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Product Liability Strict Liability Claims: California

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A Practice Note analyzing the types of strict product liability claims that a plaintiff may bring for personal injury under California law. This Note addresses available product liability claims, who can be named as parties in a strict product liability claim, manufacturing and design defects, failure to warn, causation, available damages, and the statute of limitations for claims.

California recognizes strict product liability claims for products that are alleged to be:

- Sold with a manufacturing defect.
- Defective in design.
- Defective due to inadequate warnings or instructions.

Special rules and procedures apply for strict liability claims that counsel must know before bringing a claim. This Note outlines the key issues to consider when bringing a strict product liability claim under California law, including:

- Who may sue and be sued.
- The standard for determining liability under various types of strict product liability claims.
- Practical considerations in proving (or disproving) defect and causation.
- Available damages.
- Applicable statutes of limitations.

Available Product Liability Claims

Claims Applicable to Most Products

California courts generally recognize the following causes of action in product liability cases for most products:

- Strict liability claims, including claims for:
  - manufacturing defect;
  - design defect; and
  - failure to warn.

  (*Trejo v. Johnson & Johnson*, 13 Cal. App. 5th 110, 116 (2017) (failure to warn and design defect); *Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal. App. 4th 564, 577 (2009) (failure to warn); *In re Coordinated Latex Glove Litig.*, 99 Cal. App. 4th 594, 598 (2002) (manufacturing defect); Judicial Council of California Civil Jury Instructions (CACI) 1201 (jury instructions for manufacturing defect); CACI 1203 and CACI 1204 (design defect); CACI 1205 (failure to warn).)
- Negligence claims, including claims for negligent:
  - manufacture;
  - design; and
  - failure to warn.

  (*Trejo*, 13 Cal. App. 5th at 116 (design and failure to warn); *Chavez v. Glock, Inc.*, 207 Cal. App. 4th 1283, 1305 (2012) (design and failure to warn); *Putensen v. Clay Adams, Inc.*, 12 Cal. App. 3d 1062, 1078 (1970) (manufacture); CACI 1220 (manufacture and design); CACI 1222 (failure to warn).) For more information on product liability negligence claims under California law, see Practice Note, Product Liability Negligence Claims: California.
- Breach of warranty claims, including breach of:
  - express warranty (Cal. Com. Code § 2313);
  - implied warranty of merchantability (Cal. Com. Code § 2314); and
  - implied warranty of fitness for a particular purpose (Cal. Com. Code § 2315).

  (*Hauter v. Zogarts*, 14 Cal. 3d 104, 114-15 (1975) (express warranty); *Am. Suzuki Motor Corp. v. Super. Ct.*, 37 Cal. App. 4th 1291, 1295 (1995) (even though breach of

express warranty claims are based in contract and are not true stand-alone product liability claims, California courts generally recognize breach of express warranty claims when brought in conjunction with other product liability claims); *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 245-46 (1968) (implied warranty of fitness for a particular purpose); CACI 1230 (express warranty); CACI 1231 (implied warranty of merchantability); CACI 1232 (implied warranty of fitness for a particular purpose).) For more information on product liability breach of warranty claims under California law, see Practice Note, Product Liability Breach of Warranty Claims: California.

- Common law fraud and misrepresentation claims, including:
  - negligent misrepresentation; and
  - fraudulent (intentional) misrepresentation (see Standard Clause, Fraudulent Misrepresentation Cause of Action (CA)).

  (*Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 686 (1969) (negligent misrepresentation); CACI 1903 (negligent misrepresentation); CACI 1900 (intentional misrepresentation); Restatement of Torts (Second) § 533 (1977); see Litigating Fraud and Related Claims Checklist (CA) and Pleading a Fraud Claim Checklist: Scienter (CA).)
- Deceit claims, including fraudulent:
  - inducement (see Standard Clause, Promissory Fraud Cause of Action (CA)); and
  - concealment (see Standard Clause, Fraudulent Concealment Cause of Action (CA)).

  (Cal. Civ. Code §§ 1709 and 1710; *Jones v. ConocoPhillips Co.*, 198 Cal. App. 4th 1187, 1198 (2011).)

Special Issues in Strict Liability

Under California law, strict liability does not require a plaintiff to prove a defendant's negligence. A defendant may be held liable under strict liability when it places a product on the market and the product causes injury to a person, regardless of whether the defendant was negligent. However, there are notable limitations and exceptions to the strict liability doctrine in cases involving prescription drugs, medical devices, and special ordered products.

