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CALIFORNIA PRODUCTS LIABILITY LAW: A PRIMER

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A plaintiff seeking to recover damages for injuries caused by a defective product generally may assert claims under three theories: (a) strict products liability, (b) negligence and (c) breach of warranty. All three theories may be pled in the alternative. Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal.3d 379. Under certain circumstances, a claim for fraud and deceit may also be asserted.

II. STRICT PRODUCTS LIABILITY: GENERAL RULES AND APPLICATION

A. IN GENERAL: A manufacturer (or supplier/seller) 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 person. Liability is imposed by law in order to ensure that the costs of injuries resulting from 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. Greenman v. Yuba Power Products (1963) 59 Cal.2d 57.

NOTE: California has not adopted either Restatement 2d, Torts, Section 402A or Restatement 3d, Torts: Products Liability.

1. Elements of A Strict Liability Action in California:

a. Product was used in intended or reasonably foreseeable manner (includes reasonably foreseeable misuse, abuse, changes, alterations, etc.);

b. Product was in defective condition when it left defendant's possession;

c. The defective product was the legal cause of the plaintiff's injuries or damages.

See Greenman v. Yuba Power Products, Inc., *supra*.

NOTE: Strict liability in tort does not apply to a case in which the defect in the product caused damage only to the product itself and no *further* damage to the plaintiff's person or property. Fieldstone Co. v. Briggs Plumbing Prods., Inc. (1997) 54 Cal.App.4th 357.

2. **Types of Defects.** There are three types of defects: (a) design defect, (b) manufacturing defect, and (c) inadequate warning.

The essential factual elements of a strict liability claim are met when: Plaintiff proves that he was harmed by a product distributed/manufactured/sold by defendant that: (1) contained a manufacturing defect; or (2) was defectively designed; or (3) did not include sufficient instructions or warning of potential safety hazards. *CACI*[1] *1200.*

NOTE: Strict products liability actions encompass both latent and patent defects. Luque v. McLean (1972) 8 Cal.3d 136.

3. **Evidentiary Matters.**

a. *Circumstantial evidence* that the injury was the result of the alleged defect is sufficient to shift the burden of proof to the defendant. Campbell v. General Motors Corp. (1982) 32 Cal.3d 112.

b. *Subsequent Remedial Measures*. Evidence of subsequent remedial measures or repairs undertaken by the manufacturer or seller is admissible in a strict liability action. Ault v. International Harvester Co. (1974) 13 Cal. 3d 113.

NOTE: Federal Rule of Evidence 407, regarding the admissibility of evidence regarding subsequent remedial measures, was amended so as to expressly extend to product liability actions and to clarify that it only applies to remedial measures made after the occurrence that produced the injury giving rise to the action.

c. *Safety Statutes and Regulations*. Because safety standards and regulation are often minimal, compliance with such does not establish the absence of negligence.

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[1]California Jury Instructions by the Council of California Advisory Committee on Civil Jury Instructions. These instructions are approved by the Judicial Council as the state's official jury instructions pursuant to California Rules of Court, **Rule 2.1050(a)**.

Hasson v. Ford Motor Co. (1982) 32 Cal.3d 388. On the other hand, courts have sometimes found that violation of product safety regulations causes products to be defective as a matter of law. See McGee v. Cessna Aircraft Co. (1983) 139 Cal.App.3d 179 (violation of Federal Aviation Regulation was proof of design defect); DiRosa v. Showa Denko K.K. (1991) 44 Cal.App.4th 799 (violation of the United States Food, Drug and Cosmetic Act established negligence *per se*).

B. DESIGN DEFECT.

1. Requirements. The California Supreme Court set out the requirements for establishing a defect in the design of a product in Barker v. Lull Engineering Co. (1978) 20 Cal.3d 413. A product is defective in design if either of the following two tests are met:

a. *Consumer Expectation Test*. The product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Plaintiff must prove: **(1) that defendant manufactured/distributed/sold the product; (2) that the product did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way; (3) that plaintiff was harmed; and (4) that the product's failure to perform safely was a substantial factor in causing plaintiff's harm. *CACI 1203*.**

The consumer expectation test is reserved only for cases in which the *everyday experience* of the products' user permits a conclusion that the product's design violated *minimum* safety assumptions and is therefore defective ***regardless of expert opinion about the merits of the design*. Thus, "where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect."** Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 567 (test not applicable where the plaintiff's theory of the case was one of technical and mechanical detail; "complex' products even when used as intended, may cause injury in a way that does not

engage its ordinary consumers' reasonable minimum assumptions about safe performance); Morson v. Superior Court (2001) 90 Cal.App.4th 775, 784 (consumer expectation test does not apply where alleged design defects of latex gloves caused allergic reactions); see also In re Coordinated Latex Glove Litigation (2001) 99 Cal.App.4th 594. Pruitt v. General Motors Corp. (1999) 72 Cal.App.4th 1480 (airbag deployment not part of the "every day experience" of the consuming public); but see McCabe v. American Honda Motor, Inc. (2002) 100 Cal.App.4th 1111 (under consumer expectation test, triable issues of fact exist as to whether a design defect of an airbag is the kind of product about which consumers can form minimum safety assumptions).

NOTE: Recently, a court found it to be well settled that "expert testimony is not relevant in a consumer expectations theory of liability." Mansur v. Ford Motor Company, (2011) 197 Cal. App. 4th 1365, 1380. A plaintiff's own testimony concerning his expectations about a product's safety has been deemed sufficient to require a jury instruction on the consumer expectations test. Saller v. Crown Cork & Seal Co., Inc. (2010) 187 Cal. App. 4th 1220.

However, under certain circumstances, if the expectations of the product's limited group of ordinary consumers are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the product's actual consumers do expect may be proper. Soule at 568, f.n. 4; see also, Lunghi v. Clark Equipment Co. (1984) 153 Cal.App.3d 485, 496.

- or -

b. *Risk/Benefit Test*. **It is met when: the plaintiff proves that (1) that defendant manufactured/distributed/sold the product; (2) that plaintiff was harmed; and (3) that the product's design was a substantial factor in causing harm to plaintiff AND the defendant fails to prove that the benefits of the product's design outweigh the risks of the design. *CACI 1204.***

Once the plaintiff makes a prima facie showing of causation, *the burden of proof shifts to the defendant to establish that the benefits of the design outweigh its risks*. The product may be found defective in design even if it satisfies ordinary consumer expectations, if the jury *through hindsight* finds that the risk of danger inherent in the challenged design outweighs the benefits of such design. Relevant factors include:

(1) The gravity of the potential harm resulting from the use of the product..

(2) The likelihood that this harm would occur.

(3) The feasibility of an alternative safer design at the time of manufacture.

(4) The cost of an alternative design.

(5) The disadvantages of an alternative design.

(6) Other relevant factor(s).

CACI 1204; Hansen v. Sunnyside Products, Inc. (1997) 55 Cal.App.4th 1497 (product label warnings are relevant in determining whether product has a design defect under the risk/benefit test); McCabe v. American Honda Motor, Inc. (2002) 100 Cal.App.4th 1111 (summary judgment improper where defendant failed to repute plaintiff's claim of design defect under risk/benefit test).

NOTE: When Barker was decided, there were two accepted tests for causation: the legal cause ("substantial factor") test, and the proximate cause ("but for") test. In Mitchell v. Gonzales (1991) 54 Cal.3d 1041, however, the court disapproved of the proximate cause instruction. Nevertheless, evidence presented by the appellant that the design properties of an aluminum baseball bat caused injuries to a pitcher hit by a line drive was sufficient to create a triable issue of fact on the issue of causation. Sanchez v. Hillerich & Bradsby Co. (2002) 104 Cal.App.4th 703.

2. **Inherently Unsafe Products**. A manufacturer is not held liable for design defect of inherently unsafe products.

a. *Guns and ammunition*. California Civil Code, Section 1714.4, which prohibited a product liability action under a design defect theory on the basis that the benefits of the product do not outweigh the risk of injury, was repealed by the California Legislature in 2002, following the California Supreme Courts decision in Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, wherein the Court decided that Section 1714.4 precludes negligence claim against gun manufacturer for deaths of persons killed by assault-type guns.

b. *Personal consumption products*. California Civil Code, Section 1714.45, provides that if a product, such as sugar, castor oil, alcohol, or butter, is known to be unsafe by the ordinary consumer, the manufacturer or seller is not liable in a product liability action unless the action is based on a manufacturing defect or breach of an express warranty. NOTE: This statute was amended in 1997 to exclude tobacco manufacturers from its protection. See Section VII.G. below.

c. *Drugs*. Strict liability for product design defects measured by the "consumer expectation" test (whether the product performed as safely as the ordinary consumer would expect when used in an intended and reasonably foreseeable manner) is not applicable to the manufacturing of prescription drugs. Brown v. Superior Court (1988) 44 Cal.3d 1049. In Brown, the California Supreme Court held that, because of the public interest in the development, availability, and reasonable price of prescription drugs, manufacturers could not be held strictly liable for the injures caused by any prescription drug (not just unavoidably dangerous ones), so long as it was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of its distribution. The Brown court set forth a test for liability which sound in negligence, focusing on the fault of the producer in failing to warn of dangers inherent in the use of its product that were known or knowable.

See also Anderson v. Owens-Corning Fiberglass Corp. (1991) 53 Cal.3d 987 (manufacturer of prescription drugs is not strictly liable for injuries caused by scientifically unknowable dangerous propensities of drugs; actual or constructive knowledge is required for strict liability for failure to warn.)

d. *Medical devices*. Strict liability for design defects is not applicable to prescription medical devices. The rationale of Brown v. Superior Court, the case that bars strict liability claims for design defect in prescription drugs, has been extended to prescription medical devices. Plenger v. Alza Corp. (1992) 11 Cal.App.4th 349.

3. State of the Art Technology vs. Industry Custom. A manufacturer may not introduce evidence of the custom and usage in its industry to establish that its product was not defective. The issue is whether the product was defective for a reasonably foreseeable use, not whether the manufacturer acted unreasonably or negligently.
Evidence that the design comported with the "state of the art" at the time the product was manufactured, however, is relevant to a determination of the feasibility and cost of alternative designs, and is admissible to show that there was no superior design available at the time. Rosburg v. Minnesota Mining & Mfg. Co. (1986) 181 Cal.App.3d 726.

C. MANUFACTURING DEFECT: Defined as a product unit that deviates from the manufacturer's intended result or from other ostensibly identical units of the same product line. Barker v. Lull Engineering Co. (1978) 20 Cal.3d 413. (Example: product does not conform to plans, specifications). Pursuant to *CACI 1202*, a product contains a manufacturing defect if the product differs from the manufacturer's design or specifications or from other typical units of the same product line.

See also *CACI 1201*, which requires the following to establish a claim for a manufacturing defect:

1. That defendant manufactured, distributed, or sold the product;

2. That the product contained a manufacturing defect when it left defendant's possession;

3. That plaintiff was harmed; and

4. That the product's defect was a substantial factor in causing plaintiff's harm.

D. INADEQUATE WARNINGS AND INSTRUCTIONS BY MANUFACTURER.

1. **General Rule.** In California, manufacturers and suppliers may be held liable for a product that could be used safely but that lacks warnings regarding possible dangers, when the lack of adequate warning creates unreasonable risks to the consumer. The supplier of the product will be subject to *strict liability* if it is unreasonably dangerous to place the product in the hands of the user without a suitable warning and the product is supplied and no warning is given. DeLeon v. Commercial Manufacturing & Supply Co. (1983) 148 Cal.App.3d 336; Burke v. Almaden Vineyards, Inc. (1978) 86 Cal.App.3d 768; Anderson v. Owens-Corning Fiberglass Corp. (1991) 53 Cal.3d 987.

2. **Elements.** *CACI 1205* sets forth the elements of a failure to warn claim, which plaintiff must prove as follows:

1. That defendant manufactured/distributed/sold the product;

2. That the product had potential risks/side effects/allergic reactions that were known or knowable in light of the scientific and medical knowledge that was generally accepted in the scientific community at the time of manufacture /distribution/ sale;

3. That the potential risks/side effects/allergic reactions presented a substantial danger when the product is used or misused in an intended or reasonably foreseeable way;

4. That ordinary consumers would not have recognized the potential risks/side effects/allergic reactions;

5. That defendant failed to adequately warn or instruct of the potential risks/side effects/allergic reactions;

6. That plaintiff was harmed; and

7. That the lack of sufficient instructions or warnings was a substantial factor in causing name of plaintiff's harm.

3. **Necessity for Warning.** Liability will not attach unless the absence of an adequate warning of a dangerous propensity renders the article "substantially dangerous" to the user, and therefore, defective. Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal.App.3d 338; Garman v. Magic Chef, Inc. (1981) 117 Cal.App.3d 634.

a. *Test*. Considerations relevant to the determination of whether a warning is necessary to render a product reasonably safe are the normal expectations of the consumer as to how the product will perform, degrees of simplicity or complication in the operation or use of the product, the nature and magnitude of the danger to which the user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including a warning. Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal.App.3d 338; Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal.App.3d 842.

b. *Known or Reasonably Knowable Risks Only*. Imposition of liability requires a showing that the manufacturer did not adequately warn of a *known or reasonably knowable risk*. There is no duty to warn against every conceivable health problem associated with the use of a product. However, the more severe the consequences from unprotected exposure, the greater the need to warn of significant health risks. Thus, the warning must be commensurate with the risk of harm. Schwoerer v. Union Oil Co. (1993) 14 Cal.App.4th 103. State of the art evidence is admissible on the issue of whether the defendant knew or should have known of the particular risk involved. Anderson v. Owens-Corning Fiberglass Corp. (1991) 53 Cal.3d 987.

See Wright v. Stang Manufacturing Company (1997) 54 Cal.App.4th 1218 (manufacturer of deck gun had duty to warn of dangerous, foreseeable “mismatch” of product with unsuitable mounting attachment on firetruck); Livingston v. Marie Callenders, Inc. (1999) 72 Cal.App.4th 830 (defendant may be liable to a plaintiff

suffering allergic reaction to product on a strict liability failure to warn theory when: the defendant's product contains an ingredient to which a substantial number of the population are allergic; the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product; and where the defendant knew or by the application of reasonable, developed human skill and foresight should have known, of the presence of the ingredient and the danger), **see also *CACI 1206***; Bunch v. Hoffinger Industries, Inc. (2004) 123 Cal.App.4th 1278 (danger of diving into a shallow, above-ground pool is not open and obvious to an 11 year-old as a matter of law).

c. *Circumstances Where No Warning Is Necessary*.

(1) A seller need not give a warning to consumers when the danger or potential of danger is generally known and recognized. Bojorquez v. House of Toys, Inc. (1976) 62 Cal.App.3d 930. A consumer's knowledge as to some dangers associated with a product, however, does not relieve a supplier of the duty to warn of other dangers unknown to the consumer. Selma Pressure Treating Co., Inc. v. Osmose Wood Preserving, Inc. (1990) 221 Cal.App.3d 1601 (overruled by Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56 to the extent it conflicts with the sophisticated user defense).

(2) Historically, a seller/manufacturer has had no duty to warn against a use that is not reasonably foreseeable. See Dosier v. Wilcox-Crittendon Co. (1975) 45 Cal.App.3d 74. But see Self v. General Motors Corp. (1974) 42 Cal.App.3d 1, regarding warnings as to foreseeable misuse or abuse (overruled on other grounds by Soule v. General Motors Corp. (1994) 8 Cal. 4th 548).

(3) A business proprietor has no duty to warn of dangers which are obvious or which should have been observed in the exercise of ordinary care. Felmlee v. Falcon Cable TV (1995) 36 Cal.App.4th 1032.

(4) Under California law, there is no duty to warn between merchants in privity of contract where there is no personal injury or property damage. Frank M. Booth, Inc. v. Reynolds Metals Co., 754 F.Supp. 1441 (E.D. Cal. 1991)

(5) In food, drug and cosmetic cases, recovery will be denied if the plaintiff is injured only because he or she suffers from a rare and unique allergy. When, however, the product contains an ingredient to which a substantial number of people are allergic and the ingredient is one whose danger is not generally known, or, if known, is one that the consumer would not reasonably expect to find in the product, the seller is required to warn against it. See Livingston v. Marie Callenders, Inc. (1999) 72 Cal.App.4th 830; McKinney v. Revlon (1992) 2 Cal.App.4th 602.

(6) The manufacturer's duty is to warn of the characteristics of the manufacturer's own product; there is no requirement that he study the products of other manufacturers and warn users of the risks in using them. Powell v. Standard Brands Paint Co. (1985) 166 Cal.App.3d 357.

See Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564. A manufacturer's duty to warn is limited to the manufacturer's own products. However, a manufacturer *may* owe a duty to warn when the use of its products in combination with the product of another creates a potential hazard only if the manufacturer's own product causes or creates the risk of harm. See also **O'Neil v. Crane Co., (2012) 53 Cal. 4th 335**.

(7) Pesticide manufacturers have no duty to warn the public after they become aware that warnings issued by the State during a state of emergency were inadequate. Macias v. The State of California (1995) 10 Cal.4th 844.

(8) Sophisticated User Defense. A manufacturer is not liable to a sophisticated user of its product for

failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger. The defense is considered an exception to the manufacturer's general duty to warn consumers, and therefore if successfully argued, acts as an affirmative defense to negate the manufacturer's duty to warn. Johnson v. American Standard Inc. (2008) 43 Cal. 4th 56. See *CACI 1244*.

d. *Unavoidably Unsafe Products*. The manufacturer who prepares such products carefully and markets them with appropriate restrictions or warnings is not strictly liable for injurious consequences. Brown v. Superior Court (1988) 44 Cal.3d 1049.

e. *Prescription drug manufacturers* can be strictly liable for failing to warn of risks known or reasonably knowable to the scientific community at the time of manufacturer and distribution. Food and Drug Administration action or inaction may be admissible to show whether a risk was known or reasonably scientifically knowable. Carlin v. The Superior Court of Sutter County (1996) 13 Cal.4th 1104.

