



1-1-1988

Torts

University of the Pacific; McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Legislation Commons](#)

Recommended Citation

University of the Pacific; McGeorge School of Law, *Torts*, 19 PAC. L. J. 685 (1988).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol19/iss2/31>

This Greensheet is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Torts

Torts; civil rights—blind or physically disabled persons

Civil Code §§ 51, 51.5, 51.8, 52, 53 (amended).
AB 181 (Harris); 1987 STAT. Ch. 159

Existing law entitles blind¹ or physically disabled persons to equal access to public places,² public accommodations and transportation,³ and housing accommodations.⁴ Furthermore, existing law prohibits discrimination,⁵ restrictions on the use or transfer of realty,⁶ or the denial of civil rights on the basis of sex, color, race, religion, ancestry, or national origin.⁷ Chapter 159 clarifies existing law⁸ by adding blindness and physical disability to the list of specifically prohibited bases of discrimination.⁹ Chapter 159 does not, however, require anyone who rents or leases real property for compensation to modify, alter, or repair the property, or to provide greater care for a blind or physically disabled person than is provided for anyone else.¹⁰

LJN

1. CAL. CIV. CODE § 54.6 (definition of blind).

2. *Id.* § 54 (blind or physically disabled persons have same right as the able-bodied to use streets, highways, walkways, public buildings and facilities, and other public places).

3. *Id.* § 54.1(g) (for example, telephone facilities, hotels, places of public amusement and resort, and common carriers).

4. *Id.* § 54.1(b)(1)-(6).

5. *Id.* §§ 51.5, 51.8 (business establishments and franchisors may not discriminate on the basis of race, color, religion, sex, or national origin).

6. *Id.* § 53(a), (b) (all provisions prohibiting or restricting the conveyance, leasing, mortgaging, use, occupation, or transfer of title to real property on the basis of sex, race, color, religion, ancestry, or national origin are void).

7. *Id.* § 51 (Unruh Civil Rights Act). All persons within the State's jurisdiction, regardless of their sex, race, color, religion, ancestry, or national origin, are free and equal and entitled to the full and equal accommodations of all business establishments. *Id.*

8. Existing case law indicates that the Unruh Civil Rights Act protects all persons against discrimination. *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 736, 640 P.2d 115, 124, 180 Cal. Rptr. 496, 505 (1982), *cert. denied*, 459 U.S. 858 (1982).

9. CAL. CIV. CODE § 51 (pertaining to the Unruh Civil Rights Act); *see supra* note 7. *Id.* §§ 51.5, 51.8 (pertaining to business establishments and franchisors); *see supra* note 5. *Id.* § 53 (pertaining to the use and transfer of real property); *see supra* note 6.

10. *Id.* §§ 51, 51.5, 51.8, 52, 53. Chapter 159 does not impose building standards or construction requirements, and does not alter the authority of the State Architect. *Id.* § 53.

Torts; public liability

Government Code §§ 820.9, 985 (new); §§ 910, 911.2, 911.3, 911.4, 911.6, 946.6 (amended).

AB 2616 (Brown); 1987 STAT. Ch. 1208

Under existing law a public employee¹ is liable for any injury² caused by the employee's conduct to the same extent as a private person.³ Certain immunities for employees and rights of indemnity for employers, however, are available.⁴ Chapter 1208 excludes members of city councils, boards of supervisors, school boards, and governing boards of local public entities, as well as mayors and members of locally appointed boards and commissions from vicarious liability for injuries caused by the act or omission of the public entity.⁵

Under existing law, a claim must include the following information: (1) The name and address of the claimant; (2) the post office address to which the person presenting the claim desires notice to be sent; (3) the date, place and other circumstances of the occurrence or transaction which gave rise to the claim; (4) a general description of the damages so far as they may be known at the time the claim is made; (5) the names of the public employees causing the injury, damage, or loss; and (6) the amount claimed if less than ten thousand dollars.⁶ If the claim is more than ten thousand dollars, Chapter 1208 does not require a dollar amount to be stated, however, the claim must indicate whether jurisdiction would rest in municipal or superior court.⁷

Chapter 1208 excludes the consideration of any collateral source payment⁸ paid to a plaintiff⁹ from admission in any action for

1. CAL. GOV'T CODE § 810.2 (definition of employee).

2. *Id.* § 810.8 (definition of injury).

