Los Angeles lawyer Michael M. Walsh reviews the legacy of Brown v. Superior Court on products liability litigation page 22

Los Angeles Lawyer

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Public service is the hallmark of a profession that distinguishes itself from a business. While pro bono advocates argue that the privilege of being lawyers obliges us to ensure that the legal system is accessible to the most vulnerable, market pressures have long obliged practitioners to focus on law as a business. Law school tuition has risen precipitously over the years, law firms face relentless economic pressure to watch the bottom line, and California’s courts grapple with severe budget cuts. These trends negatively affect efforts to improve access to justice. The legal profession is continuing to struggle to close the justice gap by providing legal services to the poor and low-income litigants whose needs are not met by underfunded legal service providers. In 2012, the Legal Services Corporation reported eligibility for representation swelled to an all-time high while congressional appropriations fell to an all-time low.

When Ronald M. George was Chief Justice of the California Supreme Court, he published an article titled “Pro Bono Work Is Lawyers’ Duty” in the California Bar Journal to remind lawyers of their commitment to the administration of justice. Lawyers should “strive to transcend the demands of the moment to consider the greater good” by providing pro bono service, which is an “important responsibility and obligation that attaches to the privilege of being an attorney.” The American Bar Association’s Model Rule 6.1 rule also sets an aspirational goal of 50 hours of pro bono legal service per year.

The results of voluntary pro bono, however, have caused some to call for mandatory pro bono for practicing attorneys. Yet attempts to impose mandatory pro bono failed in three states that attempted it. As reported in “Mandatory Pro Bono Is Not the Answer for Practitioners” on Law360.com, the California State Bar’s 1977 proposal to mandate a 40-hour per year pro bono requirement met strident opposition. The 1978 attempt by New York suffered a similar fate. And in 2010, after widespread negative reaction, the Mississippi Supreme Court withdrew a proposed rule for mandatory pro bono for continuing membership in the bar.

The idea of imposing mandatory pro bono as a condition of admission to the bar, however, is gathering steam. On September 14, 2012, the New York State Court of Appeals adopted a rule requiring applicants for admission to the New York State Bar to perform 50 hours of pro bono service. In 2013, the California State Bar’s Task Force on Admissions Regulation Reform recommended that the State Bar require, as a condition of admission, 50 hours of legal services in a Bar-certified pro bono or low bono program. In its Phase I Final Report of June 24, 2013, the task force observed that law is the only “learned profession that sends our newest members out into the world of practice without a period of intensive, supervised training.”

In the Law360 article mentioned above, the former leaders of two of the nation’s largest legal aid organizations, David Lash, Mitchell Kamin, and Daniel Grunfeld, argue that a civil right to counsel for cases involving basic needs—also known as civil Gideon—is a better remedy than enforced pro bono. Civil Gideon already exists as a pilot project under the auspices of the Sargent Shriver Civil Counsel Act (AB 590), which was enacted in 2009. As the continuing economic crisis of the courts and other economic factors continue to widen the justice gap, the promising results of the Sargent Shriver Civil Counsel project may convince skeptics that funding civil Gideon is a better alternative than compulsory pro bono.
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Volunteering with Local Boards and Community Organizations

LAW STUDENTS AND NEW ATTORNEYS frequently ask for advice about how to market themselves, expand their networks, and gain experience. In fact, junior attorneys often become discouraged by the challenge of finding marketing and networking opportunities so soon after entering the legal profession. Admittedly, it can be difficult to acquire experience with clients, other counsel, or before the courts. The answer, however, is simple: get involved in organizations early and give back to the community often.

Volunteering to serve on a board or become more actively involved in an organization provides an opportunity to meet new people and build a reputation while acquiring valuable leadership skills and practical legal experience. It also benefits the community at large, as many organizations provide pro bono legal services. One of the best ways to start getting involved in legal networks and the local community is to join a community organization, bar association, or nonprofit board that is oriented toward newer or younger attorneys. For example, new associates can join boards for legal aid or nonprofit organizations, become actively involved in the Barristers Section of LACBA, or volunteer for one of LACBA’s five public service projects.

One of the great benefits of membership is that it provides a way to engage professionally with a diverse group of attorneys, clients, and community representatives, especially important because networking does not always come easily to new law school graduates. Indeed, most new attorneys’ experiences with others in the legal world are connected with their alma maters, summer jobs, or externships. It is important for new attorneys to expand their networks fast and make as many new connections as possible. Involvement in a bar association or a nonprofit organization provides an opportunity to network with other legal professionals beyond the attorney’s existing circle.

Board meetings and committees are often inherently social, offering a new attorney the opportunity to build relationships as well as to start gaining recognition. Because volunteering to serve on a board for a nonprofit organization or getting involved with a bar association is viewed in a positive way, it serves to build a complimentary professional reputation. Others in the community notice when a new attorney gives up personal time to volunteer or to participate in bar activities. The more involved an attorney becomes in a community or bar organization, the more often the attorney’s name is associated with something positive. Volunteering to serve on a committee or actively participate in an organization’s events also provides the chance to learn from other legal professionals. Many larger organization events feature guest speakers and continuing education programs that allow new attorneys to expand their breadth of legal knowledge and keep apprised of pressing legal issues.

Board membership or involvement in legal and community organizations also helps new attorneys to develop valuable leadership skills. New attorneys can serve as committee heads, plan and organize events, and learn how to self-promote and make pitches. Organizations often need committee members and volunteers to spread the word to get others involved, thus encouraging new attorneys to develop skills to persuade others to champion a cause or participate in events. By serving on a board or taking a leadership role in a local organization, new attorneys also have the chance to develop their management style and gain practice commanding attention and rallying others to work toward a common goal—skills fundamental to success in any legal career.

Nonprofit board memberships and bar associations in the greater Los Angeles area usually promote public service projects, focusing on increasing attorney participation with pro bono work and improving the community. Attorney participants work directly on active pro bono matters that provide invaluable legal experience, such as how to run an active litigation matter or how to negotiate and close a deal. Specifically, pro bono cases involve direct client contact, enabling a new attorney the opportunity to develop client communication skills, interviewing skills, and how to spot potential legal issues. These skills are often not practiced or learned until after a new graduate is already working as an attorney. Pro bono work offers the opportunity to develop and refine these essential skills while gaining exposure to areas of the law that affect the lives of so many in our community but that the new attorney may not otherwise see come across his or her desk, for example guardianship and adoption matters, assisting nonprofit organizations and start-up companies with employment manuals and business formation filings, volunteering at a domestic violence clinic, and assisting veterans to appeal disability determinations and obtain benefits. The attorney can see firsthand the positive impact that his or her work has on the client’s business or life.

There are many opportunities for new and young attorneys to get involved in the local community and to begin to develop the skills and network necessary for future success. Getting involved and giving back to the community early in one’s legal career not only affords the opportunity to connect with other legal professionals in the Los Angeles area and build one’s reputation but it also benefits the community at large and provides vital services to those who need it most.

Kimberly A. Klinsport, an associate in the Los Angeles office of Foley & Lardner LLP who specializes in commercial business litigation and contractual dispute resolution, is the vice chair of the Associates Advisory Board of the Legal Aid Foundation of Los Angeles.

One of the best ways to start getting involved in legal networks and the local community is to join a community organization.
Hector Villagra Executive Director of the ACLU of Southern California

What was your best job? Staff attorney at MALDEF—the Mexican American Legal Defense and Educational Fund.

What was your worst job? I worked for a company that did a lot of geological surveying. I had to clean out copper metal tubes that they used to get dirt samples.

What characteristic do you most admire in your mother? My mom believes what she believes in, and if she disagrees, she will tell you, and it doesn’t matter who you are.

If you were handed $1 million tomorrow, what would you do with it? A nice gift to the ACLU—a bigger house...a little something for my parents to be able to fund a once-a-year vacation.

Who is on your music playlist? Arcade Fire.


Which magazine do you pick up at the doctor’s office? Motor Trend.

What scared you the most the first time you stood in front of a judge? Failing the client.

You were Regional Counsel for MALDEF in Los Angeles from 2001 to 2005. What was a typical case? We were doing a lot of work around overcrowding in the public school system.

What scared you the most the first time you handled a big case involving voting rights for the ACLU? I worried about whether we had started too big.

Which of our civil liberties is at the greatest risk today? The right of privacy.

The ACLU and communists in America have a storied relationship. What’s the status now? It’s definitely part of the history of the organization in terms of whom we defended—and how people tried to smear and undermine the organization by branding us communists and socialists.

Are there any serious schisms within the ACLU leadership now about policy decisions? Here in Los Angeles, we have been something of an outlier within the ACLU family on the notion of economic rights. We see economic rights as intertwined with civil liberties. Other ACLU affiliates are now increasingly focusing on economic rights too.

You went to Columbia University School of Law and you then clerked in New Jersey. But, are you an LA guy? Born and raised.

What is your favorite vacation spot? Any beach. Sun, water, and a book.

What do you do on a three-day weekend? We are limited now with a three-month-old. I try to get the seven- and the four-year-old out in the yard, running around. We’re in the market for a new slip-and-slide.

What are your retirement plans? I want to be here a long time.


You are on the Board of Just Detention International. What’s that about? It’s an international nonprofit dedicated to ending sexual abuse in all forms of detention.

Which person in history would you like to take out for a beer? Abraham Lincoln. The way he was able to apply his intelligence in so many ways is really stunning.

If you had to choose only one dessert for the rest of your life, what would it be? Americone Dream Ice Cream. It’s got chocolate, caramel swirl, waffle cone.

What are the three most deplorable conditions in the world? Hunger. Incarceration. The secondary status that is afforded to women.

Who are your two favorite U.S. presidents? Abraham Lincoln. 2a) FDR. 2b) LBJ.

What is the one adjective you would like on your tombstone? Inspired.
Enforcing a Dissolution Judgment after Death

WHETHER A FORMER SPOUSE DIES intestate or testate, the spouse’s personal representative has the duty to marshal the decedent’s assets and to collect all debts owed to the decedent at the time of death.1 The dissolution judgment rendered by the family law court at the time of divorce serves as the road map for the custody of minors, support payments, and division of assets. Therefore, the personal representative’s attorney tasked with administering the former spouse’s estate through probate may also have to seek enforcement of the terms of a dissolution judgment in family law court.2

The family law court has various tools at its discretion to enforce a dissolution judgment, including holding a party in contempt, appointing a receiver, or execution on property.3 Despite the tools available to enforce the judgment, a party may not seek to enforce rights under a dissolution judgment for various reasons. For example, a party may not have sufficient funds to engage in another court battle or may not want to endure the stress of further litigation, but this does not mean that the creditor’s rights are extinguished.