4. **Adequacy of Warning.** A warning must be sufficient to apprise the reader of the dangers of the product. If the warning is clear, understandable, and unambiguous, the manufacturer cannot be held liable for a breach of the duty to warn. Temple v. Velcro USA, Inc. (1983) 148 Cal.App.3d 1090.

a. *Language*. Warnings need only be in English, the official language of the State of California. Cal. Const. Art. 3 Section 6. Thus a manufacturer of non prescription drugs may not be held liable in tort for failing to label a nonprescription drug with warnings in a language other than English. See Ramirez v. Plough, Inc. (1993) 6 Cal 4th 539.

5. **Subsequent Warnings.** A manufacturer of a component part who discovers that its use in conjunction with a certain product is unsafe is not strictly liable if its subsequent adequate warnings reach the users of the product prior to the accident. Temple v. Velcro USA, Inc. (1983) 148 Cal.App.3d 1090. However, defendant's theory of component parts doctrine is not persuasive to support judgment on demurrer. Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co. (2004) 129 Cal. App. 4th 577.

NOTE: Evidence of a manufacturer's post-accident warning regarding a product's hazards may also be admissible in a strict liability case for the purpose of demonstrating that a warning could or should have been given. Schelbauer v. Butler Manufacturing Co. (1984) 35 Cal.3d 442.

6. **Learned Intermediary Doctrine.** Warnings need not reach consumer in some cases.

a. *Prescription Drugs*. Duty to warn is satisfied if the manufacturer gives adequate warning to the prescribing physician. See Finn v. G. D. Searle & Co. (1984) 35 Cal.3d 691.

b. *Medical devices*. A medical product manufacturer fulfills its duty to warn of risks by providing adequate information to the physician. Hufft v. Horowitz (1992) 4 Cal.App.4th 8. Plenger v. Alza Corp. (1992) 11 Cal.App.4th 349.

c. *Products supplied in bulk to retailers for repackaging for sale to consumers*.

(1) Duty satisfied by giving warning to retailer who repackages and labels goods. Groll v. Shell Oil Co. (1983) 148 Cal.App.3d 444.

(2) The warning need not reach the consumer where such a warning would have been ineffective, thus unnecessary, because of the ultimate user's lack of ability to make an informed judgment from such notice and the fact that the user necessarily relies on the knowledge and technical expertise of the retailer. Persons v. Salomon North America, Inc. (1990) 217 Cal.App.3d 168.

E. TYPES OF PRODUCTS TO WHICH STRICT PRODUCTS LIABILITY APPLIES.

1. **In General**. Strict products liability applies to all products sold to the public, including business and industrial machinery, consumer goods, chemicals, medical devices and equipment, weapons and explosives, etc. See West v. Johnson & Johnson Products, Inc. (1985) 174 Cal.App.3d 831.

2. **Unnatural Substances in Food**. While a consumer would reasonably expect to find certain natural substances in a food product (e.g., a sliver of beef bone in a hamburger patty; see Ford v. Miller Meat Co. (1994) 28 Cal.App.4th 1196), a manufacturer will be held liable for injuries which result from the presence of other, unnatural substances. Evart v. Suli (1989) 211 Cal.App.3d 605 (disapproved by Mexicali Rose v. Superior Court, (1992) 1 Cal. 4th 617, as to its discussion of strict liability and foreign objects).

By contrast, an injury-producing substance that is natural to the preparation of a food is not unexpected, and therefore does not render the food unfit for human consumption or defective. See Mexicali Rose v. Superior Court (1992) 1 Cal.4th 617 (plaintiff injured by a chicken bone in a chicken enchilada could maintain a cause of action for negligence, but not causes of action for strict liability or breach of the implied warranties of merchantability or fitness).

3. **Safety Devices.** A manufacturer may be held liable in strict liability on the basis that a product may be defective if it does not include safety devices necessary to its reasonable safety. Garcia v. Halsett (1970) 3 Cal.App.3d 319. A manufacturer may also be liable under a negligence theory for failing to provide reasonable safety devices. Varas v. Barco Mfg. Co. (1962) 205 Cal.App.2d 246.

a. Evidence of non-use is admissible to mitigate damages.

b. *Product as a Whole*. When evaluating liability for a defective product, the product must be considered as a whole, that is, in light of any safeguards built into the design of the product and the risks to which they are directed. Daly vs. General Motors Corp. (1978) 20

Cal.3d 725. This may be important in "crashworthiness" cases.

4. **Components and Products Subject to Further Alteration Assembly, Installation, Etc.** Generally speaking, in order to find a manufacturer of a component part liable under *any* product liability defect theory, there must be evidence directly linking the component to the plaintiff's injuries. Wiler v. Firestone Tire and Rubber Co. (1979) 95 Cal.App. 3d 621.

The component parts doctrine provides that the manufacturer of a component part is not liable for injuries caused by the finished product into which the component has been incorporated unless the component itself was defective and caused harm. O'Neil v. Crane Co., (2012) 53 Cal. 4th 335. See also Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564 (finding that valves were components of a ship's steam propulsion system, thus, the component parts defense/doctrine shielded the manufacturers of those valves from liability for other manufacturer's asbestos containing products within the same system).

NOTE: Determining whether a product is a "component" may prove difficult. The Restatement Third of Torts: Products Liability, Section 5, Comment a, defines "components" to include raw materials, bulk products, and other constituent products sold for integration into other products, which may or may not be functional on their own.

Recently, the California Supreme Court addressed the issue of a product manufacturer's liability for injuries caused by adjacent products or replacement parts, made by others and used in conjunction with a defendant's products. The court held that a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's products unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products. O'Neil v. Crane Co., (2012) 53 Cal. 4th 335.

In the case of a completed product such as an automobile, courts have been unwilling to shift the responsibility from the manufacturer to the retailer, **regardless of what part of the manufacturing process the manufacturer chooses to**

delegate to third parties; in that case both the manufacturer and retailer were subject to strict liability. Vandermark v. Ford Motor Co. (1964) 61 Cal.2d 256. The responsibility for providing a safe product is ordinarily shifted to the intermediate handler when the manufacturer supplies only bulk raw materials that the intermediate handler must process and/or repackage to create the product that eventually causes injury to the plaintiff. Walker v. Stauffer Chemical Corp. (1971) 19 Cal.App.3d 669.

5. **Real Property**. The doctrine covers damages to persons and property caused by the defective real property, but not the diminution in value of the property due to the defect. Siders v. Schloo (1987) 188 Cal.App.3d 1217.

6. **Electricity**. Electricity is considered a "product" for purposes of imposition of strict products liability upon a commercial supplier. The distribution might be a service, but the electricity itself, in the contemplation of the ordinary user, is a consumable product. Pierce v. Pacific Gas and Electricity Co. (1985) 166 Cal.App.3d 68.

The Pierce holding is limited to cases where the electricity is actually in the “a stream of commerce” and expected to be at marketable voltage. In most cases, this will mean the electricity must be delivered to the customer’s premises, to the point where it is metered. See also Stein v. Southern Calif. Edison Co. (1992) 7 Cal.App.4th 565, 571 (meter exploded when electrical arc caused by faulty transformer sent high voltage into it; the electricity was a product even though it had not actually passed through the meter).

The strict liability doctrine does not apply to facilities used by a public utility for transmission of electrical energy to consumers. See United Pac. Ins. Co. V. Southern Calif. Edison Co. (1985) 163 Cal.App.3d 700.

7. **Aircraft Navigational Landing Charts**. Fluor Corp. v. Jeppesen & Co. (1985) 170 Cal.App.3d 468.

8. Exception: Government Contractor Manufacturing Military Equipment. Liability for design defects in military equipment cannot be imposed pursuant to state laws when (1) the United States approved reasonably precise specifications; (2) the equipment performed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. Boyle v. United Technologies Corp. (1988) 487 U.S. 500; Butler v. Ingalls Shipbuilding, Inc. (9th Cir. 1996) 89 F.3d 582. But see Snell v. Bell Helicopter Textron, Inc. (9th Cir. 1997) 107 F.3d 744 (If the manufacturer had any appreciable discretion over a particular design or component part, then the defense may be unavailable--even in light of ultimate approval by government officials). See *CACI 1246*. Similarly, defendant may not be held liable for failure to warn about the dangers in the use of the product if it proves all of the following: (1) That defendant contracted with the United States government to provide the product for military use; (2) That the United States imposed reasonably precise specifications on defendant regarding the provision of warnings for the product; (3) That the product conformed to those specifications regarding warnings; and (4) That defendant warned the United States about the dangers in the use of the product that were known to defendant but not to the United States. *CACI 1247*.

F. PARTIES LIABLE UNDER STRICT LIABILITY THEORY.

1. All Parties Placing Products in the Stream of Commerce.

NOTE: There is no apportionment of fault between those within the chain of distribution of a single product; see discussion of Proposition 51 in Section VIII.F. below.

a. *Manufacturers*. A manufacturer is liable even though the defective part was supplied by another party. Since the liability is strict, it encompasses defects regardless of their source, and a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another. Vandermark v. Ford Motor Co. (1964) 61 Cal.2d 256.

NOTE: The Restatement Third of Torts: Products Liability, Section 5, recognizes that liability may be imposed on the seller or distributor of a component part where the seller or distributor *substantially participates in*

the integration of the component into the design of the product and the integration causes the product to be defective, and the defect causes harm.

b. *Wholesalers and distributors*. Strictly liable in that they are in the "stream of commerce". Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal.App.2d 228; Kaminski v. Western MacArthur Co. (1985) 175 Cal.App.3d 445.

c. *Retail Dealers*. Strictly liable for defective products under the policies expressed in the Vandermark case, as they are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.

(1) Retailers of second hand goods. A defendant's particular legal relationship is not determinative but defendant must also have participated in the enterprise which created consumer demand for and reliance on the particular product. Kasel v. Remington Arms Co. (1972) 24 Cal.App.3d 711; Tauber-Arons Auctioneers Co. v. Superior Court (1980) 101 Cal.App.3d 268.

d. *Bailors*. Business lessors of personal property. Price v. Shell Oil Co. (1970) 2 Cal.3d 245.

e. *Lessors*. Business lessors of personal property only. Price v. Shell Oil Co. (1970) 2 Cal.3d 245.

f. *Developer of multiple residential dwellings and planned development project*. Del Mar Beach Club Owners Association v. Imperial Contracting Co. (1981) 123 Cal.App.3d. 898.

g. *Developers/sellers of mass produced tract homes*. Kriegler v. Eichler Homes (1969) 269 Cal.App.2d 224. If the home is purchased through an occasional construction and sale, even though it involves a builder who is in the business of constructing homes, strict liability will not apply. The question of whether a residence falls into the category of "mass produced" is to be determined on a case by case basis. Oliver v. Superior Court (1989) 211 Cal.App.3d 86. See Fleck v. Bollinger Home Corp. (1997) 54 Cal.App.4th 926

(developer who devised plans for 11 homes qualified as "mass producer). Manufacturers of component parts that are installed in mass produced homes can be subject to strict products liability in tort when their defective products cause harm; and if so, manufacturer is strictly liable for resulting physical damage to other parts of house. Jimenez v. Superior Court (2002) 29 Cal.4th 473.

h. *Licensors*. Part of the marketing enterprise, therefore imposition of strict liability is appropriate. Garcia v. Halsett (1970) 3 Cal.App.3d 319.

i. *Franchisors*. No court has imposed the strict liability doctrine upward in the marketing chain, from manufacturer or distributor to a franchisor or a trademark licensor, but commentators have suggested that this would be a proper step. Kasel v. Remington Arms Co. (1972) 24 Cal.App.3d 711.

j. *Vendor of tract lots*. Avner v. Longridge Estates (1969) 272 Cal.App.2d 607.

k. *Employers.* The general rule is that Worker's Compensation provides the *exclusive* remedy available to an injured employee. California Labor Code, Section 3600, et seq. There are, however, exceptions to this rule: Relative to products liability, an action at law is permitted for damages in cases in which the employee's injury or death is caused by a defective product manufactured by the employer and sold, leased or transferred for valuable consideration to an independent third party, who then in turn provides the product to the employee. California Labor Code, Section 3602(b)(3). See discussion below in Section VII.J.

2. Persons Not Subject to Strict Products Liability.

a. *Manufacturers of non-defective component parts*. Lee v. Electric Motor Division (1994) 169 Cal.App.3d 375, 385 (there is "no case in which a component manufacturer who had no role in designing the finished product and who supplied a non-defective component part was held liable for the defective design of the finished product.")

b. *Financial Institutions*. Altman v. Morris Plan Co. (1976) 58 Cal.App.3d 951.

c. *Used products dealer*. LaRosa v. Superior Court (1981) 122 Cal.App.3d 741.

d. *Installers of component parts*. Endicott v. Nissan Motor Corp. (1977) 73 Cal.App.3d 917. But see Barth v. B.F.Goodrich Tire Co. (1968) 265 Cal.App.2d 228.

e. *Sellers of professional services*. See Silverhart v. Mount Zion Hosp. (1971) 20 Cal.App.3d 1022. Includes pharmacies. Murphy v. E.R. Squibb & Sons, Inc. (1985) 40 Cal.3d 672. A pharmacy is not liable for an alleged design defect in a drug manufactured by another entity because the pharmacy provides only a service); California Business & Professions Code, section 4050. **See also Hennigan v. White, (2011) 199 Cal. App. 4th 395, a beauty salon was not liable under a strict products liability claim made against it as a result of allegedly defective pigment the salon used for tattooing permanent makeup into plaintiff's eyelids and eyebrows; the transaction's primary objective was to obtain a service, not acquire ownership or use of a product.**

f. *Casual/occasional sellers of goods not engaged in selling of the product as part of the business*. Ortiz v. HPM Corp. (1991) 234 Cal.App.3d 178, 187.

g. *Blood banks*. California Health and Safety Code, Section 1606; Hyland Therapeutics, Division of Travenol Laboratories, Inc. v. Superior Court (1985) 175 Cal.App.3d 509.

h. *Auctioneer*. Tauber-Arons Auctioneers Co. v. Superior Court (1980) 101 Cal.App.3d 268.

i. *Residential and Commercial Landlords*. Pursuant to the California Supreme Court decision of Peterson v. Superior Court (1995) 10 Cal.4th 1185, neither residential nor commercial landlords are strictly liable to a tenant for latent defects in an apartment (unless they participated in the manufacture or installation of the product).

3. **Successor Corporations.** Successor corporations which purchase the assets and goods of a going concern generally are not held strictly liable for products which entered the stream of commerce prior to the acquisition. The general corporations law rule is that a successor corporation will not be held liable if the successor paid *adequate consideration* and there was *no continuation of officers, directors or stockholders.* This rule has been followed in products liability actions. See, e.g., Ortiz v. South Bend Lathe (1975) 46 Cal.App.3d 842.

a. *Exception*: The court in Ray v. Alad (1977) 19 Cal.3d 22, however, made an exception to the general rule and held that under appropriate circumstances a successor corporation *may* be held liable for damages caused by a defective product manufactured by its predecessor, depending upon the following three factors: "(1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacture's good will being enjoyed by the successor in the continued operation of the business." *Id.* at 31. See also Rosales v. Thermel-Thermatron, Inc. (1998) 67 Cal.App.4th 187 (Ray v. Alad exception applied where acquiring corporation continued to distribute the same products of the corporation that it had acquired).

NOTE: The acquisition of capital stock in a corporation does *not* constitute the creation of a successor corporation; the acquiring individual or corporation merely becomes a shareholder. Potlatch Corp. v. Superior Court (1984) 154 Cal.App.3d 1144.

b. *Ray v. Alad Exception Applicable Only to Strict Products Liability*. The exception does not extend to claims for negligence. Monarch Bay II v. Professional Service Industries, Inc. (1999) 75 Cal.App.4th 1213. Franklin v. USX Corp. (2001) 87 Cal.App.4th 615.

c. A successor corporation is not entitled to benefits of insurance policies where there is no consent by the

insurers for assignment of benefits. Henkel Corp. v. Hartford Accident and Indemnity Co. (2003) 29 Cal.4th 934.

G. PARTIES TO WHOM MANUFACTURERS/SUPPLIERS ARE LIABLE.

1. **Lawful Consumer or User of Product.** Privity of contract is not required; strict liability is imposed as a matter of law. The manufacturer then absorbs the cost of injuries from a defect and by insurance distributes the risk among the public as a cost of doing business. Barth v. Goodrich Tire Co. (1968) 265 Cal.App.2d 228.

2. **Innocent Bystanders**. California allows liability to be assessed against a manufacturer or supplier when a defective product causes injury to innocent bystanders. It is the policy of courts to give bystanders greater protection since they, as contrasted to users and sellers/manufacturers, have no chance to inspect for defects. Elmore v. American Corp. (1969) 70 Cal.2d 578.

3. **Commercial Purchaser Exception.**

a. Pursuant to the court in Kaiser Steel Corp. v. Westinghouse Electric Corp. (1976) 55 Cal.App.3d 737 (superseded by statute on other grounds), the strict liability doctrine does not apply as between parties who:

(1) Deal in a commercial setting;

(2) Bargain from positions of relatively equal economic strength;

(3) Bargain the specifications of the product; and

(4) Negotiate concerning the risk of loss from defects in the product.

See also Aris Helicopters, Ltd. v. Allison Gas Turbine (9th Cir. 1991) 932 F.2d 825.

b. All four of the enumerated criteria listed in Kaiser must be pleaded and proved to defeat a cause of action for

strict products liability. International Knights of Wine, Inc. v. Ball Corp. (1980) 110 Cal.App.3d 1001.

c. The California courts elaborated on this commercial purchaser exception by holding that, notwithstanding the general rule that strict liability does not apply as between commercial entities, a commercial defendant can cross-complain for comparative equitable indemnity against a responsible party even if that party was not named in the plaintiff's suit. The indemnity claim does not arise from a business loss, but stems from the consumers' loss. Gentry Construction Co. v. Superior Court (1989) 212 Cal.App.3d 177; GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal.App.3d 419.

