



FLOOR ALERT

August 19, 2020

To: Members, California State Senate

Re: **AB 3262 (Stone) as Amended August 13, 2020 – OPPOSE – Upends longstanding law to extend strict liability to a broad new category of online businesses**

The Civil Justice Association of California (CJAC) and the below listed organizations must respectfully **OPPOSE AB 3262**, which would unfairly and arbitrarily apply strict product liability to online marketplaces, in a serious departure from well-established legal standards and public policy governing strict liability.

AB 3262 will stifle online marketplaces and the many small businesses that sell through them at a time when businesses are already under extreme pressure and when consumers appreciate and rely upon the choice and convenience these marketplaces provide.

1. Both physical and online sellers are strictly liable for defective products under current law

It is important to understand what AB 3262 does *not* do. AB 3262 does *not* create equal treatment between physical (brick and mortar) and online sellers or retailers, as that is already the status quo. Under current law, both *physical* and *online* sellers are strictly liable for product defects, as both are deemed to be in the vertical chain of distribution, along with manufacturers and distributors.

2. AB 3262 unfairly singles out online marketplaces for greater liability than physical marketplaces and sets a bad precedent for arbitrary strict liability expansion to any industry.

Additionally, AB 3262 does *not* create equal treatment between physical and online marketplaces, both of which bring groups of sellers and buyers together. It does the opposite. AB 3262 applies only to marketplaces that are “an electronic place or internet website.” This makes physical marketplaces that function the same way –such as shopping malls, auction houses, open air markets, antique malls, and more – arbitrarily exempt from AB 3262.

Under existing law, an online marketplace that brings buyers and sellers together is subject to the same product liability standards as their brick and mortar counterparts. *Either can be found strictly liable* if, like a seller, they have control over the product and the ability to make it safer. California courts have used, for more than two decades, a multifactor test to determine this, the *Bay Summit* test.¹

The *Bay Summit* test has been used to determine whether strict product liability should apply to many types of businesses, including: online marketplaces, raw material suppliers, equipment finance lessors, product endorsers, fitness facilities, hotel proprietors, wholesale grocery membership collectives, and doctors consulted in the design of medical devices.

If online marketplaces can be singled out from this list for blanket strict liability, which industry on the list is next? AB 3262 is a significant threat of arbitrary strict liability expansion not only for online marketplaces but for many industry groups.

3. The arguments by proponents that online marketplaces should be treated differently are unfounded.

Bill proponents argue that AB 3262 is meant to address the difficulty of recovering monetary damages for defective products from “overseas” and “fly-by-night” sellers, but this is not a problem unique to the internet. One does not need to go online or overseas to find such sellers. The difficulty of recovery is more often due to a business being insolvent or low on funds, not whether it is on the internet. While consumers deserve to recover when wronged, the answer is not to arbitrarily apply strict liability to a subset of businesses who are not responsible for the wrong.

Additionally, AB 3262 declares that imposing strict liability on online marketplaces is necessary to prevent manufacturers, suppliers, and product sellers from abandoning product sales in physical locations and moving to online platforms to avoid liability for product defects. This concern also has no foundation. As noted above, these entities are already strictly liable regardless of whether the product is sold online or offline. Further, there is no factual basis for the notion that the decision by companies to sell products online is driven by liability concerns, rather than by market demand.

¹ *Bay Summit Community Ass'n. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 776. (Multi-factor test to determine when a company is strictly liable for product defects: (1) received a “direct financial benefit” from its activities and the sale of the product; (2) had a role “integral to the business enterprise” that was a necessary to bring the product to market; and (3) had “control over, or a substantial ability to influence” manufacturing or distribution.

4. The definition of “marketplace” in AB 3262 is expansive and could create strict liability for a broad range of online businesses.

Although AB 3262 states its intention is to address online marketplaces with relationships beyond a mere conduit between sellers and buyers, it does not limit its scope accordingly. Instead, with limited exceptions, AB 3262 applies strict liability to all online marketplaces as defined under Civil Code Section 1749.7, which is very broad and vague, and does not require any relationship with customers.²

Additionally, it is unclear whether AB 3262 could also apply to many online marketplaces that sell services, as the bill does not define “product” and the marketplace definition includes any website that “sells or offers for retail sale services or tangible personal property” and has an agreement with sellers who do so.

This leaves the door open for broad interpretation and application of AB 3262 and creates uncertainty for many online businesses that bring different together different sellers of services and products and connect them with buyers including: food delivery, travel, vacation rentals, clothing, stationary, home contractors, childcare, professional services and many more.

5. The timing of AB 3262 will exacerbate the current crisis by harming consumers and small businesses who rely upon online marketplaces.

Bill proponents claim the bill is necessary given the current COVID-19 crisis, but the reality is that it could not come at a worse time. Homebound Californians appreciate and seek out online marketplaces for convenience and access to more shopping choices.

AB 3262 will harm consumers by resulting in higher product costs and limiting shopping choices. The bill will also create new burdens on already struggling businesses by making it more difficult and expensive to gain access to online marketplaces, upon which small businesses rely (now more than ever) to reach customers. Rather than a reasonable reaction to the current crisis, AB 3262 reflects a perennial effort by trial lawyers to expand strict liability to more businesses and should be rejected.

Conclusion

AB 3262’s proposal that strict product liability should arbitrarily extend to all electronic marketplaces regardless of their responsibility for the defective products is wrong. It unfairly singles them out for different treatment from other industries and runs afoul of long-standing legal and public policy principles.

For the foregoing reasons, our organizations respectfully **OPPOSE AB 3262** and urge your **NO** vote. If you have any questions please contact Jaime Huff at jhuff@cjac.org or by phone 916-956-2905.

² Civil Code Section 1749.7(1) “Marketplace” means a physical or electronic place, including, but not limited to, a store, booth, internet website, catalog, television or radio broadcast, or a dedicated sales software application, that sells or offers for retail sale services or tangible personal property for delivery in this state and has an agreement with a marketplace seller to make retail sales of services or tangible personal property through that marketplace, regardless of whether the tangible personal property or the marketplace has a physical presence in the state.

Sincerely,



Jaime Huff

Vice President and Counsel, Public Policy

On behalf of the below-listed organizations:

Civil Justice Association of California - Jaime Huff

Auto Care Association - Aaron Lowe

Automotive Body Parts Association (ABPA) - Edward T. Salamy

California Automotive Wholesalers' Association, Representing the Automotive Parts Industry - Rodney Perini

California Business Roundtable - Robert Lapsey

California Chamber of Commerce - Shoeb Mohammed

California Grocers Association - Kelly Ash

California Retailers Association - Margaret Gladstein

Citizens Against Lawsuit Abuse - Maryann Marino

CompTIA - Laura Curtis

Houzz - Hissan Bajwa

Internet Association - Robert Callahan

Internet Coalition - Tammy Cota

LKQ Corporation - Catalina Jelkh Pareja

National Federation of Independent Business - John Kabateck

NetChoice - Tammy Cota

Silicon Valley Leadership Group - Justin Hyer

Simi Valley Chamber of Commerce - Samantha Shapiro

Specialty Equipment Market Association (SEMA) - Christian Robinson

TechNet - Courtney Jensen

Tulare Chamber of Commerce - Donnette Silva Carter

Western Growers Association - Gail Delihant