In Marriage of Cutler, the appellate court best explained the longevity of a dissolution judgment.4 In Cutler, a dissolution judgment included an order that an ex-husband pay child support from 1966 until the two children reached the age of majority in 1984 and 1985 or were emancipated.5 The ex-wife collected $200 in child support in 1966 with the help of the Los Angeles County District Attorney’s Office but made no further collection efforts for 30 years.6 When the ex-wife sought to collect the past due support, the trial court held that she was time-barred from collecting support under the judgment.7 The appellate court reversed the trial court’s ruling and explained that when the 1967 final judgment was issued, installment payments were enforceable via a writ of execution for 10 years after they became due, and could be ordered enforceable by the court if they were more than 10 years overdue.8 The period of enforceability for support installment payments without an order of the court continued to increase until the enactment of Civil Code Section 4384.5 in 1992, which codified the continued enforceability of support installment payments until paid in full, notwithstanding any other provision of law.9 In 1993, Section 4502 of the new California Family Code, which was applicable to all judgments existing as of January 1, 1994, exempted support judgments from renewal and restated that notwithstanding any other provision of law, support judgments were enforceable until paid in full.10 Based on the newly enacted provisions of the California Family Code, the Cutler court determined that the ex-wife was not barred from enforcing the 33-year-old judgment under California Family Code Section 4502 and that her lack of diligence was an inapplicable defense.11

Since Cutler, statutory law regarding the enforcement of dissolution judgments has further evolved. In 2008, the provisions of Family Code Section 4502 became Family Code Section 291. Pursuant to current law, a judgment for the sale or possession of property and a money judgment—for example, for support payments—are enforceable until paid in full or satisfied by some other means.12 Also, the failure of a judgment creditor to enforce his or her rights under a dissolution judgment for a prolonged time cannot be raised by the judgment debtor as a defense against enforcement, even if the judgment debtor would be prejudiced if the right were enforced.13 Therefore, unlike other judgments, dissolution judgments are immune not only from the renewal requirement but also from the defense of laches.

Procedures for Judgment Enforcement

After the death of a judgment creditor or judgment debtor, the Code of Civil Procedure instructs the surviving party how to proceed, with the Family Code’s only supplementing these instructions.14 According to the Code of Civil Procedure, after a judgment creditor’s death, the successor in interest, administrator, or executor may enforce the judgment.15 A successor in interest is a particular person who succeeds to a cause of action or property that is part of a cause of action.16 This differs from an administrator or executor because rather than starting a formal probate and taking the place of the decedent, the successor in interest must file an affidavit or declaration that explains the relationship to the decedent and right to be the successor in interest.17

Upon receiving letters of administration or letters testamentary, the personal representative of the judgment creditor can immediately begin to enforce a dissolution judgment. If the judgment debtor has an interest in real property and the judgment had not been previously recorded, one of the most important steps is to obtain and record an abstract of judgment against the real property. If it is a support order within the dissolution judgment that must be enforced, an abstract of support judgment should be recorded. In either case, the personal representative of the judgment creditor stands in place of the deceased judgment creditor and should be identified in that capacity on all forms. Counsel should quickly complete the abstract of judgment and submit it with a copy of the letters of administration or letters testamentary to the court for issuance. Once the abstract is issued, it must be recorded as a lien against the judgment debtor’s real property, protecting the estate’s interest while the personal representative discusses with counsel how to next proceed.

If the orders within the dissolution judgment in need of enforcement are for child and spousal support, the procedure to obtain a writ of execution for support installment payments requires: 1) an Application for Issuance of Writ of Possession/Sale/Execution (FAM 027),18 2) a Memorandum of Costs After Judgment, Acknowledgment of Credit, and Declaration of Accrued Interest (Judicial Council Form MC-012), and 3) a Writ of Execution (Judicial Council Form EJ-130). As with the abstract of judgment, the personal representative should be identified as the administrator or executor of the estate with the letters of administration or letters testamentary attached. The application and corresponding documents are completed...
as with any other judgment enforcement. Upon issuance of the writ of execution, the personal representative or counsel should contact the local county sheriff’s department court services division in order to levy against the judgment debtor’s bank account and other assets to collect the past due support. 19

**Personal Property**

Adjudicated property rights in a divorce cannot be modified, notwithstanding the death of one of the parties. 20 The decedent’s personal representative must determine whether the decedent received the property listed in the dissolution judgment or whether any items are outstanding. However, the Probate Code, in recognition that the cost associated with pursuing personal property items of little value is usually not in the best interest of the estate, states that “[u]nless the property is specifically devised, subject to the requirements of this chapter, the personal representative may dispose of or abandon tangible personal property where the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value.” 21 The personal representative, though, may be accused of breaching the duty to marshal the decedent’s assets if personal property items with high fair market values are abandoned.

A personal representative may pursue possession of personal property in various ways. A common remedy is to request a writ of possession, which requires the same set of forms as a writ of execution. As when seeking a writ of execution, the personal representative should be identified as the administrator or executor of the estate, with letters of administration or letters testamentary attached. 22 If the personal representative seeks to recover arrearages and personal property, one set of forms may be used for both.

The personal representative may also seek an order from the court directing the judgment debtor to deliver the property and/or documentary evidence of title thereof to the personal representative. 23 The appropriate sections in the Probate Code provide that if a decedent had a claim to real or personal property upon death, the personal representative may file a petition requesting the court to order the property transferred to the estate. 24 Absent any jurisdictional requirements, 25 the personal representative can proceed with this action under the probate matter. This may prove particularly advantageous to the estate if the judgment debtor is found to have wrongfully taken, concealed, or disposed of the personal property in bad faith because he or she will then be subject to double damages. 26

**The Family Residence**

The family court may have issued a deferred sale of home order for the family residence, which was held in joint tenancy or as community property with a right of survivorship, in order to allow the minor children to remain in their family residence with the custodial parent, thus minimizing the impact of the divorce on them. 27 Some deferred sale-of-home orders state that when the last of the minor children attains the age of majority, the family residence is to be sold and the proceeds divided equally among the parties. However, if the family residence was never sold upon the last minor’s reaching majority and if the custodial parent who resided in the home has died, the surviving party may claim ownership of the entire property based on the form of title and could even surreptitiously record an affidavit of death of joint tenant, or other change in ownership document.

Probate Code Section 5601 provides the estate with some protection by instructing that a joint tenancy, including community property with a right of survivorship, between a decedent and a former spouse is severed if the spouses are divorced at the time the decedent dies. 28 Unless the former spouse brings forth clear and convincing evidence that the decedent intended the real property to transfer to the former spouse. 29 However, this provision does not apply if the dissolution of marriage occurred before January 1, 2002. 30 Therefore, the personal representative and counsel must review applicable law in effect at that time, such as the community property presumption and case law. 31 Generally, real property held by parties in joint tenancy at the time of a divorce will be presumed to be community property, which does not automatically carry with it a right of survivorship. 32 It can be argued that even if the initial form of title remains, the dissolution judgment ordering the sale of the community asset and equal division of its proceeds serves as a severance of the joint tenancy. In addition, case law establishing a trial court’s authority to order the deferred sale of a family residence also discusses the manner in which title is held and the effect of such an order.

For example, in *Marriage of Boseman*, the sole community asset was the parties’ family residence. Explaining that the parties held “their separate interests as tenants in common,” the court awarded “a present interest in the property to each party, coupled with an award of exclusive use of the property by the wife so long as she was obliged to maintain a home for the minor children.” 33 In *Marriage of Braun*, the court later reiterated that “[e]xcept for the fact that the family law court retains jurisdiction to enforce, modify or terminate the deferred sale of home order, the ex-spouse’s respective interests should be viewed as ordinary joint ownership between individuals, in the nature of a tenancy in common.” 34 Accordingly, based on pre-2002 case law, if applicable, it can be argued that the family residence subject to the deferred sale of home order does not remain joint tenancy property or community property with a right of survivorship after the dissolution.

If the decedent’s dissolution judgment was entered before 2002 and at the time of death the original joint tenancy deed was the last deed recorded, the personal representative may need an order to clear title and defend against the former spouse. If not previously recorded, the recordation of the dissolution judgment may be sufficient to establish that the joint tenancy was severed, especially if the dissolution judgment clearly awards a one-half interest in the family residence to each spouse as separate property. Obtaining a title report is the simplest way to find out if the estate has an insurable one-half interest in the family residence. More than likely, the title report will only confirm title as belonging to the joint tenants (or the surviving joint tenant if an affidavit of death of joint tenant was recorded after the decedent died), subject to the dissolution judgment. If that is the case, a court order will be required. Generally, as with the transfer of personal property, the personal representative may file a petition in the probate matter to convey, transfer, or confirm the decedent’s interest in the family residence as an asset of the estate, and to seek double damages against the other party. 35 Since the family court retains jurisdiction over any issues arising from deferred sale of home orders, the personal representative will probably need to seek enforcement of the order in family law court, as well as obtain an order on any related matters. 36

**Retirement Plans**

If the dissolution judgment called for an asset distribution or cash-out division of a retirement plan, the decedent was either awarded an asset of comparable value to the community’s interest in the retirement plan or received a cash equalization payment. 37 If the court ordered an in-kind distribution, jurisdiction was probably reserved by the court to supervise future payments, and the question arises as to whether those payments were ever made. If the retirement plan was governed by the Employee Retirement Insurance Security Act (ERISA), counsel should investigate whether a qualified domestic relations order was entered to bind the employer or whether the decedent may have filed a motion to enforce the division of the retirement plan. 38 The decedent’s community property interest in an ERISA-governed retirement plan is not subject to testamentary or intestate transfer. 39 Nevertheless, if the
decedent did not receive payments that were owed while living, the personal representative may pursue the collection on behalf of the decedent’s estate.

A personal representative and respective counsel may be thrust into unexpected legal issues due to an unenforced dissolution judgment. The best way to proceed is to diligently investigate whether there are any child and spousal support arrearages, untransferred personal property, deferred sale of home order, and/or unpaid community interest in the former spouse’s retirement plan, and to seek the advice of counsel experienced in family law.

1 Prob. Code §9650(a)(1).
2 Id.
3 Fam. Code §290.
5 Id. at 464, 467.
6 Id.
7 Id. at 466.
8 Id. at 468.
9 Id. at 472.
10 Id. at 464, 467.
11 Id. at 474, 478.
12 Fam. Code §291(a).
13 Fam. Code §291(d).
14 Fam. Code §291(e).
18 In Los Angeles County the appropriate superior court form is FAM 027. Other jurisdictions have equivalent filing instruments.
19 See, e.g., in Los Angeles County, The Los Angeles County Sheriff’s Department—Court Services Division, at http://civil.lasd.org/CivilProcess/civprocess2.html?1.
20 11 Witkin, Summary of California Law (10th), Husband and Wife §335; See Ettlinger v. Ettlinger, 3 Cal. 2d 172, 178 (1935) (Once a property agreement is adopted into the court’s decree, “such decree, as to the matters covered by the agreement, becomes immune from subsequent modification.”).
27 Fam. Code §3800(b).
29 Prob. Code §5601(b)(2).]
30 Prob. Code §5604(c)(2).
31 Id.
32 Fam. Code §2581.
34 In re Marriage of Braud, 45 Cal. App. 4th 797, 821 (1996).
36 Fam. Code §3809.
37 California Practice Guide: Family Law, Division of Community Estate upon Dissolution, Legal Separation or Nullity §8.1126.
39 California Practice Guide: Family Law, Division of Community Estate upon Dissolution, Legal Separation or Nullity §8.1172a.
DATA BREACHES INVOLVING the personal information of consumers have recently appeared prominently in headlines. In California, for example, it is estimated that over 2.5 million residents were put at risk by data breaches in 2012, including five major breaches that each affected the personal information of 100,000 or more people. California businesses, which must give notice when a data breach results in unauthorized access to the unencrypted personal information of consumers, are under siege. As recently highlighted by an SEC roundtable, cybersecurity—including the issue of whether and how to disclose a breach—is receiving considerable scrutiny from legislators and regulators.

Disclosure of cybersecurity problems by public companies, for example, presents an interesting confluence of policy considerations for which there is still no consensus. On the one hand, investors may be interested in whether and to what extent a corporation may be burdened by cybersecurity expenses—whether they be the cost of building defenses or the losses arising from a breach. On the other hand, detailed discussion of the value of vulnerable assets or the reasons for their vulnerability may attract predators.