H. ESTABLISHMENT OF IDENTITY OF MANUFACTURER OR SELLER.

1. In General. A plaintiff must establish that the defendant in the action was the manufacturer or seller of the particular defective item which caused the plaintiff's injuries. McCreery v. Eli Lilly Co. (1978) 87 Cal.App.3d 77.

2. Market Share Theory. Applicable in situations where the manufacturer(s)/supplier(s) of the product which caused the plaintiff's injuries cannot be specifically identified, through no fault of the plaintiff, but all of the defendants in the action produced a product from an identical formula.

The market share theory was first applied to prescription drug manufacturers, particularly manufacturers of the miscarriage prevention drug DES. In Sindell v. Abbott Laboratories (1980) 26 Cal.3d 588, plaintiffs, the daughters of women who had taken DES prior to giving birth, sued defendant manufacturer of the drug for injuries sustained as a result (birth defects, etc.).

The court held that in this context, it is reasonable to measure the likelihood that any of the defendants supplied the product which injured the plaintiff by the percentage of DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug by all for that purpose. Each manufacturer's liability is then approximately equivalent to the damage caused by the DES it manufactured. Consequently, joinder of multiple manufacturers of a substantial share of an unsafe drug shifts the burden to the manufacturers of proving

that they could not have supplied the drug ingested by the plaintiff's mother.

a. *Drug manufacturers*. Since the manufacturer of prescription drugs cannot be held strictly liable for defective products unless it fails to warn the consumer, the plaintiff who proceeds on a Sindell market share theory may not prosecute a cause of action for fraud or breach of warranty. The court held that joint liability may not be imposed upon defendant manufacturers in a market share action, because such a ruling would frustrate the Sindell court's goal of achieving a balance between the interests of DES plaintiffs and manufacturers of the drug.

b. *Asbestos litigation*. The Sindell market share strict liability initially was held inapplicable to asbestos-related personal injury cases, since there is no fungibility of the defective product (asbestos) which can be composed of several different chemical compounds and formulas. Mullen v. Armstrong World Industry, Inc. (1988) 200 Cal.App.3d 250. In Ferris v. Gatke Corp. (2003) 107 Cal.App.4th 1211, the court held that the trial court did not err in barring plaintiffs from pursuing Sindell relief. In Chavers v. Gatke Corp. (2003) 107 Cal.App.4th 606, the court held that defendant in an asbestos case could not be found liable on either conspiracy theory or concert of action theory.

   But see Wheeler v. Raybestos-Manhattan (1992) 8 Cal.App.4th 1152. In Wheeler, a brake mechanic, claiming injury from exposure to asbestos in brake pads, was able to identify the manufacturers of new replacement brake linings which he installed, but asserted that it was impossible to identify the manufacturers of the worn brake pads which he removed from vehicles. The court ruled that it was appropriate to allow plaintiffs to proceed on a market share theory against friction product manufacturers with respect to liability for the injuries caused by the worn pads.

c. *Market share percentage*. The California Supreme Court held that supplying 10% of the national market of DES was insufficient to impose strict liability on a

manufacturer. Murphy v. E.R. Squibb & Sons, Inc. (1985) 40 Cal.3d 672. This decision, however, may be affected by Wheeler v. Raybestos-Manhattan (1992) 8 Cal.App.4th 1152.

I. DEFECTS EXISTING AT THE TIME OF SALE VERSUS DEFECTS ARISING LATER.

1. The Restatement Third of Torts: Products Liability, Section 2, distinguishes between defects existing at the time of sale and defects which arise later after the time of sale, for example, from a new unforeseeable use of the product. The Restatement states that negligence, not strict liability, is the proper theory of recovery for product-related, harm-causing behavior not involving defects at time of sale. **See *CACI 1223*.**

2. When a product is defective at the time of sale and the defect causes harm to persons or property, the seller is subject to liability whether or not the seller attempts to eliminate the defect by post-sale recall. In appropriate cases a plaintiff may seek recovery based on both a claim of original defect and a claim of post-sale failure to recall. Restatement Third of Torts: Products Liability, Section 11. Similarly, when a product is defective at the time of sale, if the seller reasonably should have issued a post-sale warning, then the seller may be liable for not doing so as well as being liable for the original defect. Restatement Third of Torts: Products Liability, Section 10.

III. NEGLIGENCE IN PRODUCTS LIABILITY ACTIONS: The plaintiff must plead and prove all elements of a general negligence case (i.e., duty, breach, causation and damages). The claim is based on the conduct of the defendant, rather than on the condition of the product itself. Finn v. G.D. Searle & Co. (1984) 35 Cal.3d 691.

A. ESSENTIAL FACTUAL ELEMENTS, ***CACI 1220*. Plaintiff claims that he was harmed by defendant's negligence and that he should be held responsible for that harm. To establish this claim, plaintiff must prove all of the following: (1) That defendant designed/ manufactured/ supplied/ installed/ inspected/ repaired/ rented the product; (2) That defendant was negligent in designing/ manufacturing/ supplying/ installing/ inspecting/ repairing/ renting the product; (3) That plaintiff was harmed; and (4) That defendant's negligence was a substantial factor in causing plaintiff's harm.**

B. **DUTY**: The standard of care imposed on manufacturers and sellers of chattels is the traditional reasonable person standard.

1. **Standard. *CACI 1221*.** A designer/ manufacturer/ supplier/ installer/ repairer is negligent if he fails to use the amount of care in designing/ manufacturing/ inspecting/ installing/ repairing the product that a reasonably careful designer/ manufacturer/ supplier/ installer/ repairer would use in similar circumstances to avoid exposing others to a foreseeable risk of harm. In determining whether defendant used reasonable care, you should balance what defendant knew or should have known about the likelihood and severity of potential harm from the product against the burden of taking safety measures to reduce or avoid the harm.

Manufacturers/sellers are not required to design and sell products that are accident- proof, but only to supply products that are reasonably safe for the purpose for which they were intended. Varas v. Barco Mfg. Co. (1962) 205 Cal.App.2d 246.

2. **Persons To Whom Duty Is Owed**. Liability runs to all persons that the supplier should expect to use the product, whether that person was the buyer, donee, or otherwise, including foreseeable bystanders. Barth v. B. F. Goodrich Tire Co. (1968) 265 Cal.App.2d 228; Elmore v. American Motors Corp. (1969) 70 Cal.2d 578.

C. **BREACH**

1. **General Rules**. Liability is imposed on a manufacturer when the product is dangerous, was not carefully made, and injury results from the manufacturer's failure to make the product carefully.

a. *Component Manufacturers*. "Component and raw material suppliers are not liable to ultimate consumers when the goods or material they supply are not inherently dangerous, they sell goods or material in bulk to a sophisticated buyer, the material is substantially changed during the manufacturing process and the supplier has a limited role in developing and designing the end product." Artiglio v. General Electric Company (1998) 61 Cal.App.4th 830, 839.

A product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products. Regarding plaintiffs' negligence claims, the court concluded that defendants owed no duty of care to prevent injuries from another manufacturer's product. O'Neil v. Crane Co. (2012) 53 Cal. 4th 335.

However, manufacturers which *assemble* component parts supplied by others and manufacturers which distribute products manufactured by third parties as their own are also subject to negligence liability. Vandermark v. Ford Motor Co. (1964) 61 Cal.2d 256; Dow v. Holly Mfg. Co. (1958) 49 Cal.2d 720.

b. *Manufacturer's failure to test and inspect the product properly.* Depending on the dangerous propensities of the product, a manufacturer or seller is required to make sufficient, reasonable tests and/or inspections of the articles it places on the market. Putensen v. Clay Adams, Inc. (1970) 12 Cal.App.3d 1062.

c. *Liability for negligent product design*. Generally, a manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom it should expect to use the chattel or to be endangered by its probable use for physical harm caused by its failure to exercise reasonable care in adopting a safe plan or design. Restatement Second of Torts, section 398; see *CACI 1221*.

d. *Liability for negligent failure to warn.* Manufacturers and sellers each have an independent duty to warn of dangers associated with a product. See *CACI 1222*.

NOTE: If the Sophisticated User defense is successfully argued, it acts as an affirmative defense to negate the manufacturer's duty to warn. Johnson v. American Standard Inc. (2008) 43 Cal. 4th 56.

Post-sale failure to warn: Where a manufacturer becomes aware of dangers after the product is on the market, such knowledge can impose upon the manufacturer a duty to warn of the danger. Failure to meet this duty supports a finding of negligence. Lunghi v. Clark Equipment Co. (1984) 153 Cal. App. 3d 485. **However, when the danger was already known and accounted for at the time of sale, no post-sale duty to warn arises. Daniel v. Coleman Company, Inc. (2010) 599 F.3d 1045.**

Specifically, the Restatement Third of Torts: Products Liability, Section 10, states:

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.

(b) A reasonable person in the seller's position would provide a warning after the time of sale if:

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.

e. *Liability for negligent failure to recall / retrofit*. Where a manufacturer becomes aware of dangers after the product is on the market, such knowledge can impose upon the manufacturer a duty to conduct an adequate

recall/retrofit campaign. Failure to meet this duty supports a finding of negligence. Lunghi v. Clark Equipment Co. (1984) 153 Cal. App. 3d 485. A recall can be negligently conducted as well, thus, leading to liability apart from the issue of defective design. Hernandez v. Badger Construction Equipment Co. (1994) 28 Cal. App. 4th 1791.

NOTE: A customer's failure to comply with a recall notice will not automatically absolve the manufacturer from liability. Springmeyer v. Ford Motor Co. (1998) 60 Cal. App. 4th 1541.

Jury Instructions *CACI 1223:* To establish this claim, plaintiff must prove all of the following:

(1) That defendant manufactured/ distributed/ sold the product;

(2) That defendant knew or reasonably should have known that the product was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner;

(3) That defendant became aware of this defect after the product was sold;

(4) That defendant failed to recall/ retrofit or warn of the danger of the product;

(5) That a reasonable manufacturer/ distributor/ seller under the same or similar circumstances would have recalled/ retrofitted the product;

(6) That plaintiff was harmed; and

(7) That defendant's failure to recall/ retrofit the product was a substantial factor in causing plaintiff's harm.

Directions for Use: If the issue concerns a negligently conducted recall, modify this instruction accordingly.

See also The Restatement Third of Torts: Products Liability, Section 11: One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if:

(a) (1) a governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product; or

(2) the seller or distributor, in the absence of a recall requirement under Subsection (a)(1), undertakes to recall the product; and

(b) the seller or distributor fails to act as a reasonable person in recalling the product.

2. **Violation of Statute**. Pursuant to California Evidence Code, Section 669(a), violation of a statute, ordinance, or regulation of a public entity gives rise to a presumption that the violator failed to exercise due care if the following conditions existed:

a. The violation caused the death or injury to the person or property;

b. The injury was the result of an occurrence that the statute was intended to prevent; and

c. The injured party was one of a class of persons sought to be protected by the statute.

3. **Res Ipsa Loquitur.** The doctrine of res ipsa loquitur is a judicially-created presumption that arises when the accident is of such a nature that it can be said, in light of past experience, that it probably was the result of negligence by someone and that the defendant was probably the party responsible for that negligence.

a. The plaintiff must establish three elements:

(1) The accident must be of a kind that ordinarily does not occur in the absence of negligence;

(2) The accident must be caused by an agency or instrumentality which was within the exclusive control of the defendant, or which was neither improperly handled nor changed in its condition after it left the defendant's exclusive control; and

(3) The accident must not have been due to any voluntary action or contribution on plaintiff's part.

Irwin v. Pacific Southwest Airlines (1982) 133 Cal.App.3d 709, 715.

Where res ipsa loquitur is established, the plaintiff has made a prima facie case and no directed verdict may be given for the defendant. The defendant, however, can still prevail, if the inference of negligence is rejected by the trier of fact.

b. The doctrine is not applicable to strict products liability actions, but may be used in products actions brought under a negligence theory. Tresham v. Ford Motor Co. (1969) 275 Cal.App.2d 403; Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal.3d 379.

4. **Evidence of Subsequent Remedial Measures or Repairs**. Where such measures are undertaken by the manufacturer or seller after the occurrence of an event which caused injury to the plaintiff, evidence of such measures is inadmissable to prove negligence or culpable conduct in connection with the event, except where it is independently relevant to an issue other than negligence. California Evidence Code, Section 1151; Pierce v. J.C. Penney Co. (1959) 167 Cal.App.2d 3 (disapproved on other grounds by People v. Bloodsaw (1990) 224 Cal. App. 3d 1610).

NOTE: Evidence of subsequent remedial measures or repairs undertaken by the manufacturer or seller is admissible in a strict liability action. Ault v. International Harvester Co. (1974) 13 Cal.3d 113.

IV. BREACH OF WARRANTY

A. RELEVANT STATUTES

1. **Uniform Commercial Code** ("U.C.C.")

2. **California Commercial Code**. This largely follows the provisions of the U.C.C. regarding warranties which apply to the sale of "goods". "Goods" are defined, at Section 2105 of the California Commercial Code, as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action".

3. **Song-Beverly Act.** Codified as California Civil Code, Section 1790, et seq., the Song-Beverly Consumer Warranty Act prevails over conflicting provisions of the California Commercial Code to the extent that it gives rights to buyers of consumer goods. California Civil Code, Section 1790.3. It establishes broad statutory control over warranties in consumer sales and specifies requirements for creating and excluding the warranties accompanying such sales.

4. **Magnusson-Moss Warranty Act.** Codified as 15 U.S.C., Section 2301, et. seq., the Magnusson-Moss Warranty Act regulates written warranties of consumer goods distributed in interstate commerce and manufactured after July 4, 1975. It does not restrict consumer rights or remedies under state law.

5. **Burden of Proof.** To establish a breach of warranty, Plaintiff has the burden of proving all of the elements by a preponderance of the evidence. Tidlund v. Seven Up Bottling Co. of Los Angeles (1957) 154 Cal. App. 2d 663.

B. EXPRESS WARRANTY: Any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise. Also, any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods will conform to the description. It is not necessary to the creation of an express warranty under either the California Commercial Code or the Song-Beverly Act that formal words such as "warrant" or "guarantee" be used, or that the seller have a specific intent to make a warranty. California Commercial Code, Section 2313; California Civil Code Section 1791.2. See *CACI 1230*.

C. IMPLIED WARRANTY

1. **Merchantability**. The implied warranty of merchantability arises by operation of law and is implied in every contract for the sale of goods. California Commercial Code, Section 2314. Merchantability refers to whether the goods are of average, acceptable quality and are generally fit for the ordinary purpose for which such goods are used. *See CACI 1231*.

2. **Fitness for a Particular Purpose**. California Commercial Code, Section 2315. The question of whether a product is fit for a particular purpose arises when the seller knows or has reason to know the particular purpose for which the goods are required and the buyer is relying on the seller's skill and judgment in selecting the goods. *See CACI 1232 & 1233.*

NOTE: A particular purpose differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to the uses which are customarily made of the goods in question. Am. Suzuki Motor Corp. v. Superior Court (1995) 37 Cal. App. 4th 1291.

3. **Custom or Usage of Trade**. A warranty will not be implied contrary to a course of dealing or course of performance between the seller and the buyer or a usage of trade. California Commercial Code, Section 2314.

D. EFFECT OF EXPRESS WARRANTIES ON IMPLIED WARRANTIES.

1. **California Commercial Code**. When express and implied warranties are seen as inconsistent, the intention of the parties shall determine which warranty is dominant, and implied warranties created under the Code may be excluded or modified by course of dealing, course of performance or usage of trade. California Commercial Code, Sections 2317, 2316.

2. **Song-Beverly Act.** A manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by the Act to the sale of consumer goods. California Civil Code, Section 1793.

E. PRODUCTS SUBJECT TO ACTIONS FOR BREACH OF WARRANTY.

1. **In General**. The warranty provisions of the California Commercial Code apply to transactions in goods, while the Song-Beverly Act is limited in application to "consumer goods." California Commercial Code, Section 2102; California Civil Code, Section 1790, et seq.

2. **Effect of Improper Use.** A plaintiff cannot recover for breach of warranty if he suffers harm by reason of the improper use of a product, unless the manufacturer or seller has warranted the product involved to have a certain quality or attribute regardless of the manner in which it is used. The essential question is whether the plaintiff used the product in such a way as to come within the scope of the warranty. Greenman v. Yuba Power Products (1963) 59 Cal.2d 57.

3. **Contracts for Labor and Materials.** Courts have extended liability on an implied warranty theory to such contracts even though such contracts technically do not involve sales of goods. Aced v. Hobbs-Sesack Plumbing Co. (1961) 55 Cal.2d 573 (superseded by statute on other grounds as stated in Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116).

F. TRANSACTIONS NOT SUBJECT TO WARRANTY.

1. **Transactions That Are Not Sales of Goods**. California Commercial Code, Section 2105.

2. **Blood transfusions**. Transfusions are classified as a service by statute. California Health and Safety Code, Section 1606.

G. PRIVITY OF CONTRACT.

1. **Former Law**. Before enactment of the California Commercial Code and the Song-Beverly Act, privity of contract between the seller and the plaintiff was required.

2. **Express Warranties**. Under modern case law, privity is not a requirement for actions based upon an express warranty. Seely v. White Motor Co. (1965) 63 Cal.2d 9; Rodrigues v. Campbell Industries (1978) 87 Cal.App.3d 494.

3. **Implied Warranty of Merchantability**. Privity remains a requirement in actions based upon implied warranty of merchantability. Burr v. Sherwin Williams Co. (1954) 42 Cal.2d 682, 695-96; Hauter v. Zogarts (1975) 14 Cal.3d 104, 114, fn. 8.

4. **Implied Warranty of Fitness**. Privity is also required in claims for implied warranty of fitness for a particular purpose. Anthony v. Kelsey-Hayes Co. (1972) 25 Cal.App.3d 442.

