

AMENDED IN SENATE AUGUST 13, 2020

AMENDED IN SENATE AUGUST 5, 2020

AMENDED IN SENATE JULY 16, 2020

AMENDED IN ASSEMBLY JUNE 8, 2020

AMENDED IN ASSEMBLY MAY 4, 2020

CALIFORNIA LEGISLATURE—2019–20 REGULAR SESSION

ASSEMBLY BILL

No. 3262

**Introduced by Assembly Member Mark Stone
(Coauthors: Assembly Members Gonzalez and Wicks)**

February 21, 2020

An act to add Section 1714.46 to the Civil Code, relating to civil liability.

LEGISLATIVE COUNSEL'S DIGEST

AB 3262, as amended, Mark Stone. Product liability: electronic retail marketplaces.

Existing law imposes strict liability upon persons who place a defective product on the market, including retailers engaged in the business of distributing goods to the public, for injuries caused by the product. Existing law exempts a manufacturer or seller from liability, except as provided, in any action for injury or death caused by a product, other than an action based on a manufacturing defect or breach of an express warranty, if the product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community and the product

is a common consumer product intended for personal consumption, as specified.

This bill would require an electronic retail marketplace, as defined, to be held strictly liable, subject to certain exceptions, for all damages caused by defective products ~~distributed by or through the electronic retail marketplace~~ placed into the stream of commerce to the same extent as a retailer.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
2 following:

3 (a) Over the past 10 years, online sales of consumer goods have
4 increased from less than 5 percent of retail sales to more than 15
5 percent of all retail sales in the United States. In recognition that
6 the percentage of retail sales that are online is expected to continue
7 to increase and that over \$600 billion in online sales occurred in
8 2019 in the United States, increasing dramatically during the
9 COVID-19 pandemic, it is clear that electronic retail marketplaces
10 play a substantial role in the distribution of goods to consumers
11 in the State of California, whether or not they ever take physical
12 possession of those goods. Furthermore, when manufacturers of
13 products sold online are located in foreign countries, those
14 manufacturers could be outside of the jurisdiction of the courts of
15 the State of California. Under these circumstances, the consumer
16 could be left with no recourse for damages caused by defective
17 products made by foreign manufacturers unless the electronic retail
18 marketplace that distributed the product is subject to liability for
19 the defective product.

20 (b) Under existing law a manufacturer, seller of goods, or other
21 entity that is engaged in the business of distributing goods to the
22 public is strictly liable in tort if a product they manufacture, sell,
23 or distribute proves to have a defect that causes injury to a human
24 being.

25 (c) The purpose of that liability is to ensure that the costs of
26 injuries resulting from defective products are borne by the
27 manufacturers, sellers, and other entities that are engaged in the

1 business of distributing goods to the public, rather than by the
2 injured consumers.

3 (d) Under existing law, the elements of a strict liability action
4 are all of the following:

5 (1) The product was used in an intended or reasonably
6 foreseeable manner.

7 (2) The product was in a defective condition when it left the
8 defendant's possession.

9 (3) The defective product was the legal cause of the plaintiff's
10 injuries or damages.

11 (e) There is uncertainty how to apply strict product liability law
12 to electronic retail marketplaces. As a result, some injured
13 consumers who purchase products through electronic retail
14 marketplaces are unable to obtain compensation for their injuries
15 from the entities that manufactured, distributed, or sold the
16 products, thereby defeating the compensatory purpose of strict
17 liability law.

18 (f) Unless this uncertainty is addressed in favor of compensating
19 injured consumers, more and more companies will forego selling
20 products through physical stores where strict product liability
21 principles would require compensation. Instead, manufacturers,
22 distributors, and sellers will emphasize electronic retail marketplace
23 sales of possibly defective and injurious products thereby
24 increasing the financial burdens on consumers, public health
25 systems, and private and public insurers who, alone or in
26 combination, will unjustly have to pay for the cost of treating and
27 healing injuries without contribution from those that actually
28 caused the harm or profited from the manufacture, sale, or
29 distribution of the defective product. Furthermore, the electronic
30 retail marketplace may be the only member of the enterprise
31 reasonably available to the injured consumer. In other cases the
32 electronic retail marketplace may be in a position to exert pressure
33 on manufacturers to ensure that their products are safe. In this way,
34 strict liability of the electronic retail marketplace serves as an
35 incentive to safety and the lack of such liability creates an increased
36 risk of defective products being sold to consumers. Strict liability
37 on the manufacturer and the electronic retail marketplace alike
38 affords maximum protection to the injured plaintiff and works no
39 injustice to the electronic retail marketplace or manufacturer as

1 they can adjust the costs of such protection between them in the
 2 course of their business relationship.