So far, the SEC has been taking a measured approach to the cybersecurity disclosure issue. In October 2011, the staff of the SEC’s Division of Corporate Finance published written guidance. The guidance followed a May 2011 letter from five senators to then-SEC Chair Mary Schapiro requesting that the commission “develop and publish interpretative guidance clarifying existing disclosure requirements pertaining to information security risk, including material information [about] security breaches involving intellectual property or trade secrets.” Although the guidance does not create any new rule or regulation, it does respond to the senators’ request by offering the views of the corporate finance staff on how public companies may assess what disclosures should be provided about cybersecurity matters. The staff discussed the need to disclose risks that have materialized into breaches and risks of future incidents.

In the October 2011 guidance, the staff notes that while no existing rules or regulations explicitly refer to the need for cybersecurity disclosure, a number of existing SEC requirements are broad enough to potentially encompass the issue. In particular, the staff opines that various provisions of the SEC’s Regulation S-K could touch on the need for cybersecurity disclosures in a company’s periodic reports filed with the SEC. For example, citing Item 503(c) of Regulation S-K, the staff suggests that a company may consider disclosing “the risk of cyber incidents if these issues are among the most significant factors that make an investment in the company speculative or risky.” In addition, citing Item 303 of Regulation S-K, the staff indicates that a company may want to address cybersecurity matters in the section of its periodic filings devoted to “Management’s Discussion and Analysis of Financial Condition and results of Operations.” The section covers known incidents or risks of possible incidents that reach the level of a “material event, trend, or uncertainty that is reasonably likely to have a material effect on [a company’s] results of operations, liquidity, or financial condition or would cause reported financial information not to be necessarily indicative of future operating results or financial condition.” The staff also notes Item 103 of Regulation S-K, which requires a brief description of material pending legal proceedings.

Apart from the technical discussion of which existing rules and regulations might be implicated by cybersecurity issues, the Corporate Finance staff made three general observations. First, the guidance recognizes that an assessment of whether and to what extent cybersecurity disclosures should be made in light of each company’s “specific facts and circumstances.” Second, the staff states that “we are mindful of potential concerns that detailed disclosures could compromise cybersecurity issues—for example, by providing a ‘roadmap’ for those who seek to infiltrate a [company’s] network security” and, therefore, “we emphasize that disclosures of that nature are not required under the federal securities
laws.” Third, in a related point, the staff explains that while companies “should provide disclosure tailored to their particular circumstances and avoid generic ‘boilerplate’ disclosure, we reiterate that the federal securities laws do not require disclosure that itself would compromise [a company’s] cybersecurity.”

On this last point, the staff recommends that while companies should not make a disclosure that would compromise cybersecurity, they “should provide sufficient disclosure to allow investors to appreciate the nature of the risks faced by the particular [company] in a manner that would not have that consequence.” The guidance does not explain how to do so. The tension between the risk of disclosure and the risk of nondisclosure may help explain the SEC’s approach to cybersecurity after the guidance was published, which generally has been to evaluate the issue on a case-by-case basis.

SEC Practice after the Guidance

According to SEC Chair Mary Jo White, in the 18 months following publication of the guidance, the Corporate Finance staff issued comments addressing cybersecurity matters to approximately 50 public companies of varying size and in a wide variety of industries. Many comments focus on disclosure of past incidents.

For example, in a case in which a company stated that it “continue[s] to face increasing cyber security threats,” the staff requested that the company provide it information on whether the company had experienced any “breaches, hacker attacks, unauthorized access and misuse, computer viruses and other cybersecurity risks and events in the past and, if so, what consideration you have given to disclosing such events in your risk factors.” In a similar case, the staff asked for information about whether a company had experienced any security breaches or attacks, even if they had not resulted in an adverse effect. The staff indicated that if the company had experienced such incidents, it should consider making investors aware.

In a somewhat different vein, the staff has expressed doubt when companies claim that access to their computer systems by unauthorized users is unlikely. For example, in commenting on a foreign company’s registration statement containing such an assertion, the staff requested that “[g]iven the risks associated with cybersecurity breaches, the company should “please consider revising” this assertion and, “[f]urthermore, tell us what consideration you gave to including risk factor disclosure.”

Some have questioned whether more should be done. In April 2013, Senator John D. Rockefeller IV wrote to White to urge that she make cybersecurity one of her highest priorities. Rockefeller explained that he “applauded” the October 2011 guidance “as an important first step in the right direction,” and noted that “it certainly made a positive impact on disclosures.” However, he opined that public company “disclosures are generally still insufficient for investors to discern the true costs and benefits of companies’ cybersecurity practices.”

Rockefeller tied his concerns about the sufficiency of corporate cybersecurity disclosures to his general concern that the United States is not adequately protecting itself with respect to cybersecurity. He asserted that “[l]investors deserve to know whether companies are effectively addressing their cybersecurity risks,” calling this information “indispensable to efficient markets.” He explained his belief that, “as a country, we need the private sector to make significant investments in cybersecurity,” and suggested that “[f]ormal guidance from the SEC on this issue will be a strong signal to the market that the companies need to take their cybersecurity efforts seriously.” Thus, “given the growing significance of cybersecurity on investors’ and stockholders’ decisions, the SEC should elevate [the staff’s] guidance and issue it at the Commission level as well.”

In her letter responding to Rockefeller, White agreed that cybersecurity disclosure “is a very important issue that is of increasing concern for public companies, our financial markets, and the nation.” However, she demurred on the senator’s request that the SEC elevate the existing Corporate Finance staff guidance to the Commission level, equating cybersecurity risks “with other business risks” that should be “among the factors a public company would consider in evaluating its disclosure obligations.” Nevertheless, she praised the efforts of the SEC staff in promulgating the October 2011 guidance and in reviewing companies’ disclosures, highlighting the number and breadth of the comments provided to individual companies on cybersecurity issues. White emphasized that the SEC staff “continues both to prioritize this important matter in its review of public company disclosures and to issue comments concerning cybersecurity.” She also explained that the staff “is actively engaged in discussing publicly both cybersecurity matters and the guidance to remind public companies of the staff’s view of the importance of cybersecurity disclosure” and “is using the information gathered through these efforts to evaluate the efficacy of the guidance.” She concluded by telling the senator that she has “asked the staff to provide [her] with a briefing of the current disclosure practices and overall compliance with the guidance, as well as any recommendations they have regarding further action in this area.”

In the months following the exchange between Rockefeller and White, a series of high-profile data breaches rattled the public. In December 2013, for example, Target Corporation announced a data breach resulting in the theft of approximately 40 million credit and debit card account numbers. Then, in January 2014, the Neiman Marcus Group confirmed that a similar theft had occurred at its stores, resulting in a spike in fraudulent credit and debit charges on cards that had been used at those stores. In February, Las Vegas Sands Corporation, the world’s largest casino company, revealed a cybersecurity breach that resulted in the theft of customer and employee data. These breaches echo previous events like those at TJ Maxx in 2006, which resulted in the theft of approximately 45 million credit and debit card account numbers. Overall, according to the Identity Theft Resource Center, 2013 was a record year, with more than 600 breaches reported nationwide.

In the face of these events, in March the SEC hosted a roundtable to focus on cybersecurity and the challenges it raises for American companies, regulators, and law enforcement agencies. Participants included all five SEC commissioners, high-ranking officials from other government agencies, and industry leaders from the private sector. The issue of the disclosure obligations of public companies generated considerable discussion. Although the panelists participating in the roundtable seemed to agree that cybersecurity is of growing importance to market participants, there was little consensus on how best to address the issue of disclosure.

Comments from the commissioners are illustrative. In her opening remarks, White focused on the materiality standard that is applicable generally to all financial disclosures. In contrast, the comments of Commissioner Kara Stein suggested that cybersecurity matters may need to be disclosed even absent materiality. Other panelists, particularly those from the private sector, cautioned that the SEC should tread lightly in considering whether to change reporting requirements. Roberta Karmel, a former SEC commissioner and current law professor, suggested that disclosure may not be in the public’s interest. Heavy-handed disclosure requirements could exacerbate risk by bringing breaches to the attention of those who may seek to exploit them, and, as the private sector participants argued, greater disclosure obligations could result in greater litigation risk without any increased investor protection. Commissioner Luis A. Aguilar may have summarized best: “There is no doubt that the SEC must play a role in this area. What is less clear is what that role should be.”

The SEC’s interest in cybersecurity disclosures extends both to incidents that have
already occurred and to the risk of future incidents. The staff’s comment letters, for example, have pushed companies for more information about the occurrence of past incidents and questioned how this history might reflect on the nature and scope of the risks that companies face.

Notably, public companies in the United States are already subject to a web of state laws mandating notice of data breaches involving the personal information of consumers. In this regard, California has been a leader in the field and is generally regarded as having among the most comprehensive rules. Under California law, public and private companies doing business in California or with California residents are required to give notice when a data breach results in unauthorized access to certain unencrypted personal information of consumers. If a breach triggers a company’s disclosure obligations, the business must notify any and all California residents whose personal information was acquired, or is believed to have been acquired, “in the most expedient time possible and without unreasonable delay.” While comprehensive, California’s notification requirement does not take into consideration the consequences resulting from the manner and timing of notification with respect to federally regulated securities.

The confluence of state consumer notification requirements and federal securities litigation is illustrated by the case of ChoicePoint. A spinoff from Equifax, the company aggregated personal data sourced from multiple public and private databases for sale to the government and the private sector. In 2005, it became the target of a shareholder securities class action alleging that the company had misrepresented the security of the private data it collected and sold. According to the allegations of the shareholder complaint, California law enforcement alerted ChoicePoint in September 2004 that criminals had gained access to its databases and were using stolen personal information. In turn, this triggered California’s requirement to notify consumers of the theft of their personal information.

According to the shareholder complaint, after receiving this alert from California law enforcement but before sending out the requisite consumer notices, ChoicePoint continued to issue press releases and file reports with the SEC that contained rote statements concerning the company’s commitment to protecting private information. In addition, a number of senior officers sold millions of dollars of stock. Then, in early February 2005, without making any other public statement or announcement, the company began mailing the consumer notices required by California law. Within a week, the media began reporting on the matter, and soon there was a series
of news items and statements by the company that eventually disclosed that the breach covered by the California notices extended nationwide and had been preceded by similar breaches in the past. The private shareholder litigation commenced after an announcement of investigations by both the SEC and the FTC, and a drop in the company’s stock price. After the company’s motion to dismiss the shareholder litigation was denied, the case eventually settled for $10 million.22

Securities Litigation Considerations
At the March 2014 SEC roundtable, private-sector panelists expressed concern that requiring increased disclosure of cybersecurity matters may lead to more shareholder class actions and derivative lawsuits. As an example, between 2005 and 2007, infamous hacker Albert Gonzalez and his accomplices targeted multiple companies, including TJX Companies (T.J. Maxx, Marshalls, and other retail chains) and Heartland Payment Systems.23 The data breaches caused by Gonzalez’s group ultimately resulted in the theft and sale of more than 90 million credit and debit card account numbers.24 While TJX disclosed the data breach, other companies did not. As a result, according to Douglas Meel, a panelist at the SEC’s cybersecurity roundtable, TJX experienced “all kinds” of litigation burdens while other companies that had been breached by the same hacking group did not.25

However, it is a dubious proposition that the absence of cybersecurity disclosures will insulate a company from shareholder litigation. As the SEC’s staff guidance and ongoing review of cybersecurity issues make clear, the SEC considers these issues to be within the scope of existing disclosure requirements. Therefore, a public company that fails to address cybersecurity adequately in its filings will very likely find itself to be the subject of SEC scrutiny and, if a cyber incident occurs, the lack of disclosure itself may result in private shareholder litigation.