NOTE: When food or drugs are involved, the seller's implied warranty has been extended by the courts to run to anyone injured by the defective item. Klein v. Duchess Sandwich Co., Ltd. (1939) 14 Cal.2d 272; Gottsdanker v. Cutter Laboratories (1960) 182 Cal.App.2d 602.

NOTE ALSO: Privity may be extended from a "purchaser-employer" to his/her employee with the successive right to possession, thus, permitting an employee to be covered by the implied warranties of merchantability and fitness. Peterson v. Lamb Rubber Co. (1960) 54 Cal. 2d 339.

H. NOTICE OF BREACH: A seller is not liable for a breach of warranty unless the buyer gave the seller notice of such breach within a reasonable time after the buyer knew, or as a reasonable person ought to have known, of the alleged defect and breach of warranty.

1. **"Reasonable Time" Defined**. The definition of "reasonable time" depends on the facts and circumstances of the claim. California Commercial Code, Section 2607(3)(a); Whitfield v. Jessup (1948) 31 Cal.2d 826. See *CACI 1243*.

2. **Exception**. If, however, an action is brought against a manufacturer on a warranty that arises independently of a contract of sale (e.g., a manufacturer's express warranty), timely notice of breach is not required. Greenman v. Yuba Power Products (1963) 59 Cal.2d 57; Presiding Bishop v. Cavanaugh (1963) 217 Cal.App.2d 492.

I. DISCLAIMERS AND IMPLIED WARRANTIES.

1. Implied Warranties.

a. *General Rule*. Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions such as "as is", "with all faults" or other language which in common understanding call the buyer's attention to the exclusion of warranties and make plain that there is no implied warranty. California Commercial Code, Section 2316. **See *CACI 1242***.

b. *Implied warranty of merchantability*. Implied warranties as to merchantability may be excluded or modified if, at the time of the sale, the seller specifically makes known to the buyer that the warranty of merchantability is excluded or modified and, if in writing, it must be conspicuous. California Commercial Code, Section 2316.

c. *Implied Warranty of Fitness for a Particular Purpose*. Implied warranties as to fitness may be excluded or modified by a notice in writing to the effect that there are no warranties which extend beyond the description of the goods. Such notice must be conspicuous. California Commercial Code, Section 2316.

2. **Inadequate Disclaimers**. California courts have allowed products liability actions to be maintained despite the existence of disclaimers. Hauter v. Zogarts (1974) 14 Cal.3d 104; Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal.App.3d 842.

J. WAIVER, EXCLUSION, OR MODIFICATION OF WARRANTIES: The buyer and seller may agree that there shall be no express warranties relating to the goods, or they may agree that only certain warranties shall apply and all others be excluded. If such an agreement has been made, there can be no express warranty contrary to its terms. Burr v. Sherwin Williams Co. (1954) 42 Cal.2d 682; California Commercial Code, Section 2316. **See *CACI 1241*.**

V. OTHER CLAIMS RELATING TO PRODUCTS LIABILITY.

A. Fraud and Deceit. Manufacturers/sellers who wilfully deceive another with the intent to induce that person to alter his position to his injury or risk are liable for any damages incurred by that person. California Civil Code, Section 1709.

Privity of contract is not a prerequisite to recovery. However, the plaintiff must be able to establish that he or she *relied* on the defendant's representations. Bay Summit Community Association v. Shell Oil Company (1996) 51 Cal. App. 4th 762; Mirkin v. Wasserman (1993) 5 Cal.4th 1082.

Claim for fraud is not preempted by the Federal Cigarette Labeling and Advertising Act of 1969. Whiteley v. Phillip Morris Inc. (2004) 117 Cal.App.4th 635.

B. Death Actions. Causes of action for wrongful death are allowed in suits framed in strict liability and negligence theories, as well as suits based on breach of warranty. California Code of Civil Procedure, Section 377, et seq.

C. Conspiracy. A defendant in an asbestos case could not be found liable for conspiracy. Chavers v. Gatke Corp. (2003) 107 Cal.App.4th 606.

D. Unfair Competition Law ("UCL"). California's law defines unfair competition to mean and include three types of business-related activities, Bus. & Prof. Code § 17200: (1) Any unlawful, unfair, or fraudulent business act or practice; (2) Unfair, deceptive, untrue, or misleading advertising; and (3) Any act prohibited by Bus. & Prof. Code § 17500 et seq., a chapter that governs a broad range of advertising. Notably, "in proscribing unlawful business practices, the UCL borrows violations of other laws and treats them as independently actionable." Collins v. eMachines, Inc., (2011) 202 Cal. App. 4th 249, 258.

VI. CAUSATION.

A. **IN GENERAL**. Regardless the cause of action or theory of recovery, plaintiff must prove that a defendant's conduct is both the actual and legal cause of plaintiff's injuries. A plaintiff may establish legal cause by showing that the defendant's negligent act was a "substantial factor" in bringing about plaintiff's injury and there is no rule of law relieving the actor from liability. Mitchell v. Gonzales (1991) 54 Cal.3d 1041. But see Bockrath v. Aldrich Chemical Co (1992) 21 Cal.4th 71 (plaintiff need not identify precise mechanism by which his illness was caused as long as he identifies the products that injured him to plead); McGonnell v. Kaiser gypsum Co. (2002) 98 Cal.App.4th 1098 (plaintiff cannot create triable issues of fact on exposure and causation by relying on conclusory expert declaration that fails to explain factual basis for expert's opinion, See also Lineaweaver v. Plant Insulation Co. (1997) 31 Cal. App. 4th 1409); Sanchez v. Hillerich & Bradsby Co. (2002) 104 Cal.App.4th 703 (evidence presented by the appellant that the design properties of an aluminum baseball bat caused injuries to a pitcher hit by aline drive was sufficient to create a triable issue of fact on the issue of causation); Whiteley v. Phillip Morris Inc. (2004) 117 Cal.App.4th 635 (negligent design verdict is not supported by substantial evidence that the negligent design of cigarettes was a substantial factor contributing to plaintiff's risk of developing lung cancer).

B. **EVIDENCE**. Causation may be established by circumstantial evidence. Campbell v. General Motors Corp. (1982) 32 Cal.3d 112.

See, e.g., Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953 (In a personal injury action against an asbestos manufacturer, plaintiff must prove causation by showing that exposure to defendant's defective asbestos-containing product, in reasonable medical probability, was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer).

C. **RES IPSA LOQUITUR**. This doctrine does not apply to strict products liability, but may be applied to a products action brought under a negligence theory. Tresham v. Ford Motor Co. (1969) 275 Cal.App.2d 403; Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal.3d 379.

VII. POTENTIAL DEFENSES AND CROSS-CLAIMS

A. PRODUCT MISUSE OR MODIFICATION. **When defendant claims that he is not responsible for the plaintiff's claimed harm because the product was misused or modified after it left defendant's possession; to succeed on this defense, defendant must prove that: (1) the product was misused or modified after it left defendant's possession; *and* (2) the misuse or modification was so highly extraordinary that it was not reasonably foreseeable to defendant, and therefore should be considered as the *sole* cause of plaintiff's harm. *CACI 1245*.**

Product misuse is a defense to strict products liability only when the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the *sole* reason that the product caused injury. Campbell v. Southern Pacific Co., (1978) 22 Cal. 3d 51, 56; *CACI 1245*. "Unforeseeable misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See *CACI No. 1207A*, Strict Liability—Comparative Fault of Plaintiff, and *CACI No. 1207B*, Strict Liability—Comparative Fault of Third Person." Perez v. VAS S.p.A. (2010) 188 Cal. App. 4th 658, 678, f.n.6.

See e.g., Thomas v. General Motors Corp. (1970) 13 Cal.App.3d 81 (a manufacturer or supplier is liable only when the misuse by a customer is one that is reasonably foreseeable); Romito v. Red Plastic Company, Inc. (1995) 38 Cal.App.4th 59 (holding that, as a matter of policy, a manufacturer owes no duty to prevent injuries resulting from unforeseeable and accidental product misuse, even if the technological means exist.)

B. UNAVOIDABLY UNSAFE PRODUCTS.

1. Public Policy. Many products are experimental or involve elements of danger which cannot be wholly eliminated. The social value of these products outweighs the risks, however, and the seller who prepares them carefully and markets them with appropriate restrictions or warnings is not strictly liable for injurious consequences.

2. **Drugs and Vaccines**. The "unavoidably unsafe product" defense has generally been raised only in cases involving drugs or vaccines. The California Supreme Court has held that a manufacturer is not strictly liable for injuries caused by a prescription drug so long as the drug was properly prepared and accompanied by warnings of its dangerous propensities that were known or reasonably scientifically knowable at the time of distribution. Brown v. Superior Court (1988) 44 Cal.3d 1049.

C. **ADEQUATE WARNING**: A product bearing a warning or directions as to its proper use, which is safe for use if the warning or directions are followed, is not in a defective condition. Sheffield v. Eli Lilly & Co. (1983) 144 Cal.App.3d 583.

1. **Failure to Install Feasible Safety Devices on Dangerous Machines**. The adequate warning defense is probably inapplicable to this situation. The reasonableness of measures undertaken by a manufacturer to correct the defect or to warn of its possible effects is a question of fact. Balido v. Improved Machinery, Inc. (1972) 29 Cal.App.3d 633. See also Hufft v. Horowitz (1992) 4 Cal.App.4th 8; Bernal v. Richard Wolf Medical Instruments Corp. (1990) 221 Cal.App.3d 1326 (overruled on different grounds by Soule v. General Motors Corp. (1994) 8 Cal. 4th 548).

2. **Product Sold in Bulk to Distributor**. Where the product is sold in bulk by the manufacturer, with an adequate warning, and is subsequently packed, labeled, and marketed by a distributor, the duty to warn the ultimate consumer rests with the distributor. Groll v. Shell Oil (1983) 148 Cal.App.3d 444.

D. **COMPARATIVE FAULT**: Ordinary contributory negligence, such as negligent failure to discover a danger or defect, is not a complete defense in strict products liability actions. The modern doctrine of comparative fault, however, was adopted and held to apply to strict products liability actions in Daly v. General Motors Corp. (1978) 20 Cal.3d 725. Essentially, the doctrine is applied to effect an equitable apportionment of loss, to institute fundamental fairness in the application of the strict liability doctrine to products manufacturers. Thus, the comparative negligence doctrine is applicable to strict liability actions in California.

1. **Pure Comparative Fault Applies in California**. The principles of comparative fault, under which a plaintiff's award of damages is reduced by the percentage of his own negligence relative to the "fault" of the defendants (combined 100% of fault), are applicable to actions brought under the strict products liability theory. Daly v. General Motors Corp. (1978) 20 Cal.3d 725.

2. **Fault of Others.**

a. *Employer/co-workers*. California Labor Code, Section 3864, bars claims for implied indemnity by a third party defendant against an employer whose negligence contributed to the injuries of the employee/plaintiff.

(1) Proposition 51 applies to allow allocation of fault to the injured employee's employer, for purposes of reducing the plaintiff's recovery of non–economic damages. See discussion under Section VIII.F.

(2) Punch press exception. An employee may file a civil action against an employer where the employee's injury is caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this is done under conditions known by the employer to create a probability of serious injury or death. California Labor Code, Section 4558. See discussion under Section VII.J.

b. *Others*. In DaFonte v. Up-Right, Inc. (1992) 2 Cal.4th 593, the California Supreme Court stated that California Civil Code section1431.2, does not provide an exception for damages attributable to the fault of other persons who are immune from liability or have no mutual joint obligations to pay missing shares. The statute limits the joint liability of each defendant from any share of non-economic damages beyond that attributable to his comparative fault. Thus, each defendant is liable only for his proportionate share of the non-economic damages as compared with all fault, including the employer's, and not merely compared with the fault of the other defendants present in the lawsuit. See discussion of Proposition 51, Section VIII.F. below.

3. Jury Instructions.

a. Comparative Fault of Plaintiff, *CACI 1207A*. Defendant claims that plaintiff's own negligence contributed to his harm. To succeed on this claim, defendant must prove both of the following:

(1) Plaintiff negligently used/misused/modified the product OR plaintiff was otherwise negligent; and

(2) That this negligence was a substantial factor in causing plaintiff's harm.

If defendant proves the above, plaintiff's damages are reduced by your determination of the percentage of plaintiff's responsibility.

b. Comparative Fault of Third Person, *CACI 1207B*. Defendant claims that the negligence/fault of nonparty tortfeasor(s) also contributed to plaintiff's harm. To succeed on this claim, defendant must prove both of the following:

(1) That the nonparty tortfeasor(s) negligently modified the product OR that the nonparty tortfeasor(s) was otherwise negligent/at fault; and

(2) That this negligence/fault was a substantial factor in causing plaintiff's harm.

If you find that the negligence/fault of more than one person, including defendant, plaintiff, and the nonparty tortfeasor(s), was a substantial factor in causing plaintiff's harm, you must then decide how much responsibility each has by assigning percentages of responsibility to each person listed on the verdict form. The percentages must total 100 percent.

E. COMPARATIVE INDEMNITY

1. General Rules and Theories.

a. *Partial indemnity based on comparative fault* (See preceding discussion of comparative fault principles). This theory permits apportionment of liability between one tortfeasor whose liability rests on California strict liability principles and another whose liability is based on negligence. Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal.3d 322.

b. *Total equitable indemnity.* The California Supreme Court has resolved a conflict among the Appellate Courts on the issue of the ability of passively liable defendants to seek total indemnity from a settling tortfeasor who was actively negligent. The Supreme Court held that a defendant who has entered into a good faith settlement in accordance with the terms of California Code of Civil Procedure, Section 877.6 (c), is absolved from further liability for all equitable indemnity claims. This includes claims by vicariously or derivatively liable tortfeasors seeking total equitable indemnity. Far West Financial Corp. vs. D & S Co. (1988) 46 Cal.3d 796. (See discussion of good faith settlements, below.)

c. *Comparative indemnity doctrine*. This theory is applicable to successive tortfeasors. Blecker v. Wolbart (1985) 167 Cal.App.3d 1195. Comparative equitable indemnity has been held to be available on a strict liability theory between commercial entities. Though strict liability is unavailable between commercial entities, a defendant may cross-complain against another liable party for comparative equitable indemnity on a strict liability theory, even if the other responsible party was not named in the plaintiff's suit. Further, a trier of fact may determine that in a particular case the loss may be completely shifted from one tortfeasor to another. The indemnity claim is considered to stem from the consumers' loss rather than from any business loss of the recovering tortfeasor. Gentry Construction Co. v. Superior Court (1989) 212 Cal.App.3d 177; GEM

Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal.App.3d 419.

d. *Loss of consortium*. Under California law, when a physically injured plaintiff sues for injuries sustained and his spouse sues for loss of consortium, the spouse's recovery in the loss of consortium claim is not directly reduced by the percentage of the physically injured plaintiff's comparative negligence.

(1) The physically injured plaintiff's negligence will not be imputed to the spouse in the loss of consortium action.

(2) Neither is the loss of consortium claim considered a derivative cause of action. Lantis v. Condon (1979) 95 Cal.App.3d 152.

(3) A defendant may, however, cross-complain against the physically injured plaintiff for partial equitable indemnity and/or comparative contribution. Once the physically injured plaintiff's comparative fault has been determined, he will then be liable to the defendant for his comparative fault percentage of the spouse's damages in the loss of consortium claim. Ambriz v. Kress (1983) 148 Cal.App.3d 963; Lantis v. Condon (1979) 95 Cal.App.3d 152, at 159.

2. Persons Against Whom Indemnity May Be Sought.

a. *Against plaintiff and his/her parents or spouse*.

(1) Lack of parental supervision.

(2) Change in condition of product - Failure to Maintain Product.

(3) A defendant may seek indemnity on any theory that would have been available to the plaintiff. This is true regardless of whether the indemnity and the indemnitor might be liable on different theories, such as negligence and strict liability (see Daly v. General Motors Corp. (1978) 20 Cal.3d 725), or whether the plaintiff chose not to sue the tortfeasor-indemnitor (see GEM Devs. v.

Hallcraft Homes, Inc. (1989) 213 Cal.App.3d 419, 429, 430). Example: plaintiff, an adult was injured while riding his parents' 7-year old moped. He sued the manufacturer on strict liability and negligence theories. The manufacturer cross-complained against the parents, alleging that their failure to maintain and repair the moped was a contributing or sole cause of injury. Yamaha Motor Corp. v. Paseman (1990) 219 Cal.App.3d 958.

b. *Against third parties*.

(1) Change in condition of product - Failure to Maintain Product. Yamaha Motor Corp. v. Paseman (1990) 219 Cal.App.3d 958.

(2) Express Indemnity Agreements.

c. *Against employer*. By virtue of the workers' compensation exclusive remedy rule, an employer of an injured employee may be sued for indemnity in the absence of a written express indemnity agreement. Labor Code, Section 3864; see also E.B. Willis Co., Inc. v. Superior Court of Merced County (1976) 56 Cal.App.3d 650 (employer of employee who is injured as result of joint negligence of employer and third party has no obligation to indemnify the third party unless there is an express indemnification agreement).

However, a third party tortfeasor may plead the employer's negligence as a partial defense under the rule of Witt v. Jackson (1961) 57 Cal.2d 57.

d. *Against the injured plaintiff*. See discussion re: loss of consortium in preceding subsection E(1)(d).

3. **Good Faith Settlements**. The determination that a settlement has been made in good faith pursuant to the terms of California Code of Civil Procedure, Sections 877 and 877.6 (c), absolves the settling tort defendant from any further liability for *all* equitable indemnity claims, including claims by vicariously or derivatively liable tortfeasors seeking total equitable indemnity. See further discussion in Section XII, "COMPROMISE, SETTLEMENT AND RELEASE."

F. ASSUMPTION OF THE RISK: The California Supreme Court's plurality opinion in Knight v. Jewett (1992) 3 Cal.4th 296 has become the operative statement of the law of assumption of risk. The decision distinguishes between cases of primary assumption of the risk, in which a defendant owes no duty to protect the plaintiff and is completely barred from recovery, and cases of secondary assumption of risk, in which the defendant does owe a duty of care, but the plaintiff knowingly encounters the risk and in which liability is apportioned by comparative fault.

