minors who will be banned from social media services and the service providers themselves," and that "[d]ue to its unprecedented civil liability and enforcement provisions, AB 2408 would make social media unavailable to adolescents in California." They further claim:

There is no social media company let alone any business that could tolerate that legal risk, especially considering how much this bill puts the thumb on the scales of justice for plaintiffs. *In response, social media companies and online web services would have no choice but to cease operations for kids under 18 and would institute stringent age-verification in order to ensure that adolescents did not use their sites.* Kids under 18 would be shut out of one of their few solaces during the COVID-19 pandemic. When schools were shut down and they could no longer interact with their friends and peers in person, they used social media to maintain connections and a sense of normalcy and belonging. AB 2408 would ensure that kids under 18 would no longer have an online community to turn to."

**FISCAL COMMENTS**

None

**VOTES**

**ASM JUDICIARY: 9-0-1**

**YES:** Stone, Cunningham, Davies, Kalra, Maienschein, Reyes, Robert Rivas, Carrillo, Bloom

**ABS, ABST OR NV:** Kiley

**UPDATED**

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CONSULTANT: Manuela Boucher / JUD. / (916) 319-2334

FN: 0002323