This point is illustrated by the case of Wyndham Worldwide Corporation. WWC was the target of a series of data breaches from April 2008 to January 2010. These breaches resulted in an investigation and a high-profile lawsuit by the FTC, alleging that WWC’s security practices were unfair and deceptive.26 In 2014, a shareholder derivative lawsuit was filed, piggybacking on these allegations and seeking to bring breach of fiduciary duty claims against WWC’s board of directors and several of its executives (including the general counsel).27 The shareholder also complained that the company did not disclose the data breaches until it announced the filing of the FTC’s lawsuit in a Form 10-Q with the SEC in July 2012, more than two and-a-half years after the occurrence of the last breach.28 That disclosure was also the subject of a comment letter sent by the SEC a week after the Form 10-Q was filed. Noting that WWC’s filing included a discussion of the risk of future cyber incidents, and referring to the October 2011 Corporate Finance disclosure guidance, the August 1, 2012, comment letter requested that, “[b]eginning with your next Form 10-Q, please state that you have experienced data breach incidents in the past in order to provide the proper context for your risk factor disclosure.”29

Ultimately, the question is not whether a publicly held company should provide cybersecurity disclosures, but how it should do so effectively. Heartland’s experience provides an example of how disclosures can help defeat shareholder litigation. In 2009, a group of investors sued Heartland in the District Court of New Jersey, alleging that Heartland had fraudulently concealed the occurrence of the data breach and fraudulently misrepresented the general state of Heartland’s cybersecurity.30 The court, evaluating Heartland’s motion to dismiss, explained that omissions are “only fraudulent in the presence of a duty to disclose, which usually arises only when there is insider trading, a statute requiring disclosure, or an inaccurate, incomplete,
“or misleading prior disclosure.”

Further, the court explained, “[T]here is no general duty on the part of issuers to disclose every material fact to investors.” Finding that Heartland had no duty to disclose the data breach when it occurred, the court determined that Heartland’s subsequent statements regarding the general state of its security did not amount to fraudulent concealments or misrepresentations. In effect, the court recognized that there is no statute expressly requiring the disclosure of cybersecurity incidents and, so long as a company has not otherwise made an inaccurate, incomplete, or misleading disclosure on cybersecurity matters, no legal liability should attach to the failure to disclose.

As cybersecurity becomes a more critical part of modern business, the laws and regulations addressing cybersecurity will continue to evolve. Whether this will lead to specific new disclosure standards and requirements for public companies in the United States, however, remains an open question. In the meantime, companies addressing these issues should pay careful attention to the October 2011 guidance before deciding whether and how to make disclosures. A step in the wrong direction—which could be either too much or too little disclosure—may lead to greater litigation risks or greater scrutiny from the SEC.


4 See Guidance, supra note 2.


6 The staff also indicated that cybersecurity issues may be considered under Items 101 and 307 of Regulation S-K and cited several specific accounting standards applicable to corporate financial statements that may be implicated by costs incurred as a result of cyber incidents. See Regulation S-K, 17 C.F.R. §§229.10-1208 (2011).

7 See Guidance, supra note 2.


15 Following the SEC’s roundtable in March 2014, the SEC has received several comment letters from academics, software companies, and other interested parties generally expressing support for the SEC’s efforts to provide guidance to public companies. See Comments on Cybersecurity Roundtable, available at http://www.sec.gov/comments/4-673/4-673.shtml.
17 Commissioner Aguilar has also indicated that directors of public company boards should more proactively confront the risks of cyber-attacks, including by encouraging boards to follow the guidelines set forth by the National Institute of Standards and Technology regarding best practices for managing cybersecurity risks. See Luis A. Aguilar, Commissioner of the U.S. Securities and Exchange Commission, Cyber Risks and the Boardroom, Conference at the New York Stock Exchange (June 10, 2014).
18 See Civ. Code §§1798.80-1798.84. Effective Jan. 1, 2014, Civil Code §§1798.80-1798.84 were amended to include a “user name or email address, in combination with a password or security question and answer that would permit access to an online account” in the definition of electronic personal information. See Civ. Code §§1798.82(h)(2).
19 See Civ. Code §§1798.82(a). California’s Office of Privacy Protection recommends that notice be provided within 10 business days of an organization’s determination that personal information was, or is reasonably believed to have been, acquired by an unauthorized person.
26 See id. at 3.
27 See id. at 25.
29 See id. at 10 (internal quotation marks and citations omitted).
30 See id.
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IN 1988, Brown v. Superior Court\(^1\) established a significant precedent in the development of products liability, particularly regarding prescription medical products. Indeed, Brown is credited with distinctly articulating the three separate theories of products liability—manufacturing defect, design defect, and failure to warn—at a time when these were often lumped into a single claim of strict products liability.\(^2\) Brown, a complex product liability case that involved over 69 plaintiffs and over 170 defendants, concerned the manufacture and use of DES, a synthetic estrogen that until 1971 was used to prevent miscarriage but was found to cause cancer in children and young women who had been exposed in utero.\(^3\) The court in Brown unanimously held that 1) strict products liability for defect design does not apply to prescription drugs, 2) strict liability for failure to warn in prescription drug cases is limited to information that was reasonably scientifically known or knowable at the time of distribution, and 3) the market share theory applied in Sindell v. Abbott Laboratories\(^4\) does not apply to breach of warranty or fraud claims—a defendant is only liable for an apportionment equal to its market share of the subject product.

All of these holdings remain the law in California. The first holding has since been expanded to a wider collection of medical products, including IUDs, artificial femurs, and breast implants. While the nearly unanimous majority rule held that strict liability design claims were not always appropriate for prescription drugs, using a product-by-product approach, Brown went further and joined a small minority to impose a categorical ban on such strict liability design claims. The California Supreme Court adopted the existing majority rule in limiting liability for failure to warn to what was known or knowable, and this has since been expanded to products cases generally and remains the majority rule. Similarly, Brown joined a series of cases, both within and beyond California, that set increasing limits on the potential use of market share theory.

In the earliest discussions regarding the policy goals of strict products liability, which California was the first to adopt in the 1963 decision of Greenman v. Yuba Power Products, Inc.,\(^5\) commentators recognized that some products, particularly vaccines and prescription drugs, were not well suited to strict liability.\(^6\) This acknowledgment eventually resulted in the adoption of a more nuanced approach to products liability, allowing for the use of market share theory in certain circumstances. However, Brown firmly established that prescription drugs were not amenable to strict liability for design defects.

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of comment (k) to Section 402A of the Restatement (Second) of Torts, which describes an exception to strict products liability for products that are important but remain “unavoidably unsafe” given current scientific knowledge. Comment (k) notes that this is “especially common in the field of drugs,” particularly drugs that can only be obtained through a doctor or remain experimental. However, comment (k) states that such a product, when “properly prepared, and accompanied by proper directions and warnings, is not defective, nor is it unreasonably dangerous.”

Prior to Brown, California courts were divided over the issue. In Grinnell v. Charles Pfizer & Co., the court of appeals simply allowed strict liability design defect claims against prescription products,8 while the court in Kearl v. Lederle Laboratories held that comment (k) should be applied on a case-by-case basis, to determine whether the subject product was unreasonably dangerous.9 As a precursor to Brown, another court rejected the case-by-case analysis and held that all prescription drugs were inherently dangerous and therefore fall within the context of comment (k), at least when the harm alleged was addressed by the FDA-approved warnings.10 Prior to Brown, the California Supreme Court had only flirted with the application of strict products liability to prescription drugs, and the issue was only directly addressed in two dissentsin by former Chief Justice Rose Bird.11

Restricting Liability
After discussing the development of strict products liability generally, the history of comment (k), and claims of design defect, Brown addresses prescription drugs specifically.12 While accepting that the consumer expectation test is inappropriate for prescription drugs, Brown finds no difficulty in applying a risk and benefit analysis to address an alleged design defect, once allowing for the consideration of alternative chemical compounds.13 Nevertheless, Brown distinguishes prescription drugs from other consumer products on the grounds that prescription drugs are necessary “to alleviate pain and suffering or to sustain life,” and further distinguishes them from other medical products, such as wheelchairs, because harm to some users of the drugs is unavoidable and because prescription drugs are sufficiently dangerous that a doctor’s prescription is required to obtain them.14

Because of the importance of prescription drugs to public health, Brown expresses concern that increased liability and litigation would drive useful products from the market or make them prohibitively expensive, thus denying needed medical care to some patients.15 The court found as a matter of public policy that the potential liability and expense resulting from strict liability design defect claims were detrimental to the public good. To address this concern, Brown adopts comment (k) for all prescription drugs. While the court noted in a footnote that prescription drugs are heavily regulated, this was not a significant part of its public policy analysis.16

Importantly, Brown did not bar strict liability claims for manufacturing defects or for the failure to warn of known or knowable risks.

By adopting a bright-line test that applied comment (k) to all prescription drugs, Brown expressly rejects the case-by-case approach of Kearl. While finding some appeal in distinguishing the potential liability of indisputably beneficial drugs from that of minor or failed ones, Brown concludes that the inherent uncertainty in this process, which would only occur years after the product was distributed, would defeat the benefits of comment (k). In addition, the subjective nature of deciding which drugs are sufficiently important, whether adequate alternatives are available, and whether the claimed harm is inevitable provides an invitation to inconsistent findings by different courts, further defeating any benefit from comment (k).17 Instead, Brown imposes a categorical exception for all prescription products.18

Brown does not discuss, or even mention, federal preemption. While this is commonly raised today in medical products cases, in 1988 the issue had only rarely been litigated. In fact, just two years before Brown, a court of appeal opinion dismissed the idea of preemption concerning a medical products claim, stating that “there is no question but that substantive tort law is within the province of California state law.”19 The California Supreme Court had not yet addressed preemption in this context, and the U.S. Supreme Court had only addressed one case involving blood products, finding there was no preemption based on a statement by the FDA that no preemption was intended and the presumption that state law regarding health and safety is valid.20 In light of its broad public policy conclusions, Brown avoids any need for California courts to address preemption concerning design claims. Of course, preemption regarding FDA-approved warnings remains an issue in contention in California and other jurisdictions.21

It is also worth noting one other issue only obliquely referred to in Brown: the requirement in comment (k) that the prescription drug be “properly prepared” before comment (k) applies. Brown suggests that this refers to claims of manufacturing defect and insufficient warnings. However, Brown also favorably cites an earlier court of appeal decision that held the prescription drug at issue there was not properly prepared because the manufacturer had withheld adverse data from the FDA during the approval process, thus barring application of comment (k). A similar result was reached by the Third Circuit, which held that a prescription drug was not properly prepared under comment (k) when the manufacturer failed to submit required adverse reaction reports.22 While each court addressed the withholding of data from the FDA, these cases suggest that the “properly prepared” designation could encompass a variety of transgressions by the manufacturer.