1. Primary Assumption of Risk. In cases involving primary assumption of risk, the defendant owes *no duty to protect the plaintiff from a particular risk of harm,* regardless of whether the plaintiff's conduct in undertaking the activity was reasonable or unreasonable. Whether or not the defendant owes a duty to protect the plaintiff turns not on the reasonableness or unreasonableness of plaintiff's conduct, but on the *nature of the activity in which the defendant is engaged and the relationship of the defendant and plaintiff to that activity,* Knight v. Jewett, *supra*. However, even if the defendant owes no duty to protect against the risk inherent in the activity, defendant generally owes a *duty not to increase the risks inherent* in the activity at issue. Staten v. Superior Court (1996) 45 Cal.App.4th 1628.

This doctrine is most frequently applied in the context of sports and competitions. See, e.g., Stimson v. Carlson (1992) 11 Cal.App.4th 1201 (defendant sailboat owner had no duty to protect plaintiff, an experienced sailor who had sailed with defendant at least 15 times and who had participated in sailing competitions, from injury sustained when plaintiff was struck by the main sheets during a course change). See e.g. Avila v. Citrus Community College District (2006) 38 Cal. 4th 148 (the doctrine of primary assumption of the risk barred any claim predicated on the allegation that the rival college's pitcher negligently or intentionally threw at the player because being intentionally thrown at is an inherent risk of baseball).

2. **Secondary Assumption of Risk.** The doctrine is more commonly applied in cases involving products liability. In Milwaukee Elec. Tool Corp. V. Superior Court (1993) 15 Cal.App.4th 547, an action against a power drill manufacturer for injuries sustained allegedly as a result of the drill's malfunction, the court of appeal held that: (1) a manufacturer owes a duty to its product user, thus making primary assumption of risk doctrine inapplicable, absent some extraordinary circumstance, and (2) if the manufacturer owes a duty of care to the user, but the user encounters a risk caused by the manufacturer's breach of duty yet known to the user, secondary assumption of risk is merged into comparative fault so that the trier of fact may consider the relative responsibilities of the parties in apportioning fault. See also Ford v. Polaris Industries (2006) 139 Cal. App. 4th 755.

3. **No Assumption of the Risk in Certain Cases.** Risk is not assumed in the following circumstances:

a. Plaintiff had no actual knowledge, through experience, observation, warning or otherwise, of the danger. Hayes v. Richfield Oil Corp. (1952) 38 Cal.2d 375. Generally, the question of whether a plaintiff had knowledge of the danger is left to the jury for determination. Gallegos v. Nash, San Francisco (1955) 137 Cal.App.2d 14.

b. Plaintiff had no knowledge of a particular danger. General knowledge of a danger is not enough. Curran v. Green Hills Country Club (1972) 24 Cal.App.3d 501.

c. Plaintiff's injuries are caused by an unusually dangerous condition or activity. Ratcliff v. San Diego Baseball Club (1938) 27 Cal.App.2d 733.

d. Plaintiff's injuries are caused by defendant's *violation of safety regulations*, statutes or ordinances which are intended to protect the class of persons against the subject risk. Finnegan v. Royal Realty Co. (1950) 35 Cal.2d 409; Fonseca v. County of Orange (1972) 28 Cal.App.3d 361.

4. **Express Contractual Assumption of Risk.**

a. *Generally Valid if Not Against Public Policy*. A person may expressly agree to assume the risk of another

person's negligence, and such an agreement I valid unless it contravenes public policy. Where another person has assumed the risk of a defendant's negligence, the defendant is relieved of legal duty to the plaintiff and cannot be charge with negligence. Knowledge of a particular risk is unnecessary when there is an express agreement to assume all risks. See Coates v. Newhall Land & Farming (1987) 191 Cal.App.3d 1 (upholding validity of decedent's execution of release prior to riding his dirt bike in defendant's off-highway vehicle park where decedent had fatal fall).

See also Madison v. Superior court (1988) 203 Cal.App.3d 589 (the decedent could not waive his heirs' wrongful death claim, but his assumption of risk and release of the defendants' negligence provided defendants with a complete defense against the heirs' claims).

b. *Invalid If Assuming Risk for Product Supplier*. Public policy prevents a product supplier from using an express assumption of risk contract clause as a defense to a strict liability claim. See Westlye v. Look Sports, Inc. (1993) 17 Cal.App.4th 1715 (skier's written agreement assuming te risk of injury does not bar strict liability claims against sports equipment lessor and distributors for injuries caused by allegedly defective binding).

G. COMMONLY KNOWN DANGERS: The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

1. California Civil Code, Section 1714.45. This section provides that manufacturers of consumer products known by consumers to be inherently unsafe, such as sugar, castor oil, alcohol, and butter, cannot be held strictly liable except in an action based on manufacturing defect or breach of an express warranty.

NOTE: This statute was specifically amended in 1997 so that it "does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from product liability actions, but does exempt the sale or distribution of tobacco products by any other person, including, but not limited to, retailers or distributors." Civil Code, Section

1714.45(b). For conduct falling outside the 10-year immunity period, the tobacco companies are not shielded from product liability lawsuits. Myers v. Philip Morris Companies, Inc. (2002) 28 Cal.4th 828; see also Souders v. Philip Morris, Inc. (2002) 104 Cal.App.4th 15.

2. **California Civil Code, Section 1714.4 Repealed in 2002.** Similarly, this section limits products liability actions with respect to firearms and ammunition, prohibiting such actions based on a design defect theory where it is contended that the benefits of the product do not outweigh the risk of injury. In Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, the California Supreme Court decided that Section1714.4 precludes negligence claim against gun manufacturer for deaths of persons killed by assault-type guns). In 2002, Section 1714.4 was repealed by the California Legislature.

H. SOPHISTICATED USER DEFENSE. A manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger. If successfully argued, it acts as an affirmative defense to negate the manufacturer's duty to warn. Johnson v. American Standard Inc. (2008) 43 Cal. 4th 56.

1. **Jury Instruction. Defendant claims that he is not responsible for any harm to plaintiff based on a failure to warn because plaintiff is a sophisticated user of the product. To succeed on this defense, defendant must prove that, at the time of the injury, plaintiff, because of his particular position, training, experience, knowledge, or skill, knew or should have known of the product's risk, harm, or danger. *CACI 1244*.**

2. **Availability.** The defense is available in strict liability and negligence failure to warn causes of action, including those based on negligence per se. The defense may also apply to a cause of action for strict liability/design defect under the consumer expectations analysis where the plaintiff cannot claim to be an "ordinary consumer." However, the defense is *not* available to a cause of action for strict liability/design defect under the risk/benefit analysis. Johnson v. American Standard Inc. (2008) 43 Cal. 4th 56; Johnson v. Honeywell International, Inc. (2009) 179 Cal. App. 4th 549. Whenever applicable, the sophisticated user defense can, and should, be pled as an affirmative defense.

3. **Time of Injury.** The sophisticated user's knowledge of the risk is measured from the time of the injury, not from the date the product was manufactured. Johnson v. American Standard Inc. (2008) 43 Cal. 4th 56.

I. **SPOLIATION OF EVIDENCE.** Spoliation is the destruction of or significant alteration of evidence, or the failure to preserve property for another's use as evidence, in pending or future litigation. Willard v. Caterpillar, Inc. (1995) 40 Cal.App.4th 892, 906. The measure of harm is the effect of the spoliation on the aggrieved party's ability to establish its case. *Id.*

1. **As a Tort Cause of Action.** The tort of intentional spoliation of evidence is no longer viable in California. Cedars-Sinai Medical Center v. Superior Court (1999) 18 Cal.4th 1; see also Farmers Ins. Exchange v. Superior Court (2000) 79 Cal.App.4th 1400; Lueter v. State of California (2002) 94 Cal.App.4th 1285.

a. *General Principles*. The claim turns upon a balancing of interests which include the nature and seriousness of the harm to the injured party by virtue of the loss of the evidence, the nature of the culpability of the conduct of the party responsible for the loss, the responsible party's motive and the interest promoted by the responsible party's conduct. Willard v. Caterpillar, Inc., *supra*.

For example, in Willard, the jury found a design defect in the Caterpillar tractor and that Caterpillar had destroyed documents relevant to plaintiff's case, thereby substantially hampering the plaintiff's ability to prevail. The Court of Appeal noted several factors that weighed against imposing liability for the evidence destruction: (1) damage to plaintiff's case was minimal, as other evidence showed the likely contents of the destroyed documents, (2) the documents belonged to the defendant, and defendant had no statutory duty to preserve them, and (3) the documents were destroyed prior to the plaintiff's injury and after the product had been available for almost 25 years, such that the destruction could not be viewed as unfair or immoral.

b. *Intentional Spoliation*. While California previously recognized intentional spoliation as a separate tort

entitling the victim to recovery of money damages (see Smith v. Superior Court (1984) 151 Cal.App.3d 491), the California Supreme Court held in Cedar-Sinai Medical Center v. Superior Court *supra*, that no tort cause of action will lie against a party to litigation for the intentional destruction or suppression of evidence relevant to that litigation (thereby overruling Willard at least to the extent of recognizing the tort of intentional spoliation). The Court noted the strong policy against derivative tort remedies for litigation-related misconduct, and reasoned that there are existing and effective nontort remedies for this problem, including the evidentiary inference that evidence destroyed by a party is unfavorable to that party (Evidence Cod, Section 413), sanctions for abuse of discovery (Code of Civil Procedure, Section 2023, See now Section 2023.010 et seq.) disciplinary measures against attorneys involved in spoliation of evidence, and criminal penalties. Moreover, the Court noted the uncertainty of harm in a spoliation case, the unlikelihood that spoliation would be deterred, and the strong possibility of speculative findings and unnecessary consumption of time at trial. In Penn v. Prestige Stations, Inc. (2000) 83 Cal.App.4th 336, the court decided that Cedars-Sinai applies retroactively.

In Temple Community Hospital v. Superior Court (1999) 20 Cal.4th 464, the Court extended that rule to likewise preclude an intentional spoliation claim against third parties (*i.e.*, one not a party to the lawsuit to which the evidence is relevant).

c. *Negligent Spoliation*. Whether a tort cause of action exists for *negligent* spoliation of evidence is unclear in the aftermath of Cedars-Sinai, *supra*. The Supreme Court specifically noted in Temple Community Hospital, *supra*, that it had not been asked to rule upon the viability of negligence spoliation as a tort cause of action. *Id.* at 471 fn. 3. Recent decisions have rejected the tort of negligent spoliation of evidence. Farmers Ins. Exchange v. Superior Court (2000) 79 Cal.App.4th 1400; Lueter v. State of California (2002) 94 Cal.App.4th 1285. **See also the case of Williams v. Russ (2008) 167 Cal. App. 4th 1215, regarding spoliation and sanctions therefor.**

2. **As an Affirmative Defense or Basis for Sanctions or Other Relief.** Spoliation of evidence may be asserted as grounds for monetary sanctions, discovery sanctions, preclusion of evidence sought to be introduced by the other side, a jury instruction regarding an inference against the spoliator, or as grounds for dismissal of some or all of the plaintiff's claims. Such remedies have gained importance in light of the Supreme Court's curtailment of the tort remedies previously available through asserting an intentional spoliation claim. See Puritan Insurance Company (1985) 171 Cal.App.3d 877.

See, e.g., R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal.App.4th 486 (terminating sanctions appropriate in the face of forged documents and destruction of evidence); Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal.App.4th 1152 (court has duty to impose monetary sanctions and to grant a new trial where the defendant intentionally hides evidence); Puritan Insurance Company, *supra* (where plaintiff's expert inadvertently lost conveyor belt drive shaft which was crucial to defense of products liability action, plaintiff's expert testimony based on examination or testing of the shaft was properly excluded as discovery sanction, although photographs of shaft and interpretative testimony based exclusively on photographs were not excluded).

Other jurisdictions have provided further examples. See Sipe v. Ford Motor Company (M.D.Pa. 1993) 837 F.Supp. 660 (products liability action dismissed on public policy grounds where allegedly defective heater had been repaired and was unavailable for manufacturer's inspection); Schwartz v. Subaru of America, Inc. (E.D.Pa. 1994) 851 F.Supp. 191 (destruction of automobile warranted summary judgment in favor of automobile company sued in products liability action); Stubli v. Big D International Trucks, Inc. (1991) 107 Nev. 309 (dismissal of truck driver's action for products liability and negligent repair was appropriate discovery sanction where subject trailer was destroyed just prior to filing of complaint); American Family Insurance Co. v. Village Pontiac GMC, Inc. (1992) 223 Ill.App.3d 624 (summary judgment affirmed in favor of car manufacturer and dealer where critical evidence had been destroyed).

But see Bachmeier v. Wallwork Truck Centers (1993) 507 N.W.2d 527 (order granting summary judgment in products liability action based on destruction of hub which broke off truck

and caused truck to overturn could not have been based on discovery rule addressing sanctions for failure to make or cooperate with discovery, in absence of evidence of violation of rule, and district court did not have inherent power to grant summary judgment as sanction for destruction of hub by defendant's expert).

J. WORKER'S COMPENSATION: EXCLUSIVE REMEDY.

1. **General Rule.** Pursuant to California Labor Code, Section 3600, et seq., worker's compensation is the sole and exclusive remedy available to an injured employee under the following circumstances:

a. Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions afforded under the Code's worker's compensation scheme;

b. Where, at the time of the injury, the employee is performing services growing out of his employment;

c. Where the injury is caused by the employment, either with or without negligence;

d. Where the injury is not caused by the intoxication, or unlawful use of a controlled substance, of the injured employee;

e. Where the injury was not intentionally self-inflicted;

f. Where the employee has not willfully and deliberately caused his or her own death;

g. Where the injury does not arise out of an altercation in which the injured employee was the physical aggressor;

h. Where the injury was not caused by the commission of a felonious act by the injured employee, for which he has been convicted; and

i. Where the injury does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's

work-related duties, except where these activities are required by the employment.

2. Statutory Exception to the Worker's Compensation Exclusive Remedy Rule.

a. *Products liability*. An action at law is permitted for damages in cases in which the employee's injury or death is caused by a defective product manufactured by the employer and sold, leased or transferred for valuable consideration to an independent third party, who then in turn provides the product to the employee. California Labor Code, Section 3602(b)(3).

b. *Dual Capacity Doctrine***.** California Labor Code, Section 3602(a), has limited this doctrine by stating that "the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer." But see Alander v. Vaca Valley Hospital (1996) 49 Cal.App.4th 1298 ("dual capacity exception" allows employees to recover in tort for negligent aggravation of initial industry injury from employer who assumed capacity of medical care provider by undertaking to treat employee's injury; essence of doctrine is that employer as medical care provider engages in relationship with employee as patient that is separate and distinct from employer-employee relationship, since doctor-patient relationship imposes different obligations on employer).

c. *Punch Press Exception*. An employer may be liable where the employee's injury is caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this is done under conditions known by the employer to create a probability of serious injury or death. California Labor Code, Section 4558.

(1) In Saldana v. Globe-Weis Systems Co. (1991) 233 Cal.App.3d 1505, the court ruled that the employer was not liable in that it did not have the requisite knowledge of the danger.

(2) An employer can negate the element of knowledge by establishing through evidence that it never received any information from the manufacturer of the machine regarding the necessity of a point of operation guard. Bryer v. Santa Cruz Pasta Factory (1995) 38 Cal.App.4th 1711; Aguilera v. Henry Soss & Co. (1996) 42 Cal.App.4th 1724.

d. *Claims for an employer's negligent spoliation of evidence* needed for the employee's third party action are not barred by the exclusivity provisions of the Workers' Compensation Act. Coca-Cola Bottling Co. V. Superior Court (1991) 233 Cal.App.3d 1273. (But see discussion of spoliation in general, and the viability of negligent spoliation as a tort, in section VII.I.)

K. PREEMPTION BY FEDERAL LAW. Products liability claims arising under state tort law may be preempted by federal law. The following are some examples:

1. The Food, Drug and Cosmetic Act. The Medical Device amendments of 1976 ("MDA") to the Food, Drug and Cosmetic Act contain an express preemption clause which prohibits states from imposing "any requirement . . . which is different from, or in addition to," federal requirements relating to the safety or effectiveness of medical devices intended for human use. 21 U.S.C. Section 360k(a.)

In Medtronic, Inc. v. Lohr (1996) 518 U.S. 470, a case involving a Class III medical device, the United States Supreme Court held that the MDA are intended to preempt only specific, conflicting state statutes and regulations, rather than general duties imposed by common law actions. Where the Food and Drug Administration has promulgated only generic labeling and manufacturing regulations, narrower state law requirements are not deemed to conflict with more general federal requirements. *Preemption occurs only when a specific state requirement threatens to interfere with a specific federal requirement.*

The Supreme Court further explained that nothing in the preemption provision of the MDA denies states the right to provide traditional damages remedy for violations of common law duties when those duties parallel federal requirements, and that the MDA *do not preempt state or local requirements that*

are equal to, or substantially identical to, requirements imposed by or under the Food, Drug and Cosmetic Act. The recoverability of damages does not amount to additional or different "requirement" under the MDA, but merely provides another reason for manufacturers to comply with identical existing "requirements" under federal law.

See also Papike v. Tambrands, Inc. (9th Circ. 1997) 107 F.3d 737 (toxic shock syndrome victim's failure to warn claim against tampon manufacturer preempted by the MDA); Dowkal v. Smithkline Beecham Consumer Healthcare (2004) 32 Cal.4th 910. (Warning labels mandated by Proposition 65 that conflict with FDA regulations are preempted).