3. *Id.* § 820(a).

4. *See generally id.* §§ 820.2-825.6 (immunities and indemnification).

5. *Id.* § 820.9. Chapter 1208 does not exonerate an official from liability for injury caused by that individual's wrongful conduct. *Id.*

6. *Id.* § 910. Chapter 1208 extends the statute of limitations to six months from the date the claim accrues for claims relating to a cause of action for death or for injury to a person or to personal property or growing crops. *Id.* § 911.2. All other claims have a one year time limit from the time of accrual. *Id.* *See id.* § 901 (determination of when a cause of action accrues).

7. *Id.* § 910(f).

8. *Id.* § 985(a)(1) (definition of collateral source payment). *See* RESTATEMENT (SECOND) OF TORTS § 920A(2) (collateral source payment). *See generally* Note, *California Collateral Source Rule and Plaintiff's Receipt of Uninsured Motorist Benefits*, 37 HASTINGS L.J. 667 (1986) (collateral source rule).

personal injuries or wrongful death where a public entity is a defendant.¹⁰ A defendant public entity is entitled to request from the plaintiff a list of the names and addresses of providers of collateral source payments.¹¹ The public entity must provide written notice of the date set for any pretrial settlement conference to each provider of a collateral source payment listed by the plaintiff or identified by the defendant.¹² The provider of a collateral source must be given twenty days notice of a posttrial settlement conference or hearing regarding collateral source payments.¹³ At the hearing, the trial court must make a final determination as to any pending lien and subrogation rights, and must determine what portion of collateral source payments should be reimbursed from the judgment to the provider of a collateral source payment, deducted from the verdict, or accrue to the benefit of the plaintiff.¹⁴ In making the determination as to the adjustments, the court must apply the following provisions: (1) If the court has determined the verdict included money damages for

9. CAL. GOV'T CODE § 985(a)(2) (definition of plaintiff).

10. See *id.* § 985(b). If, after a verdict has been returned against a public entity that includes damages for which payment from a collateral source has already been paid, and if the total of the collateral source payments is greater than \$5000 that amount must be increased by five percent compounded on January 1, 1989 and each January 1 thereafter. *Id.* The jury must be instructed as follows:

You shall award damages in an amount that fully compensates plaintiff for damages in accordance with instructions from the court. You shall not speculate or consider any other possible sources of benefit the plaintiff may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.

Id. § 985(j). See generally *Witt v. Jackson*, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961) (collateral source rule excluded in actions where defendant is the source of the collateral source benefits.)

11. CAL. GOV'T CODE § 985(c). Plaintiff must respond within 30 days of the request and has a continuing duty to disclose any subsequent payments received from collateral sources. *Id.* Failure to respond or comply allows the defendant, upon discovery of the provider within five years of the date judgment was entered, to request a reduction of the judgment, reflecting the payment. *Id.* § 985(d).

12. *Id.* § 985(c). A collateral source provider is not required to attend the conferences unless the court requests the provider's attendance. *Id.* Failure to comply with the court's request will result in the collateral source waiving any rights to reimbursement. *Id.*

13. *Id.* § 985(e).

14. *Id.* § 985(f). No collateral source provider may collect more than the amount determined by the court. *Id.* The court may not deduct more than one-half of the plaintiff's net recovery for all damages after attorney's fees, medical services paid by the plaintiff, and litigation costs have been deducted. *Id.* § 985(g). The court is under no duty to reimburse the collateral sources if the reimbursement will create a financial hardship on the plaintiff. *Id.* Once the court does determine reimbursement is required, then, unless other arrangements are specified, the plaintiff must pay 50% immediately. *Id.* § 985(h). In cases involving multiple defendants, the reduction must be proportional to the percentage of the judgment actually paid by the public entity and must satisfy the judgment as to the portion reduced so that no other judgment debtor will be jointly liable for the portion of the judgment reduced. *Id.* § 985(i).

which the plaintiff has already received payment from Medi-Cal, county health care, Aid to Families with Dependent Children, Victims of Crime or other nonfederal publicly funded sources of benefit with statutory lien rights, the court must order reimbursement from the judgment of those amounts to the provider;¹⁵ (2) if the court has determined the verdict includes money damages for which the plaintiff has already received payment from private medical programs, health maintenance organizations, state disability, unemployment insurance, private disability insurance, workers' compensation, or other sources of compensation similar to those listed, the court may determine what portion of the collateral source benefits will be reimbursed from the judgment to the provider of the collateral source payment;¹⁶ (3) for the amount of premiums that were paid by the plaintiff to the provider of the collateral source payment; and (4) for attorney fees and reasonable expenses incurred if the plaintiff was found partially at fault.¹⁷

JD

15. *Id.* § 985(f)(1) (the terms must be just).