Expanding the Brown Exception
By basing its ruling on public policy, Brown left open the potential for lower courts to find other circumstances in which to apply these same policy concerns. After reviewing the Brown decision in detail, the Fourth Appellate District concluded in Hufft v. Horowitz that the same policy considerations applied to a design defect claim alleged against a penile prosthesis which had been surgically implanted to relieve the plaintiff’s impotence.24 In doing so, the Hufft court noted that Brown relies, in part, on a long-standing legal concern about applying strict liability to prescription drugs, while there appeared to be no parallel discussion or concern about medical devices. Nevertheless, Hufft concludes that a prosthesis, like a prescription drug, could only be obtained through a physician and was used to reduce pain and suffering while physically becoming part of the patient, much like a prescription drug.25 More broadly, Hufft concludes that implanted medical devices as a whole could be just as important to public health as prescription drugs and otherwise matched the policy concerns expressed in Brown. As a result, Hufft extends application of comment (k) and Brown to implanted medical devices categorically, following Brown’s lead in rejecting Kearl’s product-by-product analysis.26

The same reasoning was adopted by the Fourth Appellate District in Plenger v. Alza Corporation, addressing a design defect claim over an intrauterine device. Finding no meaningful distinction between a prescription drug and a prescription medical product, this court expressly adopted Hufft’s distinction of implanted medical devices.27 In Artiglio v. Superior Court, addressing a design defect claim over breast implants, the Fourth Appellate District further extended the independent policy footing of Brown and Hufft by finding that it was irrelevant whether the implanted medical product was used for purely cosmetic reasons, whether the product was approved by the FDA, or whether the product had been supplied to the patient by the physician (and was therefore not techni-
cally “prescribed”), so long as it could only be obtained and used through a physician. Indeed, Artiglio pointed out that Brown never mentioned FDA testing or approval as a basis for its decision. In Garrett v. Hosmedica Osteonics Corporation, the Second Appellate District confirmed just last year that Brown remains the law in California and held that the reasoning in Brown applied to a product defect claim concerning an artificial femur. This decision agreed with Artiglio that whether the implanted medical device was technically prescribed is irrelevant.

**Limitations to Brown**

An attempt to expand Brown to surgical latex gloves, however, was categorically rejected since the gloves are generally available and do not require a physician to use. Similar attempts to extend Brown to selected nonprescription medications have been unsuccessful but inconclusive. One trial court ruled for the manufacturer on the pleadings, concluding that “it is self-evident that the rationale of Brown applies to aspirin since it is a “beneficial drug whose efficiency is still being investigated in certain applications, and which carries with it certain well-known and unavoidable risks.” The court of appeal reversed, stating that consideration of whether Brown could be applied to certain nonprescription medications was premature and that all that was presently at issue was whether plaintiff properly alleged a strict liability cause of action, concluding that he did. A later case noted that the same manufacturer had unsuccessfully attempted to extend Brown to a nonprescription product by summary judgment but did not pursue the issue on an appeal from the subsequent jury trial.

While the wholesale application of Brown to nonprescription drugs would appear to be an overextension of its stated policy goals—given the generally robust and profitable business of selling nonprescription drugs—the potential remains for such an extension to a particular drug or class of drugs. This type of argument would require a factual foundation showing the importance of that drug, or class of drugs, despite unavoidable risks, the potential for that class of drugs to be driven from the market by litigation or made prohibitively expensive, and perhaps that the nonprescription drug was typically used at the instruction of a doctor, or as part of a doctor’s medical care. Brown further concludes that insofar as breach of warranty claims are inconsistent with the bar on design defect liability for prescription drugs, the warranty claims are also barred. The court explained that a breach of warranty claim would simply allow a plaintiff to evade the bar on design defect claims by still holding the defendant liable for risks or defects that were unknowable at the time of manufacture. However, this explanation appears insufficient to explain the apparent categorical ban on warranty claims that is arguably expressed in Brown. Carlin v. Superior Court, addressing a prescription drug product claim, clarifies this restriction and explains that breach of warranty claims are only restricted to the same degree as are strict liability claims. For example, a breach of warranty claim is allowed when based on a failure to warn or a manufacturing defect. Brown Promotes the Minority View

When Brown was decided, comment (k) had already been accepted in most jurisdictions that had considered whether strict liability applied to prescription drugs. This trend continued, and most jurisdictions considering the issue have adopted comment (k) regarding prescription drugs and prescription medical products. However, the majority of these cases have rejected Brown’s bright-line application of comment (k)—which categorically bars design defect claims against all prescription drugs—in favor of an approach like that of Kearl requiring an evaluation of each individual product to determine whether it qualifies for treatment under comment (k). Moreover, the majority rule considers comment (k) an affirmative defense that places the burden of establishing whether comment (k) applies on the manufacturer.

While individual tests vary from state to state, they generally include a risk and benefit analysis that weighs the expected benefits of the drug against its anticipated risks, based on the knowledge available at the time of distribution. The defendant may also need to prove that the product was unavoidably unsafe given the state of the art when it was distributed. This is somewhat confusing, as it appears that the states following the majority rule require a manufacturer to meet its burden on a risk and benefit analysis under comment (k) before it can claim immunity from the analysis as part of a design defect claim. When this analysis also includes the consideration of alternate drugs that could be used instead of the subject drug, the existence of which could remove the protection of comment (k), it becomes unclear what advantage comment (k) actually provides in those jurisdictions.
but also useful and desirable, and Brown concludes that this should place all prescription drugs within the scope of comment (k).

Establishing a Warnings Test

Brown noted that some jurisdictions hold a manufacturer strictly liable for the failure to warn of a risk inherent in the product, whether or not that risk was even knowable at the time of distribution, but rejected this as tantamount to making manufacturers into insurers. Instead, Brown adopted the existing majority rule, that liability must be based on a failure to warn of risks that were known or reasonably scientifically knowable at the time of distribution. In doing so, Brown acknowledges that this standard “rings of negligence,” and its discussion leaves something unresolved the question of whether comment (k) effectively imposes a negligence standard for prescription drug warnings.

The California courts of appeal were split on the application of Brown in failure to warn claims generally, requiring the California Supreme Court to resolve the issue. In Anderson v. Owens-Corning Fiberglass, an asbestos case, the supreme court concluded that Brown had confirmed a growing trend in California for strict products liability generally. Anderson adopted the known or scientifically knowable, i.e., “state of the art,” standard for all failure to warn claims in strict products liability. In doing so, the Anderson court rejected arguments that this placed failure to warn claims wholly within a negligence framework. The Anderson court explained that a negligent failure to warn claim was distinct from strict liability because the latter bases liability on what was known or knowable within the available body of scientific knowledge existing at the time of manufacture or distribution. In contrast, a negligence claim begins with the applicable standard of care and whether the defendant acted reasonably under the circumstances.

So, in a negligence claim, the defendant could rely on a custom or practice not to provide a particular warning or explain why it was reasonable to withhold the warning, but in strict liability “the reasonableness of the defendant’s failure to warn is immaterial.” Indeed, the thought process or intention of the manufacturer is irrelevant in strict liability, as liability is based on a comparison of the available knowledge existing at the time of distribution and the warnings actually given.

This issue came full circle in Carlin, in which a divided supreme court rejected an argument that Brown compelled limiting any failure to warn claim for prescription drugs to simple negligence, despite Anderson. A bare majority reaffirmed Brown and Anderson, holding that manufacturers were subject to strict liability for failure to warn and citing Anderson extensively concerning the distinction between negligence and strict liability failure to warn claims. The three minority opinions each argued to varying degrees, that Brown required a reliance on negligence in a failure to warn claim for prescription drugs. Brown, Anderson, and Carlin remain the governing standard for warnings in strict products liability.

Restrictions per Market Share Doctrine

Eight years before Brown, California had created market share theory as an alternative basis of liability in Sindell, which held that a products liability claim could be brought against the manufacturers of a single fungible product, DES, when the specific manufacturer of the precise product used by plaintiff could not be identified, so long as the manufacturers in the lawsuit collectively represented a substantial share of that market. Since then, market share theory has been attempted but discussed more than actually deployed, as a series of decisions following Sindell limited the attempts of plaintiffs to expand on and make use of this new theory. For example, it was found that punitive damages are unavailable under market share theory and that 10 percent of the market is insufficient to bring such a claim. Brown was the second time that the California Supreme Court had addressed market share theory since Sindell, with all three cases addressing pr eventual rulings.

The basis for liability under a market share theory is that the defendants all manufactured an identical product, each following the same formula, so that the end result was fungible and indistinguishable for all practical purposes. This definition greatly limits the types of potentially subject products. Brown further restricts Sindell’s application by rejecting the attempt of the plaintiffs to pursue claims that looked to the individual conduct of each defendant, such as fraud and express warranty. The plaintiffs sought the opportunity to prove that the defendants had each made common representations and warranties, but the Brown court found no means to pursue such issues “without reference to the state of mind of a particular manufacturer” and rejected the argument.

While these arguments make sense with regard to express warranties, which would require an individual proof for each defendant, implied warranties are different. As a matter of law, each defendant is held to the same implied warranty concerning the ordinary uses for the product, which would appear consistent with the application of a market share theory. In fact, Brown appears to recognize this principle and barred the claim of implied warranty as being contrary to its bar on strict liability claims for design defect. However, the claim of implied warranty is only limited to the same extent as that of strict liability, so, if a strict liability claim can be alleged—for example, for manufacturing defect or lack of warnings—so too can a claim be made for a corresponding breach of implied warranty.

Sindell does not address the issue of whether the manufacturers, who were potentially being held collectively accountable for their common product, were jointly and severally liable for this enterprise. Brown concludes that imposition of joint and several liability would be inconsistent with the rationale of Sindell and would frustrate its goals of achieving a balance between the interests of DES plaintiffs and the drug manufacturers. As a result, a plaintiff could never recover a proportion of his or her damages in excess of the market share represented by the defendants that could be identified and were still amenable to service. This could result in a significant reduction on a plaintiff’s potential recovery. As a practical matter, it was probably this restriction, more than the fraud and warranty limitations, that reduced the attractiveness of pursuing a claim under a market share theory.

Brown has become a foundation of California products law, particularly for medical products, and has been cited in over 240 subsequent opinions. Once the distinction between strict liability and negligence standards was clarified regarding liability for inadequate warnings, there has since been no significant challenge to Brown’s holdings. While attempts to use market share theory appear to have faded, there remain efforts to expand Brown’s protection against design defect claims to a widening scope of medical products. The most likely candidates for this include nonprescription drugs and medical products that, while not implanted, interact with the human body.

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1 Brown v. Superior Court, 44 Cal. 3d 1049 (1988).
3 Brown, 44 Cal. 3d at 1054-55.
6 Kearl v. Lederle Labs., 172 Cal. App. 3d 812, 829 (1985) (this case also involved oral polio vaccine).
7 Id. at 1038-39. Brown cites the entire text of comment (k).
596 (1987), dismissed and remanded to court of appeal, 761 P. 2d 102, 251 Cal. Rptr. 642 (1988) (this case concerned warnings for an IUD.)

11 See Finn v. G.D. Searle & Co., 35 Cal. 3d 691, 694, 705 et seq. (1984) (Bird, J. dissenting) and Murphy v. E.R. Squibb & Sons, Inc., 40 Cal. 3d 672, 688,695 (1985) (Bird, J. dissenting). In these cases, Chief Justice Rose Bird asserted that prescription drugs should be subject to strict liability for design defects as well as the consumer expectation test. From these dissent, it appears that Bird would have been the sole dissent in Brown if she had still been on the court.


13 Id. at 1061-62.

14 Id. at 1063.

15 Id. at 1063-64.

16 Id. at 1069 n.12.

17 Id. at 1066-69.

18 Interestingly, Brown never attempts to define “prescription drugs,” apparently accepting this term as self-explanatory.