The United States Supreme Court found that federal law did not pre-empt plaintiff's failure to warn state tort claim because although a manufacturer generally may change a drug label only after the FDA approves a supplemental application, the agency's "changes being effected" regulation permits certain preapproval labeling changes that add or strengthen a warning to improve drug safety. It is a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times, not the FDA. The Court gave no weight to language in the FDA's 2006 preamble stating otherwise because it went against Congress' purposes and the FDA's own longstanding position. Wyeth v. Levine (2009) 129 S. Ct. 1187.

2. **The National Traffic and Motor Vehicle Safety Act.** State law causes of action for failure to install airbags, including claims premised on common law, are preempted by the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. section1392(d) (now See 49 U.S.C.S. 30103) and by virtue of the application of Federal Motor Vehicle Safety Standard 208, which applies to "air bags." Geier v. American Honda Motor Co. (2000) 529 U.S. 861.

3. **Safety Appliance Acts.** In Carrillo v. ACF Industries, Inc. (1999) 20 Cal.4th 1158, the California Supreme Court held that a products liability action against the manufacturer of a railroad hopper car, premised upon design defect and failure to warn concerning the lack of guardrails, was preempted by the federal Safety Compliance Acts (49 U.S.C. sec. 20301et seq.) , which do not require guardrails on hopper cars.

4. **Boiler Inspection Act.** In Scheidling v. General Motors Corp. (2000) 22 Cal.4th 471, the California Supreme Court determined that the Boiler Inspection Act, 49 U.S.C. section 20701 preempts state tort law claims seeking to recover damages for injuries from exposure to asbestos-containing materials in locomotives.

5. **Federal Insecticide, Fungicide, and Rodenticide Act.** In Etcheverry v. Tri-ag Service, Inc. (2000) 22 Cal.4th 316, the California Supreme Court held that state law claims for failure to warn of the risks of using a pesticide are preempted by FIFRA (overruled in part by Bates v. Dow Agrosciences LLC (2005) 544 U.S. 431). See also Arnold v. Dow Chemical Co. (2001) 91 Cal.App.4th 698 (while FIFRA preempts a failure to warn claim because the labeling and packaging on a package of insecticide had been approved by the EPA pursuant to FIFRA, a case could proceed on a strict liability design defect theory).

6. **Federal Boat Safety Act**. In LaPlante v. Wellcraft Marine Corp. (2001) 94 Cal.App.4th 282, the court held that the plaintiff's claims arising out of injuries he suffered in a boating accident were not preempted by the FBSA.

7. **Federal Cigarette Labeling and Advertising Act.** Claim for fraud is not preempted by the Federal Cigarette Labeling and Advertising Act of 1969. Whiteley v. Phillip Morris Inc. (2004) 117 Cal.App.4th 635.

8. **Commercial Motor Vehicle Safety Act**. In Weaver v. Chavez (2005) 133 Cal.App.4th 1350, the court held that the trial court erred in not allowing the jury to be instructed on a federal regulation with a higher standard of care than California law.

L. STATUTORY COMPLIANCE. While statutory compliance does not establish a complete defense to tort liability, evidence of compliance may be considered by the trier of fact in determining whether liability should be imposed. See Ramirez v. Plough, Inc. (1993) 6 Cal.4th 539, 547-548 ("there is some room in tort law for the defense of statutory compliance"); Arata v. Tonegato (1957) 152 Cal.App.2d 837, 842-843 (jury entitled to consider compliance with federal labeling requirements for hair dye as factor in determining negligence).

M. GOVERNMENTAL IMMUNITY. Various statutes confer immunity upon public entities from tort liability. See, e.g., Government Code, section 820.2 (gives immunity to public employees for injuries resulting from an exercise of discretion); Government Code, section 818 (a public entity is not liable for exemplary or punitive damages. See also Allyson v. Department of Transp. (1997) 53 Cal.App.4th 1304 (under Government Code, section 831, "the weather immunity defense," a public entity is immune from liability for an injury caused by the weather's effect on the use of highways). See also Government Code, section 831.7 (public entity not liable when injury or damage arises out of participation in a hazardous recreational activity) and Avila v. Citrus Community College District (2006) 38 Cal. 4th 148.

N. DEFENSES IN BREACH OF WARRANTY ACTIONS.

1. No Sale.

a. *U.C.C.* The requirement of a sale has been relaxed to permit recovery for breach of warranties "similar" to the implied warranty of merchantability in cases not involving a sale, in cases in which the transaction is of such a nature that the implication of such warranties is justified. See, e.g., Aced v. Hobbs-Sesack Plumbing Co. (1961) 55 Cal.2d 573, superseded by statute on other grounds as stated in Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116.

b. *Song-Beverly Act*. The Act is generally limited in application to sale of consumer goods, but remedies are extended to lessors under certain circumstances. California Civil Code, Section 1795.4.

2. Absence of Privity of Contract. Despite the exceptions for food and drugs, it remains settled law that privity between the parties is a necessary element to recovery on a breach of implied warranty of fitness for the buyer's use, under the U.C.C. Burr v. Sherwin Williams Co. (1954) 42 Cal.2d 682, 695-96; Hauter v. Zogarts (1975) 14 Cal.3d 104, 114, fn. 8.

In order to recover under the Song-Beverly Act, however, there is no need to establish privity between the buyer and the manufacturer or distributor. The Act implies warranties in retail sales of consumer goods unless they are specifically

disclaimed. California Civil Code, Sections 1792, 1792.1, 1792.2.

3. Failure to Notify Seller of Breach.

a. *U.C.C.*: The Code applies to commercial sales (between merchants) only; once a tender has been accepted, the buyer must, within a reasonable time after he discovers or should have discovered any breach, notify the seller of the breach or be barred from any remedy. The requirement protects the seller from state claims even when the breach of warranty action is framed in a tort theory. Moreover, statutory provisions concerning warranties do not limit courts from imposing common law warranty requirements in situations not involving parties to a sales contract.

b. *Song-Beverly Act*: Once a breach has occurred, the consumer must give the appropriate notice in accordance with the Act's provisions. See e.g. California Civil Code, Section 1793.3.

4. Disclaimer. In general, exculpatory clauses or disclaimers of liability are valid in actions based either on negligence or breach of warranty theories; however, they are strictly construed and must state the attempted exculpation in plain, unambiguous and clear terminology. California Commercial Code, Section 2316.

VIII. DAMAGES

A. IN GENERAL: The manufacturer and retailer of a defective product are liable to the user of the product if the product directly and immediately injures the user of the product or severely harms another while being operated by the user. The liability attaches whether the user suffers *physical* or *emotional* injuries. Kately v. Wilkinson (1983) 148 Cal.App.3d 576.

NOTE: This type of recovery is separate from the bystander liability of Dillon v. Legg (1968) 68 Cal.2d 728 and Thing v. LaChusa (1989) 48 Cal.3d 644 (allowing claims for emotional distress damages by close relations who, in the absence of physical injury or impact to themselves, are present at the scene of the injury-producing event when it occurs and are aware that the event is causing injury to the victim, and, as a result, suffer serious emotional distress).

B. DAMAGES IN NEGLIGENCE CASES.

1. **Compensatory Damages**. Compensatory damages, including damages for exacerbation of pre-existing injuries, are recoverable. California Civil Code, Section 3333.

a. *General Damages*. General damages, including pain and suffering (both present and future), are recoverable. Merrill v. Los Angeles Gas & Elec. Co. (1910) 158 Cal. 499; Capelouto v. Kaiser Foundation Hospitals (1972) 7 Cal.3d 889.

NOTE: Hedonic damages are not separately recoverable. In Loth v. Truck-A-Way Corporation (1998) 60 Cal.App.4th 757, it was held that hedonic damages - *i.e.*, for plaintiff's loss of enjoyment of life or loss of life's pleasures - are simply one form of pain and suffering, and therefore the jury cannot be instructed to decide the amount of plaintiff's pain and suffering separately from the amount of her loss of enjoyment of life.

b. *Special Damages*. Loss of earnings, and costs of required medical care, present and future, are recoverable. California Civil Code, Section 3283; Oliveira v. Warren (1938) 24 Cal.App.2d 712. Injuries to real and personal property are likewise recoverable. Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 19; but see KB Home v. Superior Court (2003) 112 Cal.App.4th 1076 (No life safety exception to economic loss rule exists where defective emission control devices resulted in damaged furnaces that were fire hazards).

2. **Enhanced Injury Damages** (Crashworthiness). Where a plaintiff shows that because of a defective design his injuries were increased or more extensive than they otherwise would have been, manufacturer will beheld liable for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred absent the defective design. Larsen v. General Motors Corp. (8th Cir. 1968) 391 F.2d 495. See also Cronin v. J.B.E. Olson Corp. (1972) 8 Cal.3d 121 at 126.

a. *Jury Instruction.* Jury must be instructed that any design defect was not a substantial or contributing cause of plaintiff's enhanced injuries if those same injuries would

have occurred even with a nondefective design. Soule v. General Motors Corp. (1994) 8 Cal.4th 548.

C. DAMAGES IN STRICT LIABILITY CASES.

Except as noted below, damages recoverable in strict liability cases are the same as those recoverable in negligence cases

1. **No Pure Economic Loss**. There is no recovery for purely economic loss under strict liability theory. A plaintiff cannot recover damages for economic or commercial loss, unless there has been personal injury and a claim for loss of earnings is made. Seely v. White Motor Co. (1965) 63 Cal.2d 9, 19; Sacramento Regional Transit Dist. v. Grumman Flexible (1984) 158 Cal.App.3d 289. Carrau v. Martin Lumber & Cedar Co. (2001) 93 Cal.App.4th 281, 292 (Seely analysis precludes recovery of damages under strict products liability theory for cost of replacing or repairing defective product); Stearman v. Centex Homes (2000) 78 Cal.App.4th 611 (damage sustained to plaintiffs' homes is physical injury falling outside the parameters of economic loss and is thus compensable under strict liability theory); KB Home v. Superior Court (2003) 112 Cal.App.4th 1076 (No life safety exception to economic loss rule exists where defective emission control devices resulted in damaged furnaces that were fire hazards).

2. **Punitive Damages**. Under some circumstances, punitive damages are recoverable. See discussion below in subsection J.

D. DAMAGES IN BREACH OF WARRANTY ACTIONS.

1. **Damages for Injuries to the Person and Property**. Recoverable under causes of action based on express warranty, implied warranties of merchantability or fitness for a particular purpose. California Commercial Code, Section 2714.

a. *Damages to the goods* are measured as follows: the difference at the time and place of acceptance between the value of goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. California Commercial Code, Section 2714.

b. *Damages under the Song-Beverly Act*. Under the Act, if the consumer good cannot be repaired to make it as warranted after a reasonable number of attempts at repair, the consumer is entitled to restitution or replacement, at his election. California Civil Code, Section 1793.2(d)(2).

If the consumer establishes a failure to replace or reimburse was willful, the judgment may include a civil penalty of up to two times the amount of actual damages. California Civil Code, Section 1794(c).

Also, if a consumer prevails in an action under the Act, he may recover costs and expenses including attorney's fees. California Civil Code, Section 1794(d).

2. Economic or Commercial Loss.

a. *Implied warranty*: Not recoverable unless privity of contract exists between plaintiff and defendant. Anthony v. Kelsey-Hayes Co. (1972) 25 Cal.App.3d 442.

b. *Express warranty*: Recoverable even if no privity of contract between plaintiff and defendant. Seely v. White Motor Co. (1965) 63 Cal.2d 9.

3. Lost Profits. When economic losses are recoverable, lost profits may be recoverable if their extent and occurrence can be ascertained with reasonable certainty, and the entity asserting the claim is an established business. Grupe v. Glick (1945) 26 Cal.2d 680.

4. Punitive Damages. Recoverable under express warranty theories when the plaintiff proceeds under alternate tort theories in his contract action. Frazier v. Metropolitan Life Ins. Co. (1985) 169 Cal.App.3d 90, 107.

E. DAMAGES IN FRAUD AND DECEIT ACTIONS.

1. **Measure of Damages. One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers. California Civil Code, Section 1709. Regarding fraudulent property sales,** damages are measured as the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction. California Civil Code, Section 3343.

2. **Punitive Damages**. Under some circumstances, punitive damages are recoverable. Ward v. Taggart (1959) 51 Cal.2d 736; California Civil Code, Section 3294. See discussion J below.

F. JOINT AND SEVERAL LIABILITY IN COMPARATIVE FAULT CASES (PROPOSITION 51).

1. **General Rule**. As a general rule, joint tortfeasors are each individually liable for the full amount of plaintiff's damages. The principles of comparative fault, which reduce a plaintiff's damages by his or her percentage of fault, apply also to strict products liability actions. Daly v. General Motors Corp. (1978) 20 Cal.3d 725.

2. **Effect of Proposition 51 (California Civil Code, Section 1431, et seq.).** The principle of joint and several liability has been limited, however, by California Civil Code Sections 1431,*et seq*., commonly referred to as Proposition 51. Joint tortfeasors are still held jointly liable for the injured party's economic damages, but are liable only for their proportionate share of the injured party's non-economic damages (such as pain and suffering) according to their percentage of fault . (NOTE: Proposition 51 does not apply to causes of action arising prior to June 4, 1986).

3. **Proposition 51 Is Applicable to Parties at "Fault."**

   a. *In General: Parties at "Fault" - Whether Present in the Action or Not*. A manufacturer will be liable only for its proportional share of the non-economic damages as compared with all fault, not merely as compared with the fault of defendants present in the lawsuit. See Cal. Civil Code §1431.2(a)

b. *Not Applicable in Strict Products Liability Cases Where Injury Is Caused Solely by One Defective Product*. Proposition 51, however, has *no* application in a strict products liability case where the plaintiff's injuries are caused solely by a defective product, and all the defendants are within the chain of distribution of that product. Wimberly v. Derby Cycle Corp. (1997) 56 Cal.App.4th 618, 633. The rationale is that the potential reduction or elimination of the defendant's responsibility for non-economic damages would thwart the public policy of ensuring that the costs of injuries caused by defective products are imposed upon those profiting from those products. *Id.* at 632. Since strict products liability is based upon a policy of allowing a consumer to recover from any entity in the chain of production and marketing of a defective product, defendants within the defective product's chain distribution may not reduce their liability for non-economic damages in proportion with their share of fault.

c. *Applicable in Strict Products Liability Cases Involving Multiple Products.* In Arena v. Owens-Corning fiberglass Corp. (1998) 63 Cal.App.4th 1178, the court held that Proposition 51 is applicable in a strict liability case where multiple products cause the plaintiff's injuries, *and* the evidence provides a basis to allocate liability for non-economic damages between the defective products.

Where the evidence shows that a particular product is responsible for only part of plaintiff's injury, Proposition 51 requires apportionment of the responsibility for that part of the injury to that particular product's chain of distribution. *Id.* at 1198. See also Wilson v. John Crane, Inc. (2000) 81 Cal.App.4th 847.

d. *Applicable to Plaintiff's Employer.* Even though the employer of the injured plaintiff cannot be a tort or indemnity defendant, Proposition 51 allows fault and a proportionate share of non-economic damages to be allocated to the employer - even though the employee will never recover the amounts so allocated by virtue of the workers' compensation exclusivity rule (see Section VII.I. above). See Dafonte v. Up-Right (1992) 2 Cal.4th 593.

e. *Applicable to Intentional tortfeasors.* Proposition 51 applies to actions in which the injury is caused by two tortfeasors, one of whom acts intentionally and the other negligently. Weidenfeller v. Star & Garter (1991) 1 Cal.App.4th 1. Protecting a negligent tortfeasor against liability for non-economic damages caused by an intentional tortfeasor does not contravene public policy, even though it may prevent a plaintiff from fully recovering due to the intentional tortfeasor's insolvency. *Id.*

f. *Not Applicable to Defendants Whose Liability is Solely Derivative.* Proposition 51 may *not* be used to reduce the liability of defendants whose liability is imposed purely as a matter of public policy (as in the case of strict products liability defendants in the chain of the defective product's distribution), and not based upon an actual finding of fault. See, e.g., Miller v. Stouffer (1992) 9 Cal.App.4th 70, 83-84 (Proposition 51 is inapplicable to reduce the liability of an employer, who is without fault and is vicariously liable for damages caused by an employee's acts pursuant to the doctrine of *respondeat superior*).

4. **Allocation of Settlements.** Pursuant to Proposition 51, non-settling defendants do not receive credit for the whole amount of a settlement under California Code of Civil Procedure, Section 877 (the good faith settlement provisions; see discussion at Section XII.C. below), since a portion of a settlement reflects the defendant's several liability for the plaintiff's non-economic damages. In re Piper Aircraft (N.D.Cal. 1992) 792 F.Supp. 1189.

a. *Availability of Set-off*. Because all defendants are jointly liable for economic damages, any award of economic damages *is* reduced by pre-trial payments. However, pre-trial settlements are not available as an offset to reduce a defendant's responsibility for any award of non-economic damages. Espinoza v. Machonga (1992) 9 Cal.App.4th 268. The set-off for economic damages is available even if the settling defendant is ultimately found by the jury to be without fault, as long as that defendant was alleged by the plaintiff to be at fault for the same injury. Poire v. C.L. Peck/Jones Brothers

Construction Corp. (1995) 39 Cal.App.4th 1832; McComber v. Wells (1999) 72 Cal.App.4th 512.

NOTE: The non-settling defendant can *waive* the right to a set-off by failing to propose a special verdict that would have permitted such calculation by differentiating between economic and non-economic portions of the judgment. See Conrad v. Ball Corporation (1994) 24 Cal.App.4th 439.

b. *Calculation of Set-off*. Espinoza, *supra*, provided that the allocation of settlement payments to economic damages should correspond to the percentage of the jury award attributable to economic damages in relationship to the entire award. *Id.* at 275.

c. *Court Approval of Pretrial Allocation?* The only appropriate *post-verdict* apportionment of a pre-trial settlement between economic and non-economic damages is the allocation reflected in the jury's verdict, pursuant to the holding in Espinoza. See Greathouse v. Amcord, Inc. (1995) 35 Cal.App.4th 831, 838-841. However, it appears that a trial court *may* be empowered under certain circumstances to approve a *pretrial* allocation of settlement proceeds between economic and non-economic damages. See Ehret v. Congoleum Corp. (1999) 73 Cal.App.4th 1308, 1321 (Appellate court noted that it was unsettled as to whether a trial court can approve a pretrial allocation, but assumed for purposes of its analysis that a trial court had that power.)