Prescription Drugs and Medical Devices

The California Supreme Court held that a manufacturer cannot be held strictly liable for injuries caused by a prescription drug, if 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. Super. Ct.*, 44 Cal. 3d 1049, 1061, 1069 (1988) (adopting Restatement of Torts (Second) § 402A, cmt. k)).

California courts, applying the *Brown* holding, have also held that the public interest in the development, availability, and affordability of implanted medical devices justifies an exemption from design defect strict product liability claims for all implanted medical devices that are available only through a doctor (whether the medical devices are characterized as prescription medical devices or not) (*Garrett v. Howmedica Osteonics Corp.*, 214 Cal. App. 4th 173, 184-85 (2013); *Artiglio v. Super. Ct.*, 22 Cal. App. 4th 1388, 1397 (1994); *Plenger v. Alza Corp.*, 11 Cal. App. 4th 349, 360-61 (1992)).

Special Ordered Products

California courts generally apply the strict liability doctrine only in cases of mass-produced, commercially distributed products. However, a product sold as a special order by a mass producer might fall within the strict liability doctrine. (See *Oliver v. Super. Ct.*, 211 Cal. App. 3d 86, 89 (1989) (the fact that a buyer special ordered machines from a manufacturer may not insulate the manufacturer from strict liability where it was in the business of manufacturing and selling and therefore not an occasional seller).)

Proper Plaintiffs

The California Supreme Court has held that any person whose injury was reasonably foreseeable may bring a strict liability claim against a product manufacturer or distributor (*Elmore v. Am. Motors Corp.*, 70 Cal. 2d 578, 586 (1969)). No privity between the parties is required, so a plaintiff need not have been the actual purchaser of the product at issue. For example, California courts have allowed strict liability claims brought by:

- An employee injured by a defective high-lift loader leased by the employer (*Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 416-17 (1978)).
- A bystander (a minor) who lost an eye when struck by a projectile discharged from a lawnmower (*Foglio v. W. Auto Supply*, 56 Cal. App. 3d 470, 472 (1976)).
- A neighbor (a minor) who sustained burns due to a neighbor's water heater that was defectively installed (*Hyman v. Gordon*, 35 Cal. App. 3d 769, 773 (1973)).

- Bystanders who sustained injuries from defective automobiles (*Elmore*, 70 Cal. 2d at 586).

For wrongful death claims, the estate of a person who would have been a proper plaintiff if the person had survived to bring suit may generally bring the claim. Section 377.60 of the California Code of Civil Procedure identifies the persons who may be proper plaintiffs in a wrongful death action, including the "decedent's surviving spouse, domestic partner, children, and issue of deceased children."

In addition to a wrongful death action, the decedent's personal representative (or if none, the decedent's successor in interest) may bring a survival action (Cal. Civ. Proc. Code § 377.30). If applicable, plaintiffs may bring causes of action for both wrongful death and survival (Cal. Civ. Proc. Code § 377.62). Survival actions focus on the injury suffered by the decedent, while wrongful death actions focus on the injury suffered by the heirs (Cal. Civ. Proc. Code §§ 377.30 to 377.35 (survival actions); Cal. Civ. Proc. Code §§ 377.60 to 377.62 (wrongful death actions); *Williams v. Pep Boys Manny Moe & Jack of Cal.*, 27 Cal. App. 5th 225, 228-29 (2018)).

Potentially Liable Defendants

A proper defendant to a strict product liability action must be both:

- In the chain of distribution for the product (for example, manufacturer, wholesaler, distributor, or retailer).
- Engaged in the business of marketing or distributing the product.

(*Peterson v. Super. Ct.*, 10 Cal. 4th 1185, 1198-1200 (1995); *Taylor*, 171 Cal. App. 4th at 576; *Oliver*, 211 Cal. App. 3d at 89.)

Chain of Distribution

An entity in the chain of distribution for a product may potentially be held liable for defects in the product. This includes "manufacturers, retailers, and others in the marketing chain of a product." (*Taylor*, 171 Cal. App. 4th at 575 (stream of commerce theory).)

A plaintiff asserting a strict product liability claim must prove that a defendant manufactured, sold, or was otherwise in the chain of distribution for the specific product giving rise to the plaintiff's claims (*Taylor*, 171 Cal. App. 4th at 576-77). Where a plaintiff does not know the manufacturer of the product at issue, the testimony of coworkers or other witnesses is admissible to establish the manufacturer (*Paulus v. Crane Co.*, 224 Cal. App. 4th 1357, 1366 (2014)).