16. Chapter 1208 does not create subrogation rights where none existed previously. *Id.* § 985(f)(2).

17. *Id.* § 985(f). The judgment will be reduced by a percentage equal to the percentage of the entire judgment owed in attorney fees and reasonable costs. *Id.* § 985(f)(3)(C). The judgment will be decreased by the same percentage as the entire judgment is reduced to take into account the plaintiff's comparative fault. *Id.* § 985(f)(3)(A).

Torts; Civil Liability Reform Act of 1987

Business and Professions Code § 6146 (amended); Civil Code §§ 1714.5, 2860 (new); §§ 3294, 3295 (amended); Code of Civil Procedure § 425.13 (new).

SB 241 (W. Brown & Lockyer); 1987 STAT. Ch. 1498

Redefines “malice” and “oppression” and provides that punitive damages must be proven by clear and convincing evidence, immunizes manufacturers and retailers of inherently unsafe products from liability, codifies an insured’s right to independent counsel if a conflict of interest arises, and raises contingency fee limits in medical malpractice cases.

EXEMPLARY DAMAGES

Existing law provides that a plaintiff may recover punitive damages¹ for breach of an obligation not arising from a contract if the defendant is guilty of fraud,² oppression,³ or malice.⁴ Prior law

1. CAL. CIV. CODE § 3294(a) (exemplary or punitive damages are awarded for the sake of example and to punish the defendant).

2. *See id.* § 3294(c)(3) (definition of fraud). *E.g.*, *Miller v. National Am. Life Ins. Co.*, 54 Cal. App. 3d 331, 336-39, 126 Cal. Rptr. 731, 733-35 (1976) (evidence sustained verdict of fraud and punitive damages).

3. *See* 1980 Cal. Stat. ch. 1242, sec. 1, at 4217 (enacting CAL. CIV. CODE § 3294(c)(2)) (definition of oppression). *E.g.*, *Richardson v. Employers Liab. Assurance Corp.*, 25 Cal. App. 3d 232, 245, 102 Cal. Rptr. 547, 556 (1972).

4. CAL. CIV. CODE § 3294(a). *See* 1980 Cal. Stat. ch. 1242, sec. 1, at 4217 (enacting CAL. CIV. CODE § 3294(c)(1)) (definition of malice); *e.g.*, *Kendall Yacht Club v. United Cal. Bank*, 50 Cal. App. 3d 949, 958, 123 Cal. Rptr. 848, 854 (1975) (mere negligence, even gross negligence, is not sufficient to justify awarding punitive damages). *See also* BAJI No. 14.71 (7th ed. & 1986 Revisions) (jury instructions for punitive damages). *See generally* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Torts §§ 848-69 (1974 & Supp. 1984) (discussing punitive damages). Punitive damages may not be awarded in cases based on the market share theory of liability. *E.g.*, *Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 889-90, 213 Cal. Rptr. 547, 554 (1985); *see generally* Comment, *Sindell and Beyond: A Case for Imposing Punitive Damages in Market Share Litigation*, 17 PAC. L.J. 1445, 1454-59 (1986) (punitive damages in market share litigation after *Sindell*). Punitive damages are inappropriate where an insured attempts to collect punitive damages under an uninsured motorist provision if the automobile liability policy does not specifically provide such coverage. *E.g.*, *California State Auto. Ass’n Inter-Ins. Bureau v. Carter*, 164 Cal. App. 3d 257, 264, 210 Cal. Rptr. 140, 145 (1985); *but cf.* *Stewart v. State Farm Mut. Auto Ins. Co.*, 104 N.M. 744, 747, 726 P.2d 1374, 1377 (1986) (under the New Mexico statute, uninsured motorist coverage includes coverage for punitive damages and the insured is allowed to recover punitive damages from insurer if entitled to recover from the uninsured tortfeasor). If an agreement so provides, an arbitrator is permitted to award punitive damages in medical malpractice claims based on tort. *E.g.*, *Baker v. Sadick*, 162 Cal. App. 3d 618, 627-31, 208 Cal. Rptr. 676, 682-84 (1984). *See also* *Devlin v. Kearney Mesa AMC/Jeep/Renault*, 155 Cal. App. 3d 381, 393-96, 202 Cal. Rptr. 204, 211-13 (1984) (appendix of cases awarding punitive damages); *Betts v. Allstate*, 154 Cal. App. 3d 688, 708-13, 201 Cal. Rptr. 528, 539-43 (1984) (punitive damages in the insurance context). *See generally*