22 Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 709 (1967); see also Brown, 44 Cal. 3d at 1059-60 n.5.


25 Id. at 18.

26 Id. at 11, 13.


29 Id. at 1393-94.


33 Id. at 1372-73.


37 See cases cited at Brown, 44 Cal. 3d at 1059-60; see also McKee v. Moore, 648 P. 2d 21 (Okla. 1982) and Terhune v. A.H. Robins Co., 577 P. 2d 975 (Wash. 1978).

38 See Frank C. Woodward III et al., 1A DRUG PRODUCT LIABILITY §14.06(4)[b][ii][A]-[B] (Matthew Bender 1997) [hereinafter Woodward], listing Nevada as the only state to reject comment (k), Allison v. Merck and Co., Inc., 878 P. 2d 948, 955-56 (Nev., 1994). See also Larsen v. Pacerset Sys., Inc., 74 Haw. 1, 837 P. 2d 1273 (Hawaii 1992), finding that a pacemaker is not unavoidably unsafe.

39 See Moss v. Wyeth, Inc. 872 F. Supp. 2d 162, 167-68 (D. Conn 2012), recognizing that Brown is in the minority on this point.


42 See Adams, 576 So. 2d at 732-733.


44 Id. at 1068-69.

45 Id. at 1058-59, 1061.

46 Id. at 1065-66.

47 Id. at 1066.

48 Id. at 1059. Many other jurisdictions openly find that applying comment (k) results in using a negligence standard to evaluate the failure to warn claim. See Woodward, supra note 38 at §14.06(4)[b][ii][B].


50 Id. at 1002-03,1004.

51 Id. at 1003.


53 Id. at 1111-13.

54 Id. at 1119, 1135-1136, 1146.


59 Id. at 1071-72.

60 Id. at 1072.


62 Brown, 44 Cal. 3d at 1074-75.
The End of the Hour

Alternatives to traditional billing include capped, blended, collar, incentive, and value billing methods

by David Graeler and Thomas D. Long

BEFORE THE TWENTIETH CENTURY, state law prescribed set fees for specific legal services, and litigation fees were usually paid by the losing parties. Over time, maximum-fee laws were repealed, and by the early twentieth century lawyers typically set fees for particular tasks, applied a discretionary fee based on an estimated value of the services rendered, charged annual retainers, or used contingency fees. Gradually, the practice of law became more complex, rendering flat-fee arrangements, fee schedules, and retainers impracticable. Clients also desired greater transparency and were dissatisfied with legal invoices that merely described a fee as “for services rendered.” These conditions eventually caused lawyers and clients to adopt hourly billing.¹

Since the proliferation of the billable hour in the mid-twentieth century, lawyers have generally billed their clients in one of two ways—through billable hours or on a contingency. Years of experience with these two arrangements resulted in a comfort level regarding the operation of these billing methods and the ethical issues involved with each. In recent years, however, lawyers and clients have again begun creating new alternative fee arrangements to address recent economic conditions and pressures and the general inefficiency promoted by hourly billing. These new arrangements not only help clients manage and often reduce their legal fees but also frequently encourage innovative approaches to problem solving while better meeting the expectations of attorneys and their clients. As the specific types of alternative billing arrangements expand, however, so too do the potential ethical issues surrounding them.

Numerous types of alternative fee arrangements have developed over recent years and are limited only by the imagination and practical limitations of lawyers and their clients. Because clients in diverse practice areas are demanding greater efficiency and risk sharing, alternative fee arrangements are employed by a wide array of lawyers, including solo practitioners, those within small firms, and those within international firms. Many alternative fee arrangements are variants of hourly

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or contingency billing, while others are entirely new creations. Each alternative is designed to address the criticism that traditional hourly fee agreements reward inefficiency and place all the risks of litigation on the client. To succeed, the arrangements must provide a balance of risk and reward and avoid ethical pitfalls. Clients who expect an alternative fee arrangement to invariably cut costs are seeking to transfer risk but not reward and may inadvertently encourage attorneys to find ways to evade the purpose of the agreement. Attorneys who refuse to share risk should not expect a reward. A balanced alternative fee agreement only transfers risk to the attorney over which he or she has at least some control and provides a prospect for a reward if the attorney is successful in producing a good result.

Alternative fee arrangements derived from a traditional hourly billing approach may take various forms. For example, a capped fee arrangement involves time billed by the hour, but with an agreed-upon maximum for the total fees that will be paid. When using a task budget, a maximum number of hours that may be billed at an agreed rate is established for each separate task. Practitioners may also consider using discounted hourly rates under which a discount is established from the standard hourly billing rate and may often be applied progressively with the discount percentage growing at specified billing increments. Volume hourly rates are based on a discount from the standard hourly billing rate and used when there is a large volume of promised work over a period of time. Blended hourly rates consist of a single hourly rate established for all lawyers working on the file or single hourly rates for partners and associates. Under partner-based rate structures, the lead partner is paid a premium rate for time on the matter, but there is no charge for the work of others on the file. Finally, a phased billing arrangement is established when the client and lawyer negotiate an agreed-upon amount of fees for each phase of a matter. If the time on a phase exceeds that amount, the overage is reserved and may be recouped later through various means, including negotiation with the client. Alternatively, if the lawyer “beats” the maximum amount, the remainder may be assigned to another phase.

**Alternative Contingency Arrangements**

There are at least three categories of alternative fee arrangements based on a contingency fee billing method. First, under an incentive and value billing arrangement, the client bases payment on the achievement of mutually agreed-upon goals resulting in the lawyer’s sharing the risk and the reward with the client. Fees and any bonuses are paid based on the value of the services rendered and are designed to reward results instead of the investment of hours. Success in this type of arrangement should be defined in terms of ascertainable and objective criteria, such as time of disposition, stage of disposition, trial outcome, amount of settlement or verdict or other such criteria.

Second, when utilizing result-based billing, the lawyer is paid by the hour and receives a bonus if a matter is successfully concluded. If there is no successful result, the lawyer accepts a discounted hourly rate for the time invested. In structuring this arrangement, the lawyer should clearly define at the outset the discount or “hold back” (what the lawyer is risking) and the performance bonus or premium (what the client is risking). If a bonus is paid, it should be mutually beneficial for the client and lawyer, i.e., the client obtains a desired result in a timely and cost-efficient manner, and the lawyer is rewarded for a willingness to share in the risks of an unfavorable outcome.

Third, there are alternative fee arrangements that involve investment in the client. In addition to or instead of fees, the lawyer receives stock or some other ownership interest in the client. Another general type of alternative fee arrangement relies on some form of a flat fee for the lawyer’s services. For instance, in a retainer arrangement, a lawyer agrees to provide a specified set of services for a particular time and a particular fee. Retainer fees can also be combined with hourly or contingent fee arrangements. Unlike other fees, there is no requirement to return unearned fees when a fee is specified as a “true” or “classic” retainer in which the expressed purpose is simply to ensure the attorney’s availability. In this case, the fees are fully earned when paid.

**Rules 4-200 and 3-300**

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Professional Conduct 4-200, Fees for Legal Services. Rule 4-200(A) states that a lawyer “shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.” Unconscionability of a fee is determined on the basis of all the facts and circumstances existing at the time the agreement is entered into, except if the parties contemplate that the fee will be affected by later events. Whether a fee is unconscionable or not is evaluated based on numerous factors: 1) the amount of the fee in proportion to the value of the services performed, 2) the relative sophistication of the lawyer and the client, 3) the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly, 4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer, 5) the amount involved and the results obtained, 6) the time limitations imposed by the client or by the circumstances, 7) the nature and length of the professional relationship with the client, 8) the experience, reputation, and ability of the lawyer performing the services, 9) whether the fee is fixed or contingent, 10) the time and labor required, and 11) the informed consent of the client to the fee.

Under Rule 4-200, a lawyer’s fee must not be “unconscionable” according to these 11 factors. Ensuring that the fee is not unconscionable in the context of alternative fees may prove more challenging than under a traditional billing approach. For example, if the alternative fee arrangement could in any way be viewed as the lawyer’s entering into a business transaction with, or acquiring an ownership or other pecuniary interest in, a client, Rule 3-300, Avoiding Interests Adverse to a Client, contains several important requirements. First, the terms of the arrangement must be fair and reasonable to the client and disclosed in writing “in a manner which should reasonably have been understood by the client.” Second, the client must be advised in writing that the client may seek an independent lawyer’s advice with respect to the arrangement, and the client has to be given a reasonable opportunity to seek that advice. Lastly, the client must consent in writing to the specific terms of the arrangement. These requirements are further underscored by the dictates of Rule 1-400, which provides that a lawyer shall not make any communication or solicitation to a prospective or present client that contains “any matter...in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public.”

An alternative fee arrangement in the form of a syndication or litigation financing arrangement must also take care to comply with Rule 3-310(F), which states that a lawyer: shall not accept compensation for representing a client from one other than the client unless: (1) There is no interference with the member’s independence of professional judgment or with the client-lawyer relationship, and (2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and (3) The lawyer obtains the client’s informed written consent, provided that no disclosure or consent is required if: (a) such nondisclosure is otherwise authorized by law; or (b) the [lawyer] is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

An alternative fee arrangement that is partially based on a contingency will be subject to the statutory requirements of a full contingency agreement. Failing to comply with statutory requirements for contingency agreements may render hybrid alternative fee arrangements that include contingency components voidable at the option of the client. Another way in which an alternative fee arrangement may be unconscionable is through reverse contingent fee agreements in which the fees are based on a percentage of what a defendant client saves in the course of the litigation. If the amount demanded in the complaint is purely speculative, a reverse contingency fee based upon the claims in the complaint may not be enforceable. Because reverse contingent fee agreements are uncommon, the determination of what is a successful defense must be clearly defined for the client.

A larger ethical concern that arises with alternative fee arrangements centers around a lawyer’s duties and abilities to provide independent advice and competent legal services, as addressed in Rules 3-310 and 3-110. It is these two fundamental obligations that are most often called into question when the fee arrangement seeks to limit 1) the tasks that will be performed, 2) the amount that will be paid for a certain task, or 3) the entire engagement. These two fundamental obligations are also called into question when the arrangement creates outcome-based risk that is shared by the lawyer and client.

For example, in a fixed or capped fee arrangement, whether applied in phases or to the entire engagement, the incentive for the lawyer may be to spend as little time as possible on a particular task or to have it completed by an associate or other lower-cost lawyer. Particularly when the lawyer and client do not have a track record with fixed fee or similar arrangements, the lawyer and client must be aware of the inherent tension that may exist in this circumstance. Practitioners must be careful to avoid agreeing to fixed fees that are excessive or unreasonable, and clients should avoid negotiating a fixed or capped fee that is inadequate and thereby encourage, indirectly, the use of less experienced and skilled lawyers. Either scenario can lead to potential ethical issues for the lawyer: in the former, that the client is being charged an unconscionable fee under Rule 4-200, and in the latter, that the lawyer’s economic interests may interfere with the lawyer’s judgment and the quality of the lawyer’s representation so as to implicate Rule 3-110. It is also important to define exactly what is within the scope of the capped fee arrangement. If unanticipated tasks are essential to perform proper representation they must be performed regardless of whether the fee agreement makes provision for them. A fee agreement that fails to properly define what happens in such a situation will strain the

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**The Collared Fee Arrangement**

Another type of an alternative fee is a “collared” or “risk collar” agreement in which attorney and client agree to a carefully considered budget for the entire matter or one or more phases of the matter. In a collared fee agreement, normal hourly rates apply as long as the number of hours performed is within the budget or a set percentage above and below the budget. If the billing goes outside the collar, overruns and savings are shared.