To prevail on a strict product liability claim, a plaintiff must be able to establish that a defendant was responsible for the specific product at issue (*Taylor*, 171 Cal. App. 4th at 575-76). California courts have applied a market share theory of liability for strict product liability claims in some instances where fungible goods that cause harm to consumers "cannot be traced to any specific producer" but all the defendants in the action produced a product from an identical formula (*Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 610-11 (1980) (discussing market share liability in the prescription-drug context); but see *Mullen v. Armstrong World Indus., Inc.*, 200 Cal. App. 3d 250, 250 (1988) (market share theory could not be extended to asbestos products, since they were not fungible goods); *Kennedy v. Baxter Healthcare Corp.*, 43 Cal. App. 4th 799, 802 (1996) (market share liability theory did not apply to latex glove manufacturers, sellers, and distributors regarding allergic reactions to gloves)).

Component Parts Liability

Product manufacturers generally cannot be held strictly liable for harm caused by a component part that was supplied by another company and used with the manufacturer's product (see *O'Neil v. Crane Co.*, 53 Cal. 4th 335, 352 (2012)). The only narrow exceptions to this rule arise when the manufacturer bears some direct responsibility for the harm (*O'Neil*, 53 Cal. 4th at 362).

Questions of liability for suppliers of component parts arise most frequently in the context of strict liability, failure-to-warn claims. For example, the California Court of Appeal has held that a manufacturer of a component part, such as a valve or pump in a Navy vessel's propulsion system, was not liable under a failure to warn theory for injuries caused by exposure to asbestos fibers released from gaskets, packing, and insulation manufactured by other companies and installed long after the valves and pumps were supplied to the Navy. The court found that the valve and pump manufacturers did not substantially participate in the integration of their components into the design of the overall system. (*Taylor*, 171 Cal. App. 4th at 575, 585.)

Successor Liability

A successor corporation generally is not liable for a defect in a product manufactured or sold by a corporation whose assets the successor has acquired (*Ray v. Alad Corp.*, 19 Cal. 3d 22, 25, 30-31 (1977)). To determine whether an exception to the general rule should apply, courts consider:

- Whether the destruction of the plaintiff's remedies against the original manufacturer were caused by the successor's acquisition of the business.
- The successor's ability to assume the original manufacturer's risk-spreading role.
- The fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's goodwill being enjoyed by the successor in the continued operation of the business.

(Cal. Civ. Code § 3521; *Ray*, 19 Cal. 3d at 31, 34.)

Engaged in the Business of Selling the Product

A defendant may only be held strictly liable if it engaged in a commercial transaction related to the product and was in the business of doing so (*Hernandezcueva v. E.F. Brady Co., Inc.*, 243 Cal. App. 4th 249, 258-59 (2015)).

A defendant that sold a product on a one-time or occasional basis but was not engaged in the business of selling that product cannot be subject to strict liability for defects related to it, though that defendant may still be subject to a negligence claim (*Oliver*, 211 Cal. App. 3d at 89). Similarly, a defendant that serviced or maintained a product but was not in the business of selling the product is not subject to strict liability, though that defendant may be subject to a negligence claim (*Hernandezcueva*, 243 Cal. App. 4th at 259; see also *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 448-49 (2020) (discussion of situations where strict liability inapplicable, such as hotel proprietors, residential landlords, or dealers in used products that do not rebuild or recondition the products)).

Strict Liability Manufacturing Defect

A party typically brings a manufacturing defect claim when it is alleged that a product's condition as sold deviated from the manufacturer's design in a way that renders the product defective.

Elements of a Manufacturing Defect Claim

A plaintiff pursuing a strict product liability manufacturing defect claim must prove that:

- The defendant manufactured, distributed, or sold the product at issue.
- The product contained a manufacturing defect, that is, it differed from the manufacturer's intended result or from other ostensibly identical units of the same product line.
- The manufacturing defect existed when the product left the defendant's control.
- The plaintiff was injured.
- The product's defective condition was a substantial factor in causing the plaintiff's injuries.

(*Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 968 (1997); *Garrett*, 214 Cal. App. 4th at 190; *Brown*, 44 Cal. 3d at 1057; see CACI 1201.)

Proving Manufacturing Defect

A plaintiff may prove that a product is defective in manufacture by establishing either:

- Direct evidence that the product deviated from the manufacturer's design in a way that rendered the product defective.
- Circumstantial evidence that the product had a manufacturing defect because it malfunctioned during normal use and no other potential causes explain its failure.

(See, for example, *Jiminez v. Sears, Roebuck & Co.*, 4 Cal. 3d 379, 383-84 (1971); *Khan v. Shiley Inc.*, 217 Cal. App. 3d 848, 854-55 (1990).)