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

4 1714.46. (a) Except as provided in subdivision (b), an
 5 electronic retail marketplace shall be strictly liable for all damages
 6 caused by defective products ~~distributed by or through the~~
 7 ~~electronic retail marketplace~~ *placed into the stream of commerce*
 8 ~~to the same extent as that~~ a retailer of that defective product *would*
 9 *be liable* and shall be deemed to be a retailer for purposes of
 10 California strict liability law, ~~whether or not the electronic retail~~
 11 ~~marketplace ever takes physical possession of, or title to, the~~
 12 ~~defective product.~~ *law.* The liability of an electronic retail
 13 marketplace shall be equal to, but not greater than, the liability of
 14 a retailer as provided in *Vandermark v. Ford Motor Co. (1964) 61*
 15 *Cal.2d 256*, and all defenses to strict liability that are available to
 16 a retailer under California law shall be preserved for an electronic
 17 retail marketplace.

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

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

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

26 (B) Handmade.

27 (2) The electronic retail marketplace did not receive
 28 ~~compensation or payment for the product, whether in the form of~~
 29 ~~payment for the product directly or indirectly from the consumer,~~
 30 ~~or in the form of any other compensation, including referral, listing,~~
 31 ~~service, or other fees paid to the electronic retail marketplace~~
 32 ~~contingent upon a direct or indirect financial benefit from the sale~~
 33 of the defective product that caused the injury.

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

37 (c) Notwithstanding subdivision (b), an electronic retail
 38 marketplace shall be strictly liable for the sale of preowned, used,
 39 handmade, or auctioned defective products ~~if the electronic retail~~
 40 ~~marketplace modifies, alters, inspects, tests, or operates the product,~~

1 ~~plays an active role in the marketing enterprise of the product,~~
2 ~~places the product in the stream of commerce, creates a reasonable~~
3 ~~expectation in the minds of users that the used product is safe for~~
4 ~~its intended use, or provides any warranty or guarantee regarding~~
5 ~~the quality of the product, including, but not limited to, describing~~
6 ~~the product as “like new” or “refurbished.” to the same extent that~~
7 ~~a retailer, because of its actions, would be liable for the sale of~~
8 ~~those goods. Those actions include, but are not limited to,~~
9 ~~promoting the product or leading a reasonable consumer to believe~~
10 ~~that the product is safe for its intended use.~~

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

12 (1) “Electronic retail marketplace” means an electronic place
13 or internet website that is engaged in the business of ~~distributing~~
14 ~~placing products to the public for delivery into the stream of~~
15 ~~commerce in this state by or through that electronic retail~~
16 ~~marketplace, state, regardless of whether the vendor, product, or~~
17 ~~the marketplace has a physical presence in the state or whether~~
18 ~~whether, as described in *Canifax v. Hercules Powder Co. (1965)*~~
19 ~~237 Cal.App.2d 44, 52, the electronic retail marketplace ever takes~~
20 ~~physical possession of the product. “Electronic retail marketplace”~~
21 ~~includes any subsidiaries or related party companies, including,~~
22 ~~but not limited to, any company that would constitute an “affiliated~~
23 ~~group” under Section 1504 of the Internal Revenue Code.~~

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

29 (3) “Product” means a tangible good that is subject to strict
30 product liability law.

31 (3)

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

35 (e) This section does not limit the provisions of existing law
36 that make manufacturers, distributors, sellers, retailers, and
37 suppliers of products strictly liable for the safety of those products

- 1 and prohibit the sale of products that violate state or federal health
- 2 or safety laws.

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