provided that oppression meant subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.⁵ Prior law also provided that malice meant conduct intended to cause injury, or conduct carried on with a conscious disregard of the rights or safety of others.⁶ With the enactment of the Brown-Lockyer Civil Liability Reform Act of 1987⁷ (Act), the defendant's fraudulent, oppressive, or malicious conduct must be proven by clear and convincing evidence.⁸ Under the Act, oppression is redefined as despicable⁹ conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.¹⁰ Furthermore, malice is redefined as conduct intended by the defendant to cause injury to the plaintiff, or despicable conduct carried on with a willful and conscious disregard for the rights or safety of others.¹¹

Under existing law, the court may grant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for punitive damages before introducing any evidence of the defendant's financial condition or profits gained from the wrongful conduct.¹² Existing law also prohibits pretrial discovery of the defendant's financial condition or wrongful profits unless the court: (1) determines that there is a substantial probability that the plaintiff will prevail on the claim, and (2) specifically enters an order allowing the pretrial discovery.¹³ Upon application by the defendant, the Act also

68 Op. Att'y Gen. 55, 57-58 (1985); 65 Op. Att'y Gen. 267, 275 (1982) (California Government Code section 818 grants immunity to public entities from exemplary damages awarded in tort pursuant to California Civil Code section 3294, or other damages imposed primarily for the sake of example or to punish the defendant).

5. 1980 Cal. Stat. ch. 1242, sec. 1, at 4217 (enacting CAL. CIV. CODE § 3294(c)(2)) (definition of oppression).

6. *Id.* sec. 1, at 4217 (enacting CAL. CIV. CODE § 3294(c)(1)) (definition of malice).

7. 1987 Cal. Stat. ch. 1498, sec. 1, at ____ (Willie L. Brown, Jr.-Bill Lockyer Civil Liability Reform Act of 1987).

8. CAL. CIV. CODE § 3294(a). The amendments to this section apply to all actions in which the initial trial has not commenced prior to January 1, 1988. *Id.* § 3294(e). See generally Thompson, *An Outline of 23 California Common Law Business Torts*, 13 PAC. L.J. 1, 8-12 (1982) (punitive damages allowable under California Civil Code sections 3294 and 3295).

9. Despicable means: to be looked down upon or deserving to be despised, or meriting hatred, scorn, or loathing, or contemptuous. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 614 (1976).

10. CAL. CIV. CODE § 3294(c)(2).

11. *Id.* § 3294(c)(1).

12. *Id.* § 3295(a). The plaintiff may subpoena documents or witnesses to be available at the trial for the purpose of establishing the defendant's financial condition or wrongful profits. *Id.* § 3295(c). An order granting pretrial discovery is not considered a determination on the merits of the claim or any defense, and may not be given into evidence or referred to at trial. *Id.*

13. *Id.* (the court has discretion to order a hearing on the plaintiff's probability of success). *E.g., In Re Related Asbestos Cases*, 543 F. Supp. 1152, 1157 (9th Cir. 1982); *Rawnsley v. Superior Court*, 183 Cal. App. 3d 86, 90-92, 227 Cal. Rptr. 806, 808-09 (1986).

requires the court to preclude the admission of evidence of the defendant's financial condition or wrongful profits until the trier of fact: (1) returns a verdict for the plaintiff awarding actual damages, and (2) finds that a defendant is guilty of fraud, oppression, or malice.¹⁴ Furthermore, a claim for exemplary damages may not state a specific amount.¹⁵ Finally, no claim for punitive damages against a health care provider may be included in a complaint or other pleading unless the court enters an order allowing such an amended pleading to be filed.¹⁶ The motion allowing the filing of an amended pleading that includes a punitive damage claim must not be granted if the motion for the order is not filed (1) within two years after the initial complaint or pleading is filed, or (2) not less than nine months before the date first set for trial, whichever is earlier.¹⁷