A plaintiff unable or unwilling to provide direct evidence of a specific defect in the product at question may use circumstantial evidence to prove the existence of a defect if it can be "logically and reasonably" inferred from the circumstantial evidence (*Campbell v. Gen. Motors Corp.*, 32 Cal. 3d 112, 121-23 (1982)).

Establishing that a product is defective in manufacture using circumstantial evidence requires proving that the product both:

- Malfunctioned or failed to perform as designed.
- Was used in an ordinary or foreseeable manner.

(*Barker*, 20 Cal. 3d at 427-28; *Gonzalez v. Autoliv ASP, Inc.*, 154 Cal. App. 4th 780, 792 (2007); *Khan*, 217 Cal. App. 3d at 854-55.)

The plaintiff need not show that an inference in the plaintiff's favor is "the only one that may be reasonably drawn from the evidence" to have the case submitted to the jury. The plaintiff must instead show that the material fact to be proved can "logically and reasonably" be inferred from the circumstantial evidence. (*Campbell*, 32 Cal. 3d at 121.)

Strict Liability Design Defect

A party typically brings a design defect claim when it is alleged that a product's design, as opposed to an error or oversight in manufacturing, resulted in a defective product that caused injury to the user.

Elements of a Design Defect Claim

While many states follow (in whole or in part) the Restatement of Torts (Second) § 402A, which provides for strict product liability claims against those who sell products in a "defective condition unreasonably dangerous to the user," the California Supreme Court has not followed the unreasonably dangerous limitation on strict liability (*Barker*, 20 Cal. 3d at 414). A plaintiff pursuing a strict product liability design defect claim under California law must instead prove that:

- The product was defective in design.
- The defect existed when the product left the defendant's control.
- The plaintiff was injured.
- The defect was a proximate cause of the plaintiff's injuries.

(*Barker*, 20 Cal. 3d at 427; *Jiminez*, 4 Cal. 3d at 382.)

Proving Design Defect

A plaintiff may prove that a product is defective in design by using either a consumer expectations test or a risk-benefit test, but a plaintiff may only rely on the consumer expectations test if the product is one that ordinary users can reasonably opine regarding the product's safety. The consumer expectations test is reserved for cases where the "everyday experience of the product's user" allows 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" (*Soule v. Gen. Motors Corp.*, 8 Cal. 4th 548, 550 (1994); *Chavez*, 207 Cal. App. 4th at 1310). A plaintiff may elect to pursue one theory or both (*Soule*, 8 Cal. 4th at 571; *Chavez*, 207 Cal. App. 4th at 1312).

Consumer Expectations Test

A plaintiff attempting to prove a strict liability design defect using the consumer expectations test must prove that because of its design, the product failed to perform as safely as an ordinary consumer would expect when used (or misused) in a reasonably foreseeable manner (*Barker*, 20 Cal. 3d at 429-30).

This requires a plaintiff to prove that:

- The defendant manufactured, distributed, or sold the product.
- The product failed to perform as safely as an ordinary consumer would expect it to perform when used or misused in an intended or reasonably foreseeable way.
- The plaintiff was harmed.
- The product's failure to perform as safely as expected was a proximate cause of the plaintiff's injuries.

(*Barker*, 20 Cal. 3d at 429-30; see CACI 1203.)

A product is not defective in design if the risk of injury it poses would be reasonably anticipated by a hypothetical reasonable consumer, irrespective of whether a particular plaintiff actually anticipated that risk (*Soule*, 8 Cal. 4th at 568; *Chavez*, 207 Cal. App. 4th at 1297-98, 1303).

Where the intended user of a product would have specialized knowledge, such as with a piece of industrial equipment, it may be necessary for the plaintiff to introduce expert testimony to establish the reasonable expectations of an ordinary consumer of that type of product. In that context, courts have permitted plaintiffs to proceed under a consumer expectations test to show the expectation of a sophisticated consumer. (*Chavez*, 207 Cal. App. 4th at 1322-23; but see *Soule*, 8 Cal. 4th at 567 (expert witnesses cannot be used to demonstrate what an ordinary consumer would expect).)

Risk-Benefit Test

A plaintiff attempting to prove strict liability design defect based on California's risk-benefit test must first prove that:

- The defendant manufactured, distributed, or sold the product.
- The plaintiff was harmed.
- The product's design was a proximate cause of the plaintiff's injuries.

(*Kim v. Toyota Motor Corp.*, 6 Cal. 5th 21, 30 (2018); *Perez v. VAS S.p.A.*, 188 Cal. App. 4th 658, 676-77 (2010); see CACI 1204.)