For example, if a matter is budgeted at $100,000 with a 10 percent collar, all billings above $110,000 would be at a 25 percent discount. Savings from billings below $90,000 would be shared with the law firm at a 25 percent rate. Different percentages for the collar and the sharing may be chosen. This approach shares the risks and rewards and provides an incentive for efficiency.

Caution should be taken when using a collared fee arrangement. On the one hand, the client must be sure that the attorney does not set an unrealistically high budget. On the other, the lawyer must be wary of issues that are not under his or her control that can drive up costs. These include the poor record keeping of a party subject to discovery, which could lead to expensive e-discovery or intransigence in settlement negotiations, making early settlement impossible. Collared arrangements may be best for well-defined phases in more complicated matters to allow the parties to tighten or loosen the collar as events may warrant.—D.G. & T.D.L.
1. There is no requirement to return an unearned fee that is specified as a true or classic retain. True. False.
2. In California, the primary rule governing attorney fee billing arrangements is California Rule of Professional Conduct 5-100. True. False.
3. Contingency fee agreements were first approved by the American Bar Association in 1929. True. False.
4. Rule 3-320(f) prohibits lawyers from entering into an alternative fee arrangement in the form of a syndication or litigation financing arrangement because a lawyer “shall not accept compensation for representing a client from one other than the client.” True. False.
5. Whether a fee for legal services is unconscionable is determined on the basis of all facts and circumstances existing at the time the agreement is entered into unless the parties contemplate that the fee will be affected by later events. True. False.
6. If an alternative fee arrangement could be viewed as the lawyer’s entering into a business transaction with, or acquiring an ownership or other pecuniary interest in, a client, which of the following is an important requirement? A. The terms of the arrangement must be fair and reasonable to the client and disclosed in writing that should reasonably be understood by the client. True. False. B. The client must consent in writing to the specific terms of the arrangement. True. False. C. The client must be advised in writing that the client may seek an independent lawyer’s advice with respect to the arrangement, and the client has to be given a reasonable opportunity to seek that advice. True. False. D. None of the above. True. False.
7. Does a syndication arrangement likely constitute an investment contract requiring compliance with state and federal securities laws? Yes. No.
8. Syndication arrangements are potentially unavailable for personal injury suits because personal injury suits are not assignable. True. False.
9. A reverse contingency fee based upon the claims expressly stated in the complaint is always enforceable even if the amount demanded in the complaint is speculative. True. False.
10. With reverse contingency fee agreements, the determination of what is a successful defense must be clearly defined for the client. True. False.
11. A partial contingency fee arrangement is not subject to the statutory requirements of a full contingency fee agreement. True. False.
12. A partial contingency fee arrangement that does not comply with the statutory requirements of a full contingency agreement gives the client an option to void the fee arrangement. True. False.
13. A lawyer shall not make any communication or solicitation to a prospective or present client that contains any matter in a manner or format that is false, deceptive, or tends to confuse, deceive, or mislead the public. True. False.
14. When fee arrangements seek to limit the tasks that will be performed, the amount that will be paid for certain tasks, or the entire engagement, a larger ethical concern that arises centers around a lawyer’s duties and abilities to provide independent advice and competent legal services. True. False.
15. Fixed or capped fee arrangements or arrangements using blended or discounted rates, which result in inadequate fees that encourage the use of less experienced and skilled lawyers, is common, acceptable, and raises no ethical concerns. True. False.
16. A lawyer’s contingent fee is considered a “pecuniary or financial interest in the client’s property” within the meaning of the California Rules of Professional Conduct. True. False.
17. Contingency fee arrangements are acceptable when representing a client in a dissolution of a marriage or domestic relationship. True. False.
18. Once a contingency fee agreement is in place, renegotiating the percentage of terms of the agreement during the course of representation is not permitted. True. False.
20. The financial capacity of the client to pay the fee is not considered in evaluating whether a fee for legal services is unconscionable. True. False.
attorney-client relationship.

Similar issues arise when examining the use of blended or discounted rates. Under these alternative fee arrangements, the law firm is incentivized to use lower billing attorneys to accomplish the majority of the work. If lawyers are selected to perform tasks without regard to the skills and experience necessary to accomplish them, ethical boundaries may be crossed particularly the obligation to render competent legal services. Even if a supervising partner or other lawyer reasonably believes that a matter has been staffed appropriately, a poorly executed task or negative outcome can lead to a client’s claiming, in hindsight, that the supervising partner or attorney did not exercise the appropriate amount of judgment in assigning work on the case but, instead, was motivated by economic interests.

As for contingency fee-based alternative fee arrangements, most are still employed by lawyers representing plaintiffs. However, these arrangements are increasingly being considered and implemented by defense lawyers as well. Whether used by the plaintiffs’ bar or defense counsel, these alternative fee arrangements present their own set of ethical issues.

The American Bar Association Committee on Ethics and Professional Responsibility has opined on the issue of contingency fees, including their use in nontraditional ways such as in business transactions. The ABA committee stated that “[t]he use of contingent fees in these areas, for plaintiffs and defendants, impecunious and affluent alike, reflects the desire of clients to tie a lawyer’s compensation to her performance and to give the lawyer incentives to improve returns to the client.” 19 While it is true that “[f]rom the client’s perspective the contingent fee arrangement tends to encourage quality and discourage excessive work,” ethical concerns may arise because the lawyer now has a financial interest in the case (or transaction) that could affect the lawyer’s judgment. As such, the greatest ethical risk to a lawyer who will be paid with a traditional contingency fee or some variant thereof is that a situation will arise in which the client’s best interests come into conflict with those of the lawyer. Even if the lawyer refrains from acting in his or her best interests when facing a conflict, tension may result if and when the client has reason to question whether a lawyer is providing the best legal advice as opposed to advice that advances the lawyer’s financial interests. Most importantly, whatever the specific alternative fee arrangement, lawyers must therefore continue to represent their clients zealously even if the arrangement becomes unprofitable.

California recognizes a public policy favoring contingent fee arrangements. “The client may and often is very likely to be a person of limited means for whom the contingent fee arrangement offers the only realistic hope of establishing a legal claim.” 21 It is likely for this reason that a lawyer’s contingent fee interest is not considered a “pecuniary or financial interest in the client’s property” within the meaning of the California Rules of Professional Conduct. 22

The use of alternative fee arrangements is likely to continue to grow as lawyers and clients look for billing arrangements that meet each other’s substantive and financial expectations for the representation.

Public Policy

Contingency fee arrangements, and likely hybrid arrangements including contingencies, are subject to public policy limitations. For example, contingency fee arrangements for the dissolution of a marriage or domestic relationship are void against public policy. 23 Although contingency fee arrangements may be appropriate in valuing community assets or in enforcing support awards, the latter are subject to statutory regulation in California. Contingency fee arrangements are not appropriate for “ordinary services” in probate proceedings in which compensation is set by statute. Contingency fee arrangements are also limited if an attorney represents a government entity. There can be no contingent fees for prosecutors because the attorney representing the government in a criminal prosecution is supposedly neutral. 24 Contingency fee contracts are also forbidden as to attorneys’ representing government agencies in prosecuting eminent domain matters and actions to abate public nuisances. To have a prospect of being enforceable, contingency fee arrangements between private attorneys and governmental agencies must provide that the private counsel does not control the litigation and must meet other criteria to distinguish the litigation from cases in which contingency fees are forbidden. 25

Once an agreement is in place, particular care must be taken when renegotiating the percentage of terms of the contingency fee agreements. Increasing percentages of a contingency (for example, a higher percentage after the complaint is filed or after the commencement of trial or entry of judgment) will likely be upheld if the agreement for the increased percentages is delineated in the initial engagement agreement. But if the agreement is renegotiated during the course of representation, Rule 3-300 likely requires full disclosure and advice to the client to seek independent counsel. 26 Problems can also arise if an attorney seeks payment of the full fee owing at the time a structured settlement is entered into without having specified in the initial agreement that the full fee was payable at that time and having provided a means for measuring the value of the structured settlement.

Before finalizing an alternative fee arrangement, clients and outside counsel should determine whether the potential arrangement aligns their interests and goals, promotes a healthy, long-term working relationship (including an increased understanding of their respective enterprises and needs), seeks to avoid surprise, and achieves an optimal mix of thorough work product and cost-effectiveness. When both the client and the lawyer get an equally good or equally bad deal, the fee arrangement is more likely than not to be deemed fair, reasonable, and not unconscionable. On the other hand, if a lawyer receives a fee at the end of the engagement that is out of proportion to both the time invested and the risk undertaken, this is more likely to create conflicts with the client and ethical issues for the lawyer.

The use of alternative fee arrangements is likely to continue to grow as lawyers and clients look for billing arrangements that meet each other’s substantive and financial expectations for the representation. In implementing such fee arrangements, the parties must be cognizant of the motivations and economic pressures that come with each type of arrangement. Lawyers and their clients should ensure that the final fee arrangement will help them meet their goals while still providing for a working relationship based on trust and independent advice as opposed to other considerations. If a practitioner believes that an alternative fee arrangement may create risks that the lawyer will not be able to exercise complete independent judgment or provide competent representation, the practitioner should simply not agree to the arrangement, no matter how profitable it may prove to be.
Choosing this course is especially important because if the fee arrangement is ultimately consummated, it will probably be subjected to far closer scrutiny after a bad result or after other problems have arisen in the attorney-client relationship. To withstand such scrutiny, clients and lawyers must engage in frank, thorough discussions and should be meticulous in defining the parameters of the final fee arrangement.


3 Cal. Rules of Prof. Conduct R. 3-700(D)(2). The attorney is entitled to the fee paid regardless of whether he or she actually performs work for the client. Baranowski v. State Bar, 24 Cal. 3d 153, 164 (1979). However, the “true” retainer must be a retainer not paid for any specific work to be done but rather paid simply for the attorney to be available for a specified time. Applying the retainer to other work done changes the nature of the agreement with the client. Confusion is often caused by the use of “retainer” to describe a deposit for work to be done under an hourly fee or other type of engagement that is not a retainer and by reference to engagement agreements generally as retainer agreements.


5 See Murphy v. Allstate Ins. Co., 17 Cal. 3d 917, 942 (1976); Riechert v. General Ins. Co. of Am., 68 Cal. 2d 822, 834 (1968), holding that wrongs founded upon personal injury are not assignable. See also Killian v. Millard, 228 Cal. App. 3d 1601, 1606 (1991) (reversing trial court’s order invalidating plaintiff’s syndication of their recovery to finance the lawsuit holding that defendant lacked standing to bring the challenge and indicating in dicta that syndication may be invalid if the case is brought “not because of any belief in its merits but purely as an investment”).


8 Cal. Rules of Prof.’l Conduct R. 3-300(A).

9 Cal. Rules of Prof.’l Conduct R. 3-300(B).

10 Cal. Rules of Prof.’l Conduct R. 3-300(C).


12 Cal. Rules of Prof.’l Conduct R. 3-310(F).


14 Id.; see also BUS. & PROF. CODE §§6147, 6148.


16 Beard v. Goodrich, 110 Cal. App. 4th 1033, 1039 (2003). A reverse contingent fee agreement giving the attorney 40% of “total net recovery,” which included “the forgiveness or discharge of debt,” was interpreted in Beard not to include the amount demanded in the plaintiff’s complaint, which the plaintiff did not receive.