STRICT PRODUCTS LIABILITY

Under existing case law, a manufacturer¹⁸ of a product is strictly liable if an article they place on the market is known to be used without inspection for defects and the article proves to have a defect that causes injury.¹⁹ Under the Act, a manufacturer or seller is not

See generally Review of Selected 1980 California Legislation, 12 PAC. L.J. 596, 596-98 (1981) (punitive damages and pretrial discovery of defendant's financial condition).

14. CAL. CIV. CODE § 3295(d). Evidence of the defendant's financial condition and wrongful profits is only admissible as to the defendant or defendants found liable to the plaintiff, and found guilty of fraud, oppression, or malice. *Id.*

15. *Id.* § 3295(e). The amendments to this section apply to all actions in which the original trial has not commenced prior to January 1, 1988. *Id.* § 3295(f). *Cf. In Re Beck Indus., Inc.*, 725 F.2d 880, 890-91 (2nd Cir. 1984) (New York law forbids evidence of a defendant's wealth to be brought out at trial unless and until a jury has returned a special verdict that the plaintiff is entitled to punitive damages).

16. CAL. CIV. PROC. CODE § 425.13. The court may allow the filing of an amended pleading claiming punitive damages on the basis of supporting and opposing affidavits presented if the plaintiff establishes that there is a substantial probability that the plaintiff will prevail on the punitive damages claim pursuant to California Civil Code section 3294. *Id.*

17. *Id.*

18. *See* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Torts §§ 819-825A (1974 & Supp. 1984) (concerning persons liable under scope of strict products liability).

19. *E.g.*, *Greenman v. Yuba Power Prod.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963); *see Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 133-35, 501 P.2d 1153, 1161-62, 104 Cal. Rptr. 433, 442-43 (1972) (a plaintiff need only prove the existence of a defect and that the defect proximately caused her injury because the unreasonably dangerous requirement is unnecessary in a strict products liability action); *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (proof of a defect in strict products liability cases); *see generally* Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 30-35 (1973) (suggests that *Cronin* adds to the uncertainty of proving defects). *See generally* Comment, *Prescription Drugs and Strict Liability: The Flaw in the Ointment*, 19 PAC. L.J. 193, 203-05 (1987) (discussing *Brown v. Superior Court*, 182 Cal. App. 3d 1125, 227 Cal. Rptr. 768, *review granted*, 723 P.2d 1248, 229 Cal. Rptr. 663 (1986), and the RESTATEMENT (SECOND) OF TORTS section 402A comment k). A product may be found defective

liable in a product liability action²⁰ if: (1) the product sold is inherently unsafe, (2) the product is known to be unsafe by the ordinary consumer with the ordinary knowledge common to the community, and (3) the product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter.²¹