If the plaintiff establishes these three elements, under the risk-benefit test, the burden of proof shifts to the defendant to prove that the benefits of the product's design outweigh the risks of the design (*Perez*, 188 Cal. App. 4th at 677-78). When conducting the risk-benefit test, California courts consider:

- The gravity of the potential harm resulting from the product's use.
- The likelihood that the harm would occur.
- The mechanical feasibility of a safer alternative when the product was manufactured.
- The financial cost of an improved alternative design.
- The adverse consequences to the products and to the consumer that would result from the alternative design.
- Any other relevant factors.

(*Barker*, 20 Cal. 3d at 431 (referred to as the *Barker* factors); *Kim*, 6 Cal. 5th at 30; see CACI 1204.)

The *Barker* factors do not require the manufacturer to prove that the challenged design is the safest possible alternative. The manufacturer must only show that, given the complexities of the design, the benefits of the design outweigh the risks. (*Soule*, 8 Cal. 4th at 571 n.8; see *Baker v. Cottrell, Inc.*, 2017 WL 6730572, at *7 (E.D. Cal. Dec. 29, 2017) (applying California law) (dismissing plaintiff's strict liability design defect claim based on the risk-benefit test where plaintiff did not present any evidence to establish that the alleged defect proximately caused plaintiff's injury).)

A defendant cannot use the risk-benefit test as a defense to the consumer expectations test or vice versa (*Chavez*, 207 Cal. App. 4th at 1303).

Reasonable Alternative Design

California courts do not require plaintiffs to present evidence of a reasonable alternative design to meet their prima facie burden. Once a plaintiff establishes a prima facie case that the product's design was a proximate cause of the plaintiff's injuries, the burden of proof shifts to the defendant to prove that, given the complexities of the design, the benefits of the design outweigh the risks. (*Kim*, 6 Cal. 5th at 30; *Perez*, 188 Cal. App. 4th at 677-78.)

While courts may allow the evaluation of competing designs, the *Barker* factors do not require the defendant to prove that the challenged design is the safest possible design (*Soule*, 8 Cal. 4th at 571 n.8).

Subsequent Remedial Measures

Under California law, subsequent remedial measures are generally inadmissible to prove negligence or culpable conduct (Cal. Evid. Code § 1151). However, post-sale changes in a product's design may be admissible to prove that the prior design of the product was defective in a strict product liability action (*Ault v. Int'l Harvester Co.*, 13 Cal. 3d 113, 117-19 (1974) (holding that the prohibition against admitting evidence of subsequent remedial conduct, as contained in Cal. Evid. Code § 1151, applies in negligence, rather than strict liability cases)).

While California Evidence Code Section 1151's prohibition against the admission of evidence of subsequent remedial actions does not apply in a strict product liability action, a trial court retains broad discretion under California Evidence Code Section 352 to exclude the evidence if it is likely to take an "undue consumption of time" or "create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The evidence of subsequent remedial conduct is therefore subject to the rules of admission of evidence generally (*Aguayo v. Crompton & Knowles Corp.*, 183 Cal. App. 3d 1032, 1039-40 (1986) (excluding evidence of subsequent remedial measures in strict liability design defect case on grounds of relevancy and remoteness)).

Enhanced Injury or Crashworthiness Claims

California allows plaintiffs to assert strict product liability claims based on a theory of crashworthiness or enhanced injury. In a crashworthiness claim, the plaintiff alleges that the product did not adequately protect users during a collision or accident due to a defective condition in the product, even though the accident or collision itself may not have been caused by any defect in the product. (*Soule*, 8 Cal. 4th at 572; *Endicott v. Nissan Motor Corp.*, 73 Cal. App. 3d 917, 928 (1977).)

California courts analyze enhanced injury claims within the context of proximate causation, or the substantial factor test. The courts look to whether the plaintiff was likely to have suffered the injury even if the alleged defect had not been a factor. If so, the defect cannot be a substantial contributing factor to the injury. (*Doupnik v. Gen. Motors Corp.*, 225 Cal. App. 3d 849, 862 (1990); *Endicott*, 73 Cal. App. 3d at 926.) A plaintiff is not required to rule out all possible alternatives but must show instead that the defective mechanism was "more probable than not the cause in fact" of the plaintiff's injuries (*Doupnik*, 225 Cal. App. 3d at 864).

Strict Liability Failure to Warn

A party typically brings a strict liability failure to warn claim when alleging that a plaintiff's injuries were caused by inadequate warnings or instructions for the safe use of a product.