Assuming that such a pretrial allocation were possible, it is not clear what evidentiary showing and what procedural mechanism would be required to obtain the allocation. Generally speaking, the determination would certainly have to be made during a hearing that "satisfies due process standards" (Greathouse, *supra* at 841), and is conducted on "a proper adversarial basis" (Regan Roofing Co. v. Superior Court (1994) 21 Cal.App.4th 1685, 1703). In other words, the party proposing the allocation must make a factual showing supporting that allocation, pursuant to a noticed motion. Evidence supporting a proposed allocation should include information regarding the timing of the settlements, the terms of the settlements (*e.g.*, whether the settlement

amounts were fixed prior to the contractor's death, or whether they were contingent upon his survival of trial), and whether the settlement agreements themselves contained any allocations between economic and non-economic damages. Ehret, *supra*.

d. *Post-Trial Settlements*. The Espinoza rule does not apply where settlement occurs *after* trial. In Torres v. Xomox (1996) 49 Cal. App.4th 1, the court concluded that the Espinoza approach is inappropriate for allocating post-verdict settlements, in that it may result in an allocation of more of the settlement to non-economic damages than the settling defendant's liability for such damages under the verdict. Instead, the court held that the "ceiling" approach should be used. Under this approach, the amount of a post- verdict settlement is allocated first to non-economic damages, but only up to the amount of the settling defendant's liability for such damages under the verdict. The balance of the settlement, if any, then becomes a credit against the award of economic damages. *Id*. at 40.

5. Set-off From Award of Economic Damages in Amount of Worker's Compensation Benefits. In Scalice v. Performance Cleaning Systems (1996) 50 Cal.App.4th 221, the court noted that Workers' Compensation benefits have both economic and non-economic attributes. Since such benefits are in the nature of a "settlement" imposed by the Legislature, they should be allocated pursuant to the same rule used for apportioning settlement proceeds - *i.e.*, the economic portion of the settlement proceeds should bear the same ratio to the total settlement as the jury-determined economic damages bore to the total judgment. Then, only the economic portion of workers' compensation is subtracted from the economic damages as an offset. See also Torres v. Xomox Corporation (1996) 49 Cal.App.4th 1 (Proposition 51 applied to Workers' Compensation benefits received by an employee in subsequent wrongful death action brought by the employee's family against the manufacturer of the product which allegedly caused the employee's death).

G. **COLLATERAL SOURCE RULE**. Under this rule, a plaintiff's recovery against a wrongdoer is not diminished by any amounts received by the plaintiff from a source wholly independent of the wrongdoer (*e.g.* medical insurance benefits). Helfend v. Southern Calif. Rapid Transit Dist. (1970) 2 Cal.3d 1, 6; see also McKinney v. California Portland Cement Co. (2002) 96 Cal.App.4th 1214.

NOTE: **In Howell v. Hamilton Meats & Provisions, (2011) 52 Cal. 4th 541, the California Supreme Court concluded that plaintiff could recover as damages for her past medical expenses *no more than* her medical providers had accepted as payment in full from plaintiff and her health insurer. Thus, reversing the appellate court decision which found that** the negotiated rate differential is a benefit within the meaning of the collateral source rule. Howell v. Hamilton Meats (2009) 179 Cal. App. 4th 686 **(superseded)**. **See also, Hanif v. Hous. Auth., (1988) 200 Cal. App. 3d 635; Nishihama v.City, (2001) 93 Cal. App. 4th 298**.

H. **PROPOSITION 213 NOT APPLICABLE**. Proposition 213 (Civil Code, Section 3333.4) which prohibits the recovery of non-economic damages if the injured person was an uninsured owner or operator of the vehicle involved in the accident, does not apply to products liability actions (Hodges v. Superior Court (1999) 21 Cal.4th 109) or to wrongful death actions (Horwich v. Superior Court (1999) 21 Cal.4th 272).

I. **PUNITIVE DAMAGES**. Punitive or exemplary damages are awarded in tort actions where the defendant's conduct has been outrageous, for the purpose of punishing him and deterring him and others from such conduct in the future. California Civil Code, Section 3294.

1. **"Oppression," "Fraud" or "Malice" Required**. The plaintiff must prove that the defendant has been guilty of "oppression," "fraud" or "malice."

a. *"Malice"* is defined as conduct intended by defendant to cause injury to plaintiff, or despicable conduct with willful and conscious disregard of the rights or safety of others. The legal interpretation of "malice" encompasses the callous and conscious disregard of public safety exercised by the manufacturers of mass-produced, defectively designed products, since neither compensatory damages, government safety standards, or criminal penalties effectively protect consumers from

such corporate conduct. Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757.

b. *"Oppression"* is defined to include despicable conduct that subjects a person to cruel and unjust hardship.

NOTE: Proof of malice in fact or actual malice is required. Proof may be by (1) direct evidence of bad motive, (2) evidence furnished by the nature of the act done, or (3) circumstantial evidence. See Ross v. Sweeters (1932) 119 Cal.App.716; Travelers Ins. Co. v. Lesher (1986) 187 Cal.App.3d 169 (overruled on other grounds by Buss v. Superior Court (1997) 16 Cal. 4th 35); Parrott v. Bank of America (1950) 97 Cal.App.2d 14. A non-suit on punitive damages is appropriate when no substantial evidence of "malice" was presented. Stewart v. Truck Insurance Exch. (1993) 17 Cal.App.4th 468.

2. Pleading and Proof.

a. *Clear and convincing* evidence of "oppression," "fraud" or "malice" is required.

b. *Corporations*. Punitive damages may not be imposed on a corporate defendant unless it is shown that the requisite acts were performed either (1) by an "officer, director, or managing agent," or (2) by an employee, who is known by his/her employer to be "unfit" and yet employed "with a conscious disregard of the rights and safety of others," or whose acts were "authorized or ratified" by an "officer, director, or managing agent." Civil Code, Section 3294(b); Kelly-Zurian v. Wohl Shoe Co., Inc. (1994) 22 Cal.App.4th 397.

NOTE: In White v. Ultramar, Inc. (1999) 21 Cal.4th 563, the California Supreme Court clarified that, whether or not a supervisory employee qualifies as a "managing agent" in the context of Section 3294(b), turns not so much on the managerial level of the employee, but on whether the employee had "substantial independent authority and judgment in their corporate decision making so that their decisions ultimately determine corporate policy."

c. *Evidence of Financial Condition*. Evidence of defendant's financial condition is a prerequisite to a punitive damages award. A plaintiff seeking an award of punitive damages bears the burden of producing evidence of defendant's financial condition. Adams v. Murakami (1991) 54 Cal. 3d 105.

3. Limitations.

a. *Statutory Protection*. Section 3295 of the California Civil Code provides some protection to defendants in actions where punitive damages are sought.

(1) Section 3295 limits the discovery of a defendant's financial condition, and

(2) Section 3295 allows for the bifurcation of trials, precluding evidence of the defendant's financial condition until after the trier of fact returns a verdict for the plaintiff awarding actual damages and finding the defendant guilty of malice. oppression, or fraud.

b. *Requires "Meaningful Evidence."* Award of punitive damages constitutes reversible error unless trial record contains "meaningful evidence" of defendant's financial condition. Evidence of the defendant's income alone, without any evidence of net worth, balance sheets, et cetera, is inadequate to sustain an award of punitive damages because such evidence does not provide a sufficient basis for evaluating whether the award exceeds the amount necessary to punish and deter. Lara v. Cadag (1993) 13 Cal.App 4th 1061.

c. *Grossly excessive awards* of punitive damage may be overturned as violative of the due process clause of the Fourteenth Amendment. In BMW of North America, Inc. v. Gore (1996) 517 U.S. 559, 116 S.Ct. 1589 the United States Supreme Court found a jury's punitive damage award of $4 Million, reduced by the Alabama Supreme Court to $2 million, grossly excessive and therefore violative of the due process clause of the Fourteenth Amendment. In that case, the plaintiff purchased a BMW sports sedan and sued for failure to disclose after detecting evidence that the car had been repainted;

Supreme Court held that BMW's conduct was not sufficiently egregious to justify the severe punitive sanction imposed against it, and that such an award violates due process when it can be fairly characterized as grossly excessive in relation to the state's legitimate interest in punishing unlawful conduct and deterring its repetition.)

The United States Supreme Court noted that several factors weigh in analyzing the excessiveness of a punitive damage award: the degree of reprehensibility of the defendant's conduct; the ratio between the plaintiff's compensatory damages and the amount of punitive damages; and the difference between a punitive damages award and the civil or criminal sanctions that could be imposed for comparable misconduct.

The United States Supreme Court revisited the issue of punitive damages in State Farm Mutual Automobile Ins. Co. v. Campbell (2003) 538 U.S. 408. Using the Gore guideposts, the Court found that a $145 million punitive damages award was neither reasonable or proportionate to the wrong committed, where the compensatory damages were $1 million in a case involving a bad faith failure to settle within policy limits. The Court held it was an irrational and arbitrary deprivation of the property of defendant in violation of the Due Process Clause of the 14th Amendment to the Constitution.

In Romo v. Ford Motor Co. (2003) 113 Cal.App.4th 738, following remand from the United States Supreme Court for further consideration in light of State Farm, the California Court of Appeal reduced the punitive damages award from $290 million to $23,723,287, about five times the compensatory damages. The wrongful death case involved a products liability action arising out of rollover accident.

The punitive damages award in Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburg (2004) 118 Cal.App.4th 1061, was also vacated by the United States Supreme Court, which remanded the case twice for further consideration in light of State Farm. The jury had awarded $165,414.40 in an insurance coverage case with actions for breach of contract, breach of

implied covenant of good faith and fair dealing, and fraud. The trial court reduced the original punitive damages award of $10 million to $1.7 million. The punitive damages were ultimately reduced to $360,000.

In Boeken v. Philip Morris Inc. (2005) 127 Cal.App.4th 1640, the court reduced a $3 billion punitive damages to $50 million pursuant to State Farm. Plaintiff was awarded $5,539,127 in compensatory damages for personal injuries he incurred as a smoker.

In Johnson v. Ford Motor Co. (2005) 35 Cal. 4th 1191, the California Supreme Court held that punitive damages reduced from $10 million to $53,435 was improper because the Court of Appeal failed to adequately consider that defendant's fraud was more reprehensible because it was part of a repeated corporate practice. The Court remanded the case for a due process review as required by State Farm and Gore.

In Exxon Shipping Co. v. Baker (2008) 128 S. Ct. 2605 the United States Supreme Court held that as a matter of maritime common law the punitive damages award against Exxon was excessive, and found that in the circumstances of that case, the award should be limited to an amount equal to compensatory damages, thus, adopting a 1:1 ratio as the cap. Notably, the application of this decision is narrow as the analysis was under federal maritime law, and not under due process.

d. *Death Actions*. Punitive damages are not recoverable by a decedent's heirs in a wrongful death action except where the death resulted from a homicide for which the defendant has been convicted of a felony. California Code of Civil Procedure Section 377.20 and Civil Code Section 3294(d).

IX. PRELIMINARY PROCEDURAL MATTERS

A. PERSONAL JURISDICTION OVER DEFENDANTS.

1. **Domestic Defendants**.

California's "long arm" jurisdictional statute provides that the courts of this state can exercise jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States," California Code of Civil Procedure, Section 410.10; Aanestad v. Beech Aircraft Corp. (1974) 521 F.2d 1298.

a. *Minimum Contacts*. An accident within the State is usually sufficient to establish "minimum contacts" with the forum state necessary for the exercise of jurisdiction over the manufacturer of the product involved in the accident.

b. In Worldwide Volkswagen Corporation v. Woodsen (1980) 444 U.S. 286, the United States Supreme Court set forth five factors to be considered in determining whether personal jurisdiction exists:

   (1) The extent to which the lawsuit relates to the defendant's activities or contacts with California;

   (2) The availability of evidence, and the location of witnesses;

   (3) The availability of an alternative form in which the claim could be litigated;

   (4) The relative costs and burdens to the litigants of bringing or defending the action in the forum state rather than elsewhere; and

   (5) The state policy in providing a forum for the particular litigation.

c. Maintenance of the suit within the forum state must not offend traditional notions of fair play and substantial justice. Alexander v. Circus Circus Enterprises, Inc. (1991) 939 F.2d 847 (opinion later withdrawn on evidentiary issues). See International Shoe Co. v. State of Washington (1947) 326 U.S. 310.

2. **Foreign Defendants**. The rules for service of persons in foreign countries are expressly subject to the Hague Convention, if the countries involved are signatories. (The United States is a signatory to the Hague Convention.) 20 U.S.T. 361-367; Suzuki Motor Co. v. Superior Court (1988) 200 Cal.App.3d 1476.

a. According to Honda Motor Company, Ltd. v. Superior Court (1992) 10 Cal.App.4th 1043, among the methods of service authorized under the Hague Convention are the following:

(1) Service through the receiving country's designated "central authority" for service of foreign process (Article 5);

(2) Delivery by the "central authority" to the addressee who accepts service voluntarily so long as the method used is not incompatible with the law of the receiving state (Article 5);

(3) Service through diplomatic or consular agents of the sending state (Article 8);

(4) Service through the judicial officers, officials, or other competent persons of the receiving state (Article 10);

(5) Service permitted by the internal law of the receiving state for documents coming from abroad (Article 19).

B. **STATUTE OF LIMITATIONS**: Generally the two-year period of limitations prescribed by California Code of Civil Procedure, Section 335.1, applies to personal injury actions in products liability.

1. **Exception: the Discovery Rule**. Courts have created an exception to the strict application of the statute, the "discovery rule," pursuant to which the statute of limitations does not begin to run until the plaintiff knows, or by the exercise of reasonable diligence should have discovered, his injury. Martinez-Ferrer v. Richardson-Merrell, Inc. (1980) 105 Cal.App.3d 316.

See, e.g., Tucker v. Baxter Healthcare Corporation (9th Cir. 1998) 158 F.3d 1046 (limitations period in products liability

action is tolled where injuries were not known to be associated with product). Norgart v. Upjohn Co,. (1999) 21 Cal.4th 383 (date of accrual for a wrongful death cause of action is the date on which the plaintiff comes at least to suspect, or has reason to suspect, a factual basis for its elements). Clark v. Baxter Healthcare Corp (2000) 83 Cal.App.4th 1048 (even though the plaintiff knew her reaction was caused by latex gloves, a genuine issue of material f act existed whether she knew of a basis for a manufacturing defect claim); Siegel v. Anderson (2004) 118 Cal.App.4th 994 (a cause of action for latent construction defects accrues when the owner discovers the damage, not when the defects cause some appreciable harm); Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797 (under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and a wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that cause of action).

2. **No Statute of Repose in California**. Many states have some form of repose statute essentially ending the manufacturer's potential liability at the end of an express or implied period of time designated as the "useful life" of the product by statute. California does not have any statute of repose.

X. DISCOVERY

A. **ELECTRONICALLY STORED INFORMATION (ESI)**. In June 2009 the Electronic Discovery Act was signed into law, which made several changes to the California Code of Civil Procedure ("CCP"). Intended to "establish procedures for a person to obtain discovery of electronically stored information," it is extremely important in products liability litigation.

1. **Definitions**. "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities and "Electronically stored information" means information that is stored in an electronic medium. Cal. Code Civ. Proc. § 2016.020.

2. **Relevance**. **"By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records - paper or electronic - and to search in the right places for those records, will inevitably result in the spoliation of evidence." Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 462 (2010).**

   Clients have an obligation to implement a proper document retention strategy to preserve ESI, and their attorneys have a duty to monitor compliance, a duty to locate relevant information, and a continuing duty to ensure preservation. Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (2004). Both clients and their attorneys can be severely sanctioned for failure to disclose ESI, such as emails and other electronic documents. Qualcomm Incorporated v. Broadcom Corporation, 548 F.3d 1004 (2008).

3. **Subpoenas and Demands.** One's obligation to produce ESI is triggered by a subpoena demanding ESI or by a discovery request demanding ESI. Cal. Code Civ. Proc. §§ 1985.8 and 2031.010.

4. **Protective Orders**. When a demand is made, any party or affected person, under certain circumstances, may promptly move for a protective order, accompanied by a meet and confer declaration. Cal. Code Civ. Proc. § 2031.060.

5. **Inadvertently Produced ESI.** The Electronic Discovery Act provides a mechanism to retrieve privileged or protected ESI that was already produced, inadvertently, to the other party pursuant to a response to a demand or a subpoena. Cal. Code Civ. Proc. §§ 2031.285 and 1985.8(i).

B. INSURANCE POLICIES ARE DISCOVERABLE. Irvington-Moore, Inc. v. Superior Court of Shasta County (1993) 14 Cal.App.4th 733. Cal. Code Civ. Proc., Section 2017.210, provides for the discovery of information as to insurance coverage. It does not expressly exclude discovery of an application but it does limit the discovery of insurance policies to their "contents." Thus, when an application is not made part of the policy, the application would not be separately discoverable.

1. **Objections to Discovery Requesting Insurance Application.** The trial court may limit discovery on a proper showing under Code of Civil Procedure Section 2019.030, considering whether the request is duplicative, cumulative or unduly intrusive. Code of Civil Procedure, Section 2031.060, permits a party on whom a request for production of documents is served to object or seek a protective order. The trial court may make any order that justice requires to protect a party against unwarranted disclosure.

C. DISCOVERY RE: EXPERTS.

(See Section XI.C. re: use and substance of expert testimony.)