in design under two alternative theories: (1) if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner; or (2) if the plaintiff demonstrates that the product's design proximately caused her injury and the defendant fails to establish, in light of relevant factors, that the benefits of the challenged design outweigh the dangers inherent in the design. *Barker*, 20 Cal. 3d at 431-32, 573 P.2d at 455-56, 143 Cal. Rptr. at 237; *accord* Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 885 (Alaska 1979), *rev'd in part, aff'd in part, and remanded*, 624 P.2d 790 (Alaska 1981) (following *Barker* analysis); *contra* Vineyard v. Empire Mach. Co., 119 Ariz. 502, 581 P.2d 1152 (1978); *Hayes v. Ariens Co.*, 391 Mass. 407, 412, 462 N.E.2d 273, 278 (1984); *Kallio v. Ford Motor Co.*, ___ Minn. ___, 407 N.W.2d 92, 95-97, 55 U.S.L.W. 860 (1987). *See also* BAJI No. 9.00.5 (7th ed. & 1986 Revisions) (jury instructions for design defects). *See generally* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367-71 (1965) (illustrating the inherent difficulties in the defectiveness standard); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 816-816D (1974 & Supp. 1984) (regarding design defects). A defect in the manufacture of a product exists if the product differs from the manufacturer's intended result or differs from identical products from the same manufacturer. *E.g.*, *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 735-43, 575 P.2d 1162, 1166-73, 144 Cal. Rptr. 380, 384-91 (1978) (applying comparative negligence principles to strict liability cases); *Lewis v. American Hoist & Derrick Co.*, 20 Cal. App. 3d 570, 586, 97 Cal. Rptr. 798, 808-09 (1971); *but cf.* *Lippard v. Houdaille Indus., Inc.*, 715 S.W.2d 491 (1986); *Bowling v. Heil Co.*, 31 Ohio St. 3d 277, 511 N.E.2d 373, 31 Ohio B. 553 (1987); *Staymates v. ITT Holub Indus.*, ___ Pa. Super. ___, 527 A.2d 140 (1987). *See also* BAJI 9.00.3 (7th ed. & 1986 Revisions) (jury instructions for manufacturing defects). *See generally* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 815 (1974 & Supp. 1984) (discussing production defects). A defective condition unreasonably dangerous to the user or consumer may result if a seller has reason to anticipate dangers from a product's particular use and the seller fails to give an adequate warning. *E.g.*, *Finn v. G.D. Searle & Co.*, 35 Cal. 3d 691, 699-703, 677 P.2d 1147, 200 Cal. Rptr. 870, 874-76 (1984); *Kearl v. Lederle Laboratories*, 172 Cal. App. 3d 812, 831-35, 218 Cal. Rptr. 453, 465-68 (1985); *Cavers v. Cushman Motors Sales, Inc.*, 95 Cal. App. 3d 338, 346-49, 157 Cal. Rptr. 142, 147-49 (1979); *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44, 53, 46 Cal. Rptr. 552, 558 (1965). *See also* BAJI No. 9.00.7 (7th ed. & 1986 Revisions) (jury instructions for failure to warn). *See generally* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 814, 839, 840 (1974 & Supp. 1984) (regarding failure to warn).

20. Under the Act, product liability action means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty. CAL. CIV. CODE § 1714.45(b).

21. *Id.* § 1714.45(a)(1), (2). The Act is intended to be declarative of and does not alter or amend existing California law, including *Cronin, supra*, and will apply to all product liability actions pending on, or commenced after January 1, 1988. *Id.* § 1714.45(c); *but cf.* *Rigby v. Beech Aircraft Co.*, 548 F.2d 288, 291 (10th Cir. 1977); *Dart v. Wieba Mfg. Inc.*, 147 Ariz. 242, 709 P.2d 876 (1985) (rejecting *Cronin's* modification of the RESTATEMENT (SECOND) TORTS section 402A). The RESTATEMENT (SECOND) OF TORTS provides that anyone who sells a product in a defective condition unreasonably dangerous to the user or consumer is subject to liability for harm caused if: (1) the seller is engaged in the business of selling such a product, and (2) the product is expected to and does reach the consumer without substantial changes in condition. RESTATEMENT (SECOND) OF TORTS § 402A (1979). The commentators of the Restatement noted that many products cannot possibly be made entirely

CONFLICTS OF INTEREST

Under existing case law, if divergent interests are brought about by the insurer reserving rights to assert non-coverage in a liability action against an insured, the insurer must pay the insured's reasonable costs incurred for hiring independent counsel.²² Under the Act, if an insurance policy's provisions impose a duty to defend on the

safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. *Id.* § 402A comment i (1979). The article sold must be dangerous to an extent normally contemplated by the ordinary consumer with the ordinary knowledge common to the community as to the characteristics of the product. *Id.* Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture; however, this is not what is meant by unreasonably dangerous. *Id.* Good tobacco is not unreasonably dangerous because the effects of smoking may be harmful; but tobacco containing marijuana may be unreasonably dangerous. *Id.* Likewise, good whiskey is not unreasonably dangerous because some people get drunk; but bad whiskey containing a dangerous amount of fuel oil is unreasonably dangerous. *Id.* Some products are incapable of being made safe for their intended and ordinary use due to the present state of human knowledge. *Id.* § 402A comment k (1979). This is also particularly true with new or experimental drugs that are marketed and used notwithstanding the medically recognizable risks. *Id.* If properly prepared and marketed, and if proper warning is given when called for, the seller of such a product is not strictly liable for undertaking to supply the public with an apparently useful and desirable product attended with a known but apparently reasonable risk. *Id.* See generally Schwartz, *Unavoidably Unsafe Products: Clarifying the Meaning and Policy Behind Comment K*, 42 WASH. & LEE L. REV. 1139, 1143-45 (1985) (illustrating how comment k treats known risks); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 831-33 (1973) (suggests that the Restatement's language is potentially misleading and gives the impression that the plaintiff must prove that the product was unusually or extremely dangerous). Many other jurisdictions continue to adhere to the RESTATEMENT (SECOND) OF TORTS and require the plaintiff to prove that the product was both defective and unreasonably dangerous. *E.g.*, *Purvis v. Consolidated Energy Prod. Co.*, 674 F.2d 217, 222 (4th Cir. 1982); *Two Rivers Co. v. Curtiss Breeding Serv.*, 624 F.2d 1242, 1248-51 (5th Cir. 1980), *cert. denied* 450 U.S. 920 (1981); *Brown v. Western Farmers Ass'n*, 268 Or. 470, 472-74, 521 P.2d 537, 539-41 (1974). See generally Comment, *Prescription Drugs and Strict Liability: The Flaw in the Ointment*, 19 PAC. L.J. 193, 210-13 (1987) (examples of strict liability for prescription drugs in jurisdictions other than California).

22. *E.g.*, *McGee v. Superior Court*, 176 Cal. App. 3d 221, 227, 221 Cal. Rptr. 421, 424 (1985); *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal. App. 3d 358, 375, 208 Cal. Rptr. 494, 506 (1984); *but cf. Ziemann Mfg. Co. v. St. Paul Fire & Marine Ins. Co.*, 724 F.2d 1343, 1344-45 (9th Cir. 1983); *St. Paul Marine & Fire Ins. Co. v. Roach Bros. Co.*, 639 F. Supp. 134, 139 (E.D. Penn. 1986) (insurer not liable for independent counsel fees where independent counsel was obtained because of a potential conflict of interest, insurer paid full policy limits in settlement, and no separate interests of the insured were prejudiced). A conflict of interest between jointly represented clients occurs whenever their common lawyer's representation of the one is rendered less effective by reason of the lawyer's representation of the other. *Cumis*, 162 Cal. App. 3d at 375, 208 Cal. Rptr. at 375. The lawyers hired by the insurer have a duty to fully explain the implications of joint representation to both the insured and insurer in situations where the insurer has reserved rights to deny coverage. *Id.* An insurer may not compel an insured to surrender control of litigation where the insurer has reserved rights to deny coverage, and accordingly, an attorney who jointly represents the insurer and insured must cease to represent both parties unless the insured gives and informed consent to the attorney's joint representation. *Id.* See generally Comment, *Reexamining Conflicts of Interest: When is Private Counsel Necessary?*, 17 PAC. L.J. 1421, 1430-36 (1986) (suggests *Cumis* and other problems highlight the need for a new solution to the conflict of interest dilemma).

insurer, and a conflict of interest²³ arises that creates a duty to provide independent counsel to the insured, the insurer must provide independent counsel unless the insured expressly waives the right to independent counsel in writing.²⁴ Under the Act, the insurer's obligation to pay fees is limited to the rates actually paid other attorneys defending similar actions in the community where the claim arises or is being defended.²⁵ In addition, the insurer has the right to require that the independent counsel selected by the insured possess certain minimum qualifications.²⁶ Furthermore, if independent counsel is selected, the insured and independent counsel have a duty to disclose all information concerning the litigation to the insurer,²⁷ and timely inform and consult with the insurer on all matters relating to the action.²⁸ Finally, if independent counsel is selected, both the counsel provided by the insurer and the independent counsel are allowed to consult on all aspects of the litigation.²⁹

ATTORNEY'S FEES

Under existing law, attorneys are prohibited from collecting a contingency fee³⁰ in an action against a health care provider³¹ based upon professional negligence³² in excess of the following limits: (1) Forty percent of the first fifty thousand dollars recovered;³³ (2) thirty-three and a third percent of the next fifty thousand dollars recovered;

23. Under the Act, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage. CAL. CIV. CODE § 2860(b). If the insurer reserves a right on a given issue, however, and the outcome of the coverage issue can be controlled by the counsel retained by the insurer for the defense of the claim, a conflict of interest may exist. *Id.* No conflict of interest exists as to allegations of punitive damages or because an insured is sued for an amount in excess of the policy limits. *Id.*

24. *Id.* § 2860(a) (an insurance contract may contain provisions that set forth the method of selecting independent counsel). *See id.* § 2860(e) (form for express waiver statement).