Elements of Failure to Warn Claim

When pursuing a strict product liability failure to warn claim under California law, a plaintiff must prove that:

- The defendant manufactured, distributed, or sold the product.
- The product had potential risks (or side effects or allergic reactions) that were known or knowable considering the scientific and medical knowledge that was generally accepted in the scientific community at the time of manufacture, distribution, or sale.
- The potential risks (or side effects or allergic reactions) presented a substantial danger when the product was used or misused in an intended or reasonably foreseeable way.
- Ordinary consumers were not likely to have recognized those potential risks (or side effects or allergic reactions).
- The defendant failed to adequately warn or instruct of the potential risks (or side effects or allergic reactions).
- The plaintiff was injured.
- The lack of sufficient warnings or instructions was a proximate cause of the plaintiff's injuries.

(*Carlin v. Super. Ct.*, 13 Cal. 4th 1104, 1112-13 (1996); *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 999-1000 (1991); see CACI 1205.)

For strict liability failure to warn claims, a plaintiff must prove that the product's lack of sufficient warnings was a substantial factor in causing the plaintiff's injuries (*Huitt v. S. Cal. Gas Co.*, 188 Cal. App. 4th 1586, 1604 (2010)). This requires the plaintiff to establish both that the product's warnings were inadequate and that an adequate warning would have prevented the plaintiff's injuries (*Chavez*, 207 Cal. App. 4th at 1304; *Huitt*, 188 Cal. App. 4th at 1603; *Taylor*, 171 Cal. App. 4th at 577).

There are additional considerations for claims pertaining to particular types of products.

Prescription Drugs and Medical Devices

California follows the learned intermediary doctrine for prescription drugs and medical devices, which provides that any warning must be given to the prescribing physician (*Bigler-Engler v. Breg, Inc.*, 7 Cal. App. 5th 276, 319 (2017)). The manufacturer has a continuing duty to warn physicians (not the patient) for as long as the product is in use (see CACI 1205; but see *Bigler-Engler*, 7 Cal. App. 5th at 319 (for medical devices that are provided to patients for their use, duty to warn runs to the physician and the patient)). As a result, the manufacturer "discharges its duty to warn if it provides adequate warnings to the physician about any known or reasonably knowable dangerous side effects, regardless of whether the warning reaches the patient" (*Motus v. Pfizer Inc.*, 196 F. Supp. 2d 984, 991 (C.D. Cal. 2001), *aff'd*, 358 F.3d 659 (9th Cir. 2004) (applying California law)).

Products Containing Allergens

California has adopted the Restatement of Torts (Second) § 402A, comment j on the application of strict liability failure to warn in the case of products containing allergens (*Livingston v. Marie Callender's, Inc.*, 72 Cal. App. 4th 830, 838 (1999)). When pursuing a strict liability failure to warn claim involving products containing allergens, a plaintiff must prove that:

- The defendant manufactured, distributed, or sold the product.
- A substantial number of people are allergic to an ingredient in the product.
- The danger of the ingredient is not generally known or, if known, the ingredient is one that a consumer would not reasonably expect to find in the product.
- The defendant knew or by using scientific knowledge available at the time should have known of the ingredient's danger and presence.
- The defendant failed to provide sufficient warnings concerning the ingredient's danger or presence.
- The plaintiff was injured.
- The lack of sufficient warnings was a proximate cause of the plaintiff's injuries.

(*Livingston*, 72 Cal. App. 4th at 839; see CACI 1206.)

Proving Failure to Warn Defect

Under California law, a product is defective due to failure to warn if it was distributed or sold without sufficient warnings of dangers "that were known to the scientific community" at the time the product was manufactured and distributed (*Johnson v. Am. Standard, Inc.*, 43 Cal. 4th 56, 64-65 (2008); *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 1003 (1991)). The product's user must be given the option to either not use the product at all or use it in a way to "minimize the degree of danger" (*Johnson*, 43 Cal. 4th at 65).

A plaintiff must prove, typically using expert testimony, that the defendant failed to adequately warn of a risk

that was "known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time" (*Anderson*, 53 Cal. 3d at 992, 1002-03). However, a defendant may raise a state-of-the-art defense, arguing that it could not have warned of the product's dangers because they were unknown at the relevant time (*Anderson*, 53 Cal. 3d at 990-91, 1004).

In evaluating the adequacy of a warning under California law, courts consider whether the warning:

- Alerts users to hidden dangers inherent in the use of the product (*Johnson*, 43 Cal. 4th at 64-65; *Anderson*, 53 Cal. 3d at 1003).
- Is appropriate for the level of knowledge and understanding of the product's intended user (*Johnson*, 43 Cal. 4th at 65-66).
- Is sufficiently prominent to apprise users of the product's dangers (for example, the warning's location or position) (*Buckner v. Milwaukee Elec. Tool Corp.*, 222 Cal. App. 4th 522, 528 (2013)).