1. **In Federal Court**. Discovery of material on which expert relies in forming opinion is not limited to documents which support expert's opinion because they are relevant to impeachment of the witness during trial. Federal Rules Civil Procedure R. 26(b). In re Air Crash Disaster at Stapleton Int'l Airpt., Denver, Colorado on November 15, 1987 (1988) 720 F.Supp. 1442.

2. **In State Court**. See Code of Civil Procedure, Section 2034.010 et seq. The trial court can exclude testimony of an undisclosed expert witness. Province v. Center for Women's Health & Family Birth (1993) 20 Cal.App.4th 1673, Duane Fish v. Santiago F. Guevara (1993) 12 Cal.App.4th 142, Martinez v. City of Poway (1993) 12 Cal.App.4th 425 (disapproved to the extent inconsistent by Bonds v. Roy (1999) 20 Cal. 4th 140).

   a. *Opportunity to Depose*. Trial court can exclude testimony of expert where the expert is "unreasonably" unprepared at the agreed-upon time for his or her deposition to testify regarding expert opinions to be offered at trial. Stanchfield v. Hamer Toyota (1995) 37 Cal.App.4th 1495 (no exclusion of testimony based upon failure to give a complete deposition where the objecting party elected not to pursue matter until two weeks into trial).

   b. *Treating Physicians*. Plaintiff's treating physician is not a "retained" expert, and therefore may render expert opinions at trial regarding his/her *own observations and treatment*, even if not designated as an expert under Section 2034.210 et seq. Huntley v. Foster (1995) 35 Cal.App.4th 753; see also Schreiber v. Estate of Donald

Wayne Kiser (1999) 22 Cal.4th 31 (Section 2034.210 et seq. does not require submission of an expert witness declaration for a treating physician).

D. MEDICAL EXAMINATIONS. Court ordered medical examinations may not be videotaped. Ramirez v. MacAdam (1993) 13 Cal.App.4th 1638.

E. DEPOSITIONS.

1. Persons Who May Be Deposed. Only witnesses who actually live in California at the time of service of a subpoena issued in California must appear. Code of Civil Procedure, Section 1989.

Chief Executive Officer may not be deposed in suit against corporation absent showing he or she had some involvement in suit. Liberty Mutual Insurance Company v. Superior Court (1992) 10 Cal.App.4th 1282. The remedy is to move for a protective order pursuant to Code of Civil Procedure, Section 2025.420.

2. Form of Questions and Responses.

a. *"Legal contention" questions*, which ask a party deponent to state all facts, list all witnesses and identify all documents that support or pertain to a particular contention in that party's pleadings, while entirely appropriate for interrogatories, are not proper in the deposition of a party who is represented by counsel. Rifkind v. Superior Court, (1994) 22 Cal.App.4th 1255.

b. *Nonverbal answers may be compelled.* The word "answer," as used in Code of Civil Procedure, Section 2025.480, (pertaining to motions to compel "answers"), includes nonverbal as well as verbal responses at a videotaped deposition, and a deponent's failure to comply with a court order compelling a nonverbal reenactment of the accident warrants sanctions, including evidence preclusion. Emerson Electric Co. v. The Superior Court of Los Angeles County (1997) 16 Cal.4th 1101.

F. ORDERS ISSUED IN OTHER STATES. In Smith v. Superior Court (1996) 41 Cal.App.4th 1014, a California Court of Appeal held that a permanent injunction issued by a Michigan court, which adversely

affected plaintiffs' discovery rights in a California action, would not be given effect in California. The Michigan court had issued a permanent injunction in favor of General Motors which prevented a former employee from disclosing trade secrets or confidential materials. Plaintiffs in Smith sought to depose the former employee and call him as an expert. The California court concluded that the public policy exception to the full faith and credit clause of the United States Constitution does not require enforcement of the injunction, where enforcement would substantially impair the California parties' rights, and where the Michigan court did not have jurisdiction over the California parties.

XI. TRIAL STRATEGY

A. JURIES.

1. **Forensic Psychologists May Be Used to Pick Juries**.

2. **Ensure That Jury Understands Its Role**. See, e.g., McDonald v. Southern Pacific Transportation Company (1999) 71 Cal.App.4th 256 (jury discussing evidence not presented at trial during jury deliberations constitutes misconduct requiring new trial).

3. **Use Demonstrative Evidence.** Juries place great weight on tangible items in evidence, e.g., animation, graphics, blow-ups, working/functional mock-ups.

B. **JOINT AND SEVERAL LIABILITY**. California Civil Code, Section 1431 (Proposition 51). See discussion under "DAMAGES."

C. **EXPERT TESTIMONY**.

1. **Qualification.** An expert is a person who has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. The special knowledge, skill, etc., may be shown by any admissible evidence, including his own testimony. California Evidence Code, Section 720.

2. **Subject Matter and Admissibility.** Generally speaking, physical facts which are shown by the evidence and can be perceived by a layman do not require expert testimony. Pursuant to California Evidence Code, Section 801, an expert's testimony in the form of an opinion is allowed under the following conditions:

   a. The expert's opinion is related to a subject sufficiently beyond common experience that the opinion of an expert would assist the trier of fact;

   b. The expert's opinion is based on matter (including special knowledge, skill, etc.) perceived by or personally known to the witness or *made* known to him at or before the hearing, admissible or not, that reasonably may be relied upon by an expert in forming an opinion on the testimony subject, unless precluded by law from using such matter as a basis for his opinion.

      See McKendall v. Crown Control Corp. (9th Cir. 1997) 122 F.3d 803 (expert opinion based on experience and training is admissible in the absence of "sound" scientific principles); California Evidence Code, Section 721(b) (expert may be cross-examined with regard to a publication if it has been established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice).

3. **May Be Disregarded by Jury**. Even if an expert witness's testimony is uncontradicted by any other expert testimony, a jury may disregard it if there is substantial evidence which allows the jury to conclude that the expert's opinion lacked foundation or was not credible. Howard v. Owens-Corning (1999) 72 Cal.App.4th 621.

4. **Scientific Expert Testimony**. The U.S. Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993) 509 U.S. 579, 113 S.Ct. 2786 requires "a reasonable degree of scientific certainty" for expert scientific testimony to be admissible. The California Supreme Court has rejected Daubert and reconfirmed the rule enunciated in People v. Kelly (1976) 17 Cal.3d 24. People v. Leahy (1994) 8 Cal.4th 587.

   a. *Kelly Test*. Scientific expert testimony may be received in evidence if the following factors have been

established: (a) the reliability of the method in general; (b) the evidence is provided by a properly qualified expert; (c) proper scientific procedures have been used.

Stephen v. Ford Motor Co. (2005) 134 Cal. App. 4th 1363 Plaintiff's tire expert's testimony was properly excluded in a rollover case because there was no foundation for his opinions.

D. FUTURE MEDICAL TESTIMONY

1. **In General.** Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future. California Civil Code Section 3283.

2. **Reasonable Certainty**. In order to recover present damages for apprehended future injures, the evidence must show with *reasonable certainty* that such injuries will follow. Wiley v. Young (1918) 178 Cal. 681; Bellman v. San Francisco High School (1938) 11 Cal. 2d 576. However, the law does not require a witness, e.g. a doctor, to state that he is reasonably certain that the indicated results will follow before the testimony is admissible. It is the province of the jury to weigh the testimony's value as proof. Cordiner v. Los Angeles Traction Co. (1907) 5 Cal. App. 400.

E. GENERAL DEFENSE TRIAL STRATEGIES RE: STRICT LIABILITY

1. Try Conduct of Plaintiff and Employer

a. Was there misuse or abuse of product?

b. Was the product altered?

c. Was the product properly maintained?

2. Try Accident - Not Product

a. Violent accident. Raise laws of physics.

b. Freak accident. Not reasonably foreseeable. The trial court may admit testimony regarding the absence of prior similar claims whether the action is based on negligence or strict products liability. Evidence

concerning a lack of prior similar claims involving vehicles manufactured by the defendant on trial is relevant and probative. Benson v. Honda Motor Company, (1994) 26 Cal.App.4th 1337.

c. Plaintiff caused/created the problem/accident/injury.

d. Manufacturer provided everything reasonably required to do job safely.

F. RECOVERY OF COSTS BY PREVAILING PARTY

1. **In General**. While the American litigation system generally provides that each party bears the cost of its own litigation, one significant exception to this rule is contained in Code of Civil Procedure, Section 1032(b), which enables the "prevailing party" to recover "costs" in an action "as a matter of right" except where otherwise provided.

2. **"Prevailing Party" Defined**. Code of Civil Procedure, Section 1032(a)(4) defines "prevailing party" to include (1) a party with a net monetary recovery, (2) a defendant in whose favor a dismissal has been entered, (3) a defendant where relief is not afforded to either plaintiff or defendant, and (4) a defendant as against specific plaintiffs who do not obtain relief against that defendant. Where the four categories do not apply, or where a party recovers something other than monetary relief, the court, in its discretion, determines who the prevailing party is and whether or not to award costs. Lincoln v. Schurgin (1995) 39 Cal.App.4th 100.

NOTE: A party requesting a trial de novo after a judicial arbitration may not recover costs if the judgment is less favorable than the arbitration award. Code of Civil Procedure, Section 1141.21(a)(1).

3. **"Costs" Defined**. Code of Civil Procedure Section 1033.5(a) enumerates numerous items recoverable as "costs." The more common items include filing fees, deposition transcripts, and the cost of models, blowups of exhibits an copies of exhibits if reasonably helpful to the trier of fact. Section 1033.5(b) specifically disallows recovery of fees for experts not ordered by the court, transcripts of court proceedings not ordered by the court, investigation expenses, juror investigation and voir dire preparation, and postage, telephone and copying charges (except for exhibits). It was held that the prevailing party is not entitled to recover expenses which represent high-powered computer support akin to paralegal services or document retrieval. Science Applications International Corporation v. The Superior Court of San Diego County (1995) 39 Cal.App.4th 1095.

4. **Not Reduced by Prior Settlement**. A prior settlement in an amount greater than the amount obtained by plaintiff at trial may be applied to reduce the judgment to zero, but may not be further applied to reduce plaintiff's recovery costs as prevailing party. Reed v. Wilson (1999) 73 Cal.App.4th 439.

XII. COMPROMISE, SETTLEMENT AND RELEASE

A. ORAL SETTLEMENT: Code of Civil Procedure, Section 664.6, provides that the court may enter judgment pursuant to a settlement agreement made in writing outside the presence of the court, or made orally before court. Thus, an oral settlement is not enforceable by a court unless it has been recited on the record before a judge of a court of the state authorized to act as such under the laws of the state.

B. SETTLEMENT WITH CO-DEFENDANTS MAY RELEASE MANUFACTURER.

In an action for products liability against the manufacturer of a car arising from an accident, the trial court erred in denying the manufacturer's motion for summary judgment, where plaintiff had settled with the other driver and had plainly released her and "any and all persons, firms and corporations" from liability for the accident. Plaintiff did not present any evidence that the release was not freely negotiated or that its application was unconscionable or against public policy. General Motors Corp. v. Superior Court (1993) 12 Cal.App.4th 435. See also Lama v. Comcast Cablevision (1993) 14 Cal.App.4th 59.

In Hess v. Ford Motor Co. (2002) 27 Cal.4th 516, the California Supreme Court decided that defendant was not entitled to the benefit of the general release because the broad language was included by mutual mistake of the contracting parties. The Court also reject compound interest in such cases.

C. **GOOD FAITH SETTLEMENTS**: The determination that a settlement has been made in good faith pursuant to the terms of California Code of Civil Procedure, Sections 877 and 877.6 (c), absolves the settling tort defendant from any further liability for *all* equitable indemnity claims, including claims by vicariously or derivatively liable tortfeasors seeking total equitable indemnity. Far West Financial Corp. v. D & S Co. (1988) 46 Cal.3d 796. This also includes subsequent claims by an insurer by subrogation. Insurance Company of North America v. T.L.C. Lines, Inc. (1996) 50 Cal.App.4th 90.

On the other hand, a *settling* defendant may still obtain indemnity from concurrent defendants if it proves the non-settling defendant's fault and the payment and reasonableness of the settlement amount. These requirements are sufficient to protect non-settling defendants from collusion. Mullin Lumber Co. v. Chandler (1986) 185 Cal.App.3d 1127. However, Section 877.6 provides that the good faith settlement reduces the claim against the non-settling tortfeasors by the amount stipulated in the release.

1. **Factors for Determination**. The factors for determining whether a settlement is in good faith, as set forth in Tech-Bilt, Inc. v. Woodward-Clyde & Associates (1985) 38 Cal.3d 488, are as follows:

a. The settlor's proportionate liability vis-a-vis the plaintiffs' approximate anticipated recovery;

b. The amount paid in settlement;

c. The allocation of settlement proceeds among the plaintiffs;

d. The financial condition and insurance policy limits of the settlor;

e. The possibility of collusion, fraud, or tortious conduct which might negatively affect the interests of the non-settling defendants; and

f. Finally, it should be taken into consideration that the settlor should pay less in settlement than he would if he were found liable after trial.

2. Evidentiary Matters.

a. A settling party's proportionate liability must be proved with *substantial evidence* in order for the settlement to be held to be in good faith. Mattco Forge v. Arthur Young & Co. (1995) 38 Cal.App.4th 1337.

b. The value of the good faith settlement itself, and any underlying allocations approved at the good faith hearing, have no precedential value in terms of the settling defendant's subsequent indemnification action against a non-settling defendant. Gouvis Engineering v. Superior Court (1995) 37 Cal.App.4th 642.

c. No good faith settlement where settling parties failed to set a value for settlement and failed to present competent evidence providing a value for settlement. Franklin Mint Co. v. Superior Court (2005) 130 Cal. App. 4th 1550.

D. SLIDING SCALE RECOVERY AGREEMENTS: Sliding scale recovery agreements, also known as "Mary Carter" agreements, are agreements or covenants between a plaintiff, and one or more, but not all, alleged tortfeasor defendants, which limit the liability of the agreeing tortfeasor defendants to an amount which is dependent upon the amount of recovery which the plaintiff is able to recover from the non-agreeing defendants. California Code of Civil Procedure, Section 877.5.

1. **Determination of Good Faith**. The parties to the agreement, since they are in the best position to place a monetary figure on its value, should have the burden of establishing the monetary value of the sliding scale agreement. The good faith standard enunciated in Tech-Bilt, Inc. v. Woodward-Clyde & Associates (1985) 38 Cal.3d 488 applies to sliding scale agreements. The determination of whether the agreement was entered into in good faith is a question of fact. Abbott Ford, Inc. v. Superior Court (1987) 43 Cal.3d 858. The plaintiff's claims against the remaining defendants must be reduced by the amount of "consideration paid" (for the agreement) by the settling defendant. Abbott Ford, Inc., supra.

2. **Participation in Trial**. A sliding scale settlement does not bar the settling defendants from participating in the trial, where the settlement is found to be in good faith, including the agreement that the settling defendants participate in the trial. Alcala Company, Inc. v. The Superior Court of San Diego County (1996) 49 Cal.App.4th 1308.

E. ATTORNEY LIENS. **A court recently found in favor of an attorney with a contractual lien, and against the opposing party in the original action for tortious interference with contract, where a settlement agreement and release was reached amongst the parties without payment of the lien or notice to the attorney involved. Little v. Amber Hotel Co., (2011) 202 Cal. App. 4th 280.**

XIII. THE CORPORATE CRIMINAL LIABILITY ACT

A. IN GENERAL: California Penal Code, Section 387, sets forth criminal penalties for the failure to report a "serious concealed danger that is subject to the regulatory authority of an appropriate agency and is associated with a product, component of a product, or business practice."

B. PERSONS LIABLE: Both corporations and individuals may be liable; however, in order for an individual employee to be liable, the individual must have both of the following: (1) management authority in or as a business entity; and (2) significant responsibility for any aspect of a business which includes actual authority for the safety of a product or business practice, or for the conduct of research or testing in connection with a product or business practice.

C. CONDUCT PROSCRIBED: A corporation or individual is subject to prosecution under Section 387 only under all of the following conditions:

1. Actual Knowledge. There is actual knowledge of a serious concealed danger that is subject to the regulatory authority of an appropriate agency and is associated with that product or a component of that product or business practice; and

NOTE: An "appropriate government agency" is any of the following: the Division of Occupational Safety and Health in the Department of Industrial Relations, the State Department of Health Services, the Department of Agriculture, county departments of health, the U.S. Food and Drug Administration, the U.S. Environmental Protection Agency, the National Highway Traffic Safety Administration, the Federal Occupational Safety and Health Administration, the Nuclear Regulatory Commission, the Consumer Product Safety Commission, the Federal Aviation Administration, and the Federal Mine Safety and Health Review Commission.

2. Knowing Omission. There is a knowing failure to do the following:

a. Inform the Division of Occupation Safety and Health in the Department of Industrial Relations in writing, unless the corporation or individual has actual knowledge that the Division has already been informed; or

b. Warn affected employees in writing, unless the corporation or individual has actual knowledge that such employees has already been so warned.

NOTE: If there is imminent risk of great bodily harm, the notification must take place immediately; otherwise, it must take place within fifteen days after the actual knowledge is acquired. The disclosure requirement is not applicable if the hazard is abated within the time prescribed for reporting, unless the appropriate regulatory agency requires disclosure by regulation.

D. PENALTIES.

1. Penalties for Individuals. An individual guilty under Section 387 may be punished in any of the following manners:

a. By imprisonment in the county jail for a term not exceeding one year;

b. By a fine not exceeding $10,000;

c. By both that fine and imprisonment;

d. By imprisonment in the state prison for 16 months, two years, or three years;

e. By a fine not exceeding $25,000;

f. By both that fine and imprisonment.

2. **Penalties for Corporations**. A corporation or limited liability company guilty under Section 387 may be fined an amount not to exceed $1,000,000.

XIV. MEDICARE SECONDARY PAYER STATUTE. While it is a complex and evolving area of law, the MSP statute (and any amendments, related statutes, laws, and regulations) must be considered in any products liability suit as it may require various actions, like reporting, communications, payments, etc. in any given case.