25. *Id.* § 2860(c). Any dispute concerning attorney's fees not resolved by those methods must be resolved by a final and binding arbitration conducted by a single neutral arbitrator selected by both parties. *Id.*

26. *Id.* The insurer may require the independent counsel to possess certain minimum qualifications such as having at least five years of tort litigation practice that includes substantial defense experience in the subjects in the litigation, and possessing errors and omissions coverage. *Id.*

27. *Id.* § 2860(d) (this does not include privileged material relevant to coverage disputes).

28. *Id.*

29. *Id.* Any claim of privilege asserted is subject to in camera review, and any information disclosed by the insured or independent counsel, is not a waiver of the privilege as to any other party. *Id.*

30. CAL BUS. & PROF. CODE § 6146(a) (or contracting for a contingency fee).

31. *See id.* § 6146(c)(2) (definition of health care provider).

32. *See id.* § 6146(c)(3) (definition of professional negligence).

33. *See id.* § 6146(c)(1) (definition of recovered).

(3) twenty-five percent of the next one hundred thousand dollars recovered; and (4) ten percent of any amount exceeding two hundred thousand dollars.³⁴ Under the Act, an attorney is prohibited from collecting a contingency fee in an action against a health care provider based upon professional negligence in excess of the following limits: (1) Forty percent of the first fifty thousand dollars recovered; (2) thirty-three and one third percent of the next fifty thousand dollars recovered; (3) twenty-five percent of the next five hundred thousand dollars recovered; and (4) fifteen percent of any amount exceeding six hundred thousand dollars.³⁵

SDS

34. *Id.* § 6146(a). If a plaintiff pursues and recovers a non-MICRA cause of action, the provisions of California Business and Professions Code section 6146 limiting attorney's fees do not apply, even if the plaintiff also succeeds on a separate MICRA cause of action. *Waters v. Bourhis*, 40 Cal. 3d 424, 437, 709 P.2d 469, 477-78, 220 Cal. Rptr. 666, 674-75 (1985). *See also* *Roa v. Lodi Medical Group*, 37 Cal. 3d 920, 925-33, 695 P.2d 164, 166-67, 211 Cal. Rptr. 77, 80-85 (1985) (MICRA's provision limiting the amount of fees an attorney can collect in a medical malpractice action is rationally related to a legitimate legislative objective and does not run afoul of the due process or equal protection clauses), *appeal dismissed*, 474 U.S. 990 (1985); *Hathaway v. Baldwin Park Community Hosp.*, 186 Cal. App. 3d 1247, 1251, 231 Cal. Rptr. 334, 336 (1986). *See generally* *Review of Selected 1975 California Legislation*, 7 PAC. L.J. 544, 549-50 (1976) (attorney's fees under the Medical Injury Compensation Reform Act); *Barnett & Rubinfeld, The Assignment of Temporary Justices in the California Supreme Court*, 17 PAC. L.J. 1045, 1051 (1986) (raises questions regarding the make-up of the California Supreme Court and the Court's interpretation of MICRA provisions).

35. CAL. BUS. & PROF. CODE § 6146(a). If periodic payments are awarded to the plaintiff pursuant to California Code of Civil Procedure section 667.7, the court must place a total value on the payments based on the plaintiff's projected life expectancy and include that amount in calculating the total award from which attorney's fees are calculated. *Id.* *See, e.g.*, *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 154-57, 695 P.2d 665, 677-79, 211 Cal. Rptr. 368, 380-82 (1985) (noneconomic damages awarded in lump sum and future medical expenses in periodic payments), *appeal dismissed*, 474 U.S. 892 (1985); *but cf.* *Lucas v. United States*, 811 F.2d 270 (5th Cir. 1987); *Duren v. Suburban Community Hosp.*, 24 Ohio Misc. 2d 25, 482 N.E.2d 1358, 24 Ohio B. 450 (1985) (rejecting *Fein's* interpretation of legislative provisions limiting fee recovery).