A manufacturer may be required to give two types of warnings. If the product's dangers can be avoided or lessened by proper use of the product, the manufacturer may be required to adequately instruct the consumer "to use it in such a way as to minimize the degree of danger." If the risks of the product are unavoidable (for example, side effects of prescription drugs), the manufacturer may be required to give an adequate warning to allow the end user to make an informed decision about whether to use the product at all (*Buckner*, 222 Cal. App. 4th at 531-32).

California recognizes "the obvious danger rule, which provides that there is no need to warn of known risks" (Cal. Civ. Code § 1714.45(a); *Johnson*, 43 Cal. 4th at 67). Similarly, where a product is designed and intended to be used by a specific class of users with specialized knowledge, such as industrial products designed for use by skilled technicians, a manufacturer or seller need not warn of dangers that a reasonable intended user of that product would appreciate in the absence of warnings (*Johnson*, 43 Cal. 4th at 65-66, 71 (no requirement to warn HVAC professionals about the dangers of certain heat exposure)).

Courts have held that warnings are legally adequate when they contain information warning of the exact danger that causes a plaintiff's injury (*Marroquin v. Pfizer, Inc.*, 367 F. Supp. 3d 1152, 1163 (E.D. Cal. 2019) (applying California law) (dismissing failure to warn claim where plaintiff alleged that company failed to warn of potentially fatal risk of taking drug but the warning stated that the drug was a drug of last resort because of its "potentially fatal toxicities")).

Heeding Presumption

Unlike some jurisdictions, California does not recognize a rebuttable presumption that a plaintiff would have heeded an adequate warning if the product manufacturer, distributor, or seller had provided one. The plaintiff maintains the burden of establishing that any failure to warn by the defendant was a proximate cause of the plaintiff's injury. (*Huitt*, 188 Cal. App. 4th at 1603.)

Post-Sale Duty to Warn

California generally does not impose a post-sale duty to warn on product manufacturers or suppliers where no defect existed in the product at the time of sale. To hold the manufacturer or supplier liable for failing to warn of dangers of which it would be impossible to know based on the state of knowledge at the time would render the manufacturer or supplier the "virtual insurer of the product." (*Brown*, 44 Cal. 3d at 1061, 1066.)

However, for prescription drugs and implantable medical devices, the manufacturer, distributor, or seller has a continuing duty to warn physicians of potential risks, side effects, and allergic reactions that may result from the foreseeable use of the product for as long as the product is in use. The duty to warn runs to the physician, who stands in the shoes of the ordinary user and not the patient. (*Bigler-Engler*, 7 Cal. App. 5th at 319; see CACI 1205.)

Proving Causation

Under California law, a plaintiff must show both general causation (that the product at issue was capable of causing the alleged injury) as well as specific causation (that the product actually caused "or was a substantial factor in causing" the plaintiff's injury) (*Nelson v. Matrixx Initiatives, Inc.*, 592 F. App'x 591, 592 (9th Cir. 2015) (citing *Jones v. Ortho Pharm. Corp.*, 163 Cal. App. 3d 396, 404 (1985))). "General and specific causation 'must be proven within a reasonable medical probability based upon competent expert testimony'" (*Nelson*, 592 F. App'x at 592 (citing *Jones*, 163 Cal. App. 3d at 402)).

To demonstrate that a defendant may have caused a plaintiff's injury, California uses the substantial factor test to determine proximate causation (*Rutherford*, 16 Cal. 4th at 968-69; see Restatement of Torts (Second) § 431(a)). Under this test, a plaintiff must prove that the defendant's defective products were a "substantial factor in bringing about" their injury (*Rutherford*, 16 Cal. 4th at 968). It does not need to be the only cause of the injury but must be more than a

remote or trivial factor (*Rutherford*, 16 Cal. 4th at 969; *Soule*, 8 Cal. 4th at 572).

California courts have used the substantial factor test as a "clearer rule of causation" than the but for test, as the substantial factor test "subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact" (*Rutherford*, 16 Cal. 4th at 969).

California has adopted the learned intermediary doctrine, which provides that in cases involving prescription medications, a pharmaceutical manufacturer's duty to warn "runs to the physician, not to the patient" (*Motus v. Pfizer Inc.*, 196 F. Supp. 2d 984, 990-91 (C.D. Cal. 2001), *aff'd*, 358 F.3d 659 (9th Cir. 2004) (applying California law)). In view of that doctrine, to establish that a pharmaceutical manufacturer's failure to warn was the proximate cause of an injury, a plaintiff must show that an adequate warning would have changed the physician's prescribing decision (*Motus*, 196 F. Supp. 2d at 990-91). That is, to prove that a defendant's alleged failure to warn or inadequate warning was a substantial factor in the plaintiff's injury, the plaintiff has the burden to prove that the "inadequate warning was the proximate cause of the injury, or, in other words, that an adequate warning to the prescribing physician would have altered the physician's conduct" (*Motus*, 196 F. Supp. 2d at 991).

Damages

Available Damages

Under California law, a plaintiff who prevails on a strict product liability claim may potentially recover:

- Compensatory damages for economic losses, including:
  - costs of required medical care;
  - loss of earnings; and
  - property damage other than to the product at issue.
- Compensatory damages for noneconomic losses, including compensation for:
  - pain and suffering; and
  - loss of consortium (typically brought by the spouse).
- Punitive damages.

In a wrongful death action, a plaintiff may seek economic damages in the form of:

- Financial support that the decedent would have contributed to the family.
- Loss of gifts or benefits the plaintiff would have expected to receive from the decedent.
- Funeral and burial expenses.
- Reasonable value of household services that the decedent would have provided.

In a wrongful death action, a plaintiff may seek noneconomic damages, including loss of:

- The decedent's love, companionship, comfort, and care.
- Consortium.
- The decedent's training and guidance.

(Cal. Civ. Proc. Code § 377.61.)

California recognizes the economic loss rule, which generally bars tort recovery in strict liability for damage to the defective product itself. Under this rule, a manufacturer or distributor cannot be liable for "purely economic losses" (*KB Home v. Super. Ct.*, 112 Cal. App. 4th 1076, 1084 (2003)).

Limitations on Damages

Punitive damages may be awarded where the plaintiff can prove "by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice" (Cal. Civ. Code § 3294(a)).

Punitive damages cannot be imposed on a corporate defendant unless the plaintiff can prove that an officer, director, or managing agent of a corporation had "advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice" (Cal. Civ. Code § 3294(b); *Anaya v. Machines de Triage et Broyage*, 2019 WL 359421, at *5 (N.D. Cal. Jan. 29, 2019) (applying California law); *Morgan v. J-M Mfg. Co., Inc.*, 60 Cal. App. 5th 1078, 1089 (2021)).

Under California Civil Code Section 1431.2 (known as Proposition 51), each defendant's liability for non-economic damages is several and not joint (*B.B. v. County of Los Angeles*, 10 Cal. 5th 1, 9 (2020); *DaFonte v. Up-Right, Inc.*, 2 Cal. 4th 593, 600 (1992); but see *Schreiber v. Lee*, 47 Cal. App. 5th 745, 754 (2020) (acknowledging a "split in authority of sorts" over Proposition 51's applicability to strict product liability actions and quoting *Romine v. Johnson Controls, Inc.*, 224 Cal. App. 4th 990, 1011 (2014))).

Although California law itself does not provide a cap on punitive damages in a personal injury case, the US Supreme Court has held that, as a matter of substantive due process, punitive damages must bear a reasonable relationship to the compensatory damages awarded to

the plaintiff (Cal. Civ. Code § 3294; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-20 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

Statutes of Limitations

The statute of limitations for product liability claims is generally two years from the date the cause of action accrues (Cal. Civ. Proc. Code § 312; Cal. Civ. Proc. Code § 335.1 (personal injury actions); Cal. Civ. Proc. Code § 361 (effect of limitation laws of other states); *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 404-05 (1999) (calculating accrual of wrongful death actions)). A cause of action generally accrues when "the cause of action is complete with all of its elements" (*Norgart*, 21 Cal. 4th at 397).

California recognizes the discovery rule, which "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action" (*Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 807-09 (2005)).

For asbestos exposure cases, the statute of limitations is within one year after the date the plaintiff first suffered the disability or within one year after the date the plaintiff "knew, or through the exercise of reasonable diligence should have known, that such disability was caused or contributed to by exposure," whichever is later (Cal. Civ. Proc. Code § 340.2(a) (personal injury actions); Cal. Civ. Proc. Code § 340.2(c) (one year for wrongful death actions)).

For exposure to hazardous materials or toxic substances other than asbestos, the statute of limitations is the later of two years from the date of injury or two years after the plaintiff becomes aware of "or reasonably should have become aware of":

- An injury.
- The physical cause of the injury.
- Sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another.

(Cal. Civ. Proc. Code § 340.8(a) (personal injury actions); Cal. Civ. Proc. Code § 340.8(b) (two years for wrongful death actions).)

California does not have a statute of repose applicable to product liability actions.