17 Cal. Rules of Prof.’l Conduct R. 3-310 generally prohibits a lawyer from representing clients with adverse interests unless the lawyer obtains the informed, written consent of the client.

18 Cal. Rules of Prof.’l Conduct R. 3-110 prohibits a lawyer from intentionally, recklessly, or repeatedly failing to perform legal services with competence.


21 Fracasse v. Brent, 6 Cal. 3d 784, 792 (1972).


23 Newman v. Freitas, 129 Cal. 283, 289-90 (1900); see also ABA Model Rules of Prof.’l Conduct 1.5(d)(1).

24 “Contingent fee contracts for criminal prosecutors have been recognized to be unethical and potential unconstitutionnal.” People ex rel. Clancy v. Superior Court (Ebel), 39 Cal. 3d 740, 748 (1985).


Many consumer protection laws provide for the recovery of a specified amount of damages per violation—often in the hundreds or thousands of dollars—rather than requiring plaintiffs to prove actual damages. When combined with the procedural device of the class action, aggregated statutory damages claims can create exposure in the hundreds of millions or even billions of dollars for a class that has suffered little or no actual damages. Statutory damages and class actions serve similar public policy objectives. Statutory damages class actions, however, often threaten companies and individuals with annihilating civil exposure for technical violations of laws that either create no appreciable injuries to consumers or far exceed any actual injury. When a company is confronted with a statutory damages class action, the enormous potential liability creates intense pressure to settle rather than risk an enormous monetary judgment, even if the underlying claims lack merit.

Some legislatures have addressed this problem by capping cumulative statutory damages in some consumer protection laws. Others have passed laws forbidding class action lawsuits when statutory damages are sought. In some circumstances when legislatures have not addressed the issue, courts have limited statutory damage liability by finding that the class action does not meet the superiority requirement of Rule 23(b)(3).¹ A lawsuit may be certified as a class action under this rule only if the court determines that class treatment is superior to other available methods for fair and efficient adjudication. As the aggregation of statutory penalties may lead to injustice, many courts have denied certification in cases in which the damages sought would be ruinous or otherwise disproportionate to the harm alleged.

Judicial response to this issue in such cases has been anything but uniform. Some courts have circumvented the issue by delaying consideration of the due process implications of ruinous damage awards until after certification or until a verdict has been reached. Since nearly all such cases settle long before trial, the issue has rarely been addressed by courts. The disparate and unpredictable judicial treatment of aggregated statutory damages can leave businesses facing class action lawsuits with an unenviable dilemma: settle, or risk potential bankruptcy in litigation.

Federal Decisions

The problem of disproportionate risk when aggregated statutory damages and class actions are combined was addressed as early as the 1970s, shortly after the 1966 amendments to Rule 23 ushered in the modern class action era. The seminal case is a 1972 decision from a federal district court in New York, Ratner v. Chemical Bank N.Y. Trust Company.² In Ratner, Judge Marvin Frankel, David B. Farkas is a member of the Business Litigation Department with Liner LLP in Los Angeles and focuses his practice on consumer class actions.
one of the architects of Rule 23, denied the plaintiff’s motion to certify a class of 130,000 persons seeking $13 million in minimum statutory damages pursuant to the Truth in Lending Act (TILA). The court held that “allowance of thousands of minimum recoveries like plaintiff’s would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement.” Frankel explained that the $13 million minimum statutory award “would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of [TILA].” 5 Judge Frankel also considered the legislative history and purpose behind Congress’s enactment of TILA, concluding that by providing for attorney’s fees and statutory minimum damages, TILA made individual litigation economically feasible. Moreover, he noted that Congress did not contemplate that defendants might face such an enormous liability when designating TILA’s statutory damages provision. While Congress soon amended TILA by capping damages, in the 40 years since Ratner was decided, many courts confronted by the problem of statutory damages and class actions in the context of other statutes have adopted Judge Frankel’s reasoning. 4

Just two years after Ratner was decided, the Ninth Circuit considered an action brought against real estate brokers in Los Angeles for allegedly conspiring to fix brokerage commissions in violation of the Sherman Act. 5 In Kline v. Coldwell Banker & Company, based on approximately 400,000 sales involving allegedly fixed commissions, the plaintiffs estimated that their collective injury amounted to $250 million and that they were entitled to $750 million under the treble damages provision of the Sherman Act. 6 After the district court’s grant of class certification was brought up on interlocutory appeal, the Ninth Circuit followed the rationale of Ratner and held that a class action is not superior to other available methods of adjudication if it seeks “outrageous amounts in statutory penalties” such that it leads to an “aburdurn result.” 7 “In order to certify the action as a proper class action it is necessary to demonstrate that the class action is superior to other available methods for the fair and efficient adjudication of the controversy as required by Rule 23(b)(3).” 8

Following Kline, the Eleventh, Seventh, and Ninth Circuits expressed doubts as to whether or not cases in which aggregated statutory damages were sought satisfied the superiority requirement and could be certified as class actions. In London v. Wal-Mart Stores, Inc., the plaintiff, the president of an investment company with no credit problems, brought putative class claims against Wal-Mart, a bank, and an insurance company for their failure to comply with certain provisions of a Florida statute regulating creditor agents. 9 The plaintiff applied for a Wal-Mart credit card and enrolled in a life insurance program offered with the card, even though he did not need the insurance or the credit card. 10 The district court granted the plaintiff summary judgment and certified a class of individuals who enrolled in the same program as the plaintiff. 11 On appeal, the Eleventh Circuit decertified the class after concluding that the plaintiff’s relationship with class counsel was too close and created a conflict of interest. 12 Having concluded that the class should be decertified, the London court declined to address the remaining issues. 13 However, in a footnote, the court expressed “doubt as to whether the class certification could meet Rule 23(b)(3)’s superiority requirement.” 14 In particular, the court noted that the plaintiff “suffered no economic harm” and that the legal violations were a result of the defendants’ noncompliance with “a complex regulatory scheme subject to different interpretations.” The London court reasoned that, in such situations, the superiority requirement probably is not met if “the defendant's potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff.” 15

With few exceptions, courts in the Ninth Circuit and beyond repeatedly have shown reluctance to allow class certification when aggregated statutory penalties bear no relation to the alleged harm. For example, in cases dealing with the Fair and Accurate Credit Transaction Act (FACTA) class certification, with limited exceptions, nearly uniformly been rejected. 16 FACTA generally prohibits merchants from displaying on receipts the expiration date or more than the last five digits of credit cards. In a case brought against Vitamin Shoppe Industries in 2007, a district court in the Central District of California refused to certify a class under FACTA when statutory recovery between $22.7 million and $227 million, relative to $31 million in equity and $161 million in total assets, would amount to “putting the company out of business.” 17

The most prominent decision approving class certification in the face of massive aggregated statutory penalties for practitioners in the Ninth Circuit is Bateman v. American Multi-Cinema. 18 Bateman involved a FACTA class action suit against a movie theater company in which it was alleged that the company had violated the statute by displaying eight digits of consumers’ credit card numbers. The court conducted a detailed review of the legislative history and concluded that the “proportionality” of the potential damages award to the harm alleged should not be considered as part of a Rule 23 analysis because Congress had not set any limit on the range of statutory damages available for FACTA violations and had also not acted to limit those damages when it passed an amendment to FACTA in 2008, despite being aware of class actions brought under the statute. 19

While Bateman struck a blow against defendants arguing that class treatment is inappropriate when statutory damages are aggregated to extremes, the decision is actually far more limited than it may first appear. The court expressly reserved the issue of whether district courts may consider the threat of “ruinous liability” as a factor weighing against the superiority of a class action. In doing so, the Ninth Circuit noted, “It is widely accepted that class certification ‘may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.” 20 The court further declined to address whether exposing a defendant to “ruinous liability” could be considered as a factor in a Rule 23(b)(3) superiority analysis, stating: “We reserve judgment as to whether a showing of ‘ruinous liability’ would warrant denial of class certification in a FACTA or similar action.” 21 Finally, in distinguishing Kline and other cases that have held that aggregated statutory penalties may be inappropriate, Bateman focuses heavily on FACTA’s legislative history: “We think it clear that the Rule 23(b)(3) superiority analysis must be consistent with the congressional intent in enacting a particular statutory damages provision.” 22

At least two district courts in California have recognized the limits of the Ninth Circuit’s decision in Bateman. 23 In Rowden v. Pacific Parking Systems, Inc., yet another class action lawsuit brought under FACTA, a customer of a city parking lot brought a putative class action against the parking lot operator and the City of Laguna Beach for printing parking receipts that displayed the expiration dates of customer credit cards. The court held that a class action was not the superior method of adjudication when there were two reasonable alternatives to a class action: individual litigation pursuant to FACTA and an administrative claim under the California Government Claims Act. 24 Notwithstanding Bateman’s statements to the contrary, the court found that FACTA provided a specific, individual remedy for aggrieved parties and allowed for recovery of attorney’s fees, costs, and punitive damages. In distinguishing Bateman, the court focused on the potential effect of the damages award on the defendant, an issue explicitly left undecided by the Ninth Circuit in.
Bateman, but also appeared to consider the proportionality of harm:

[The plaintiff] argues that the Ninth Circuit’s recent decision in Bateman prohibits considering the magnitude of liability and proportionality to actual harm at the class certification stage. Bateman, however, is readily distinguishable from the present case. In Bateman, a class action was brought against a billion-dollar movie theater company for allegedly printing receipts displaying eight digits of consumers’ credit card numbers in violation of FACTA. Here, in stark contrast, [the plaintiff] seeks $15 million from a relatively small municipality for harmlessly printing the credit and debit card expiration dates on parking receipts. No one was harmed in this case and there has been no allegation that Laguna Beach’s conduct was malicious or in bad faith. Moreover, a class action is unmanageable here, and there are two far superior methods for resolving this controversy: an individual action or an administrative proceeding.25

Similarly, in Anderson v. Domino’s Pizza, Inc., a case brought under the Telephone Consumer Protection Act (TCPA),26 which generally prohibits using a “robo-dialer” to make marketing calls without consent, and its Washington State law equivalent (both of which provide for a private right of action for $500 per call),27 the court refused to certify a class in part because certification would “inflict[] a grossly disproportionate and crippling liability, far beyond the actual damages suffered.”28

California Decisions

Paralleling the superiority requirement of Rule 23(b)(3), California appellate courts interpreting California’s class action statute29 have held that class action suits should be allowed “only where substantial benefits accrue both to litigants and the courts.”30 Nevertheless, judicial treatment of the issue of aggregated statutory penalties in the class action context is much more difficult to predict when it comes to California state court decisions. As superior court decisions are typically unpublished, it is unclear whether or not trial courts are granting or denying class certification in these types of cases. However, California state courts may be reluctant to grant certification in situations in which aggregated penalties reach astronomical levels.

In 1978, the Supreme Court of California addressed the propriety of cumulative statutory penalties, albeit outside the context of class actions. In Hale v. Morgan, a tenant sued the owner of a mobile home park under a California statute that prohibits discon-necting utilities in order to terminate tenancy for failure to pay rent.31 The statute provides for a $100 per day penalty for as long as the utility services are withheld. The landlord in question had disconnected the tenant’s utilities for three months, leading the trial court to award $17,300 to the tenant under the statute. The California Supreme Court reversed and remanded for trial on the issue of an appropriate penalty. Noting that “[a] statute which applies...a mandatory, fixed, substantial and cumulative punitive sanction” is “manifestly suspect,”32 the court held the statute to be unconstitutional as applied and a violation of due process because “[t]he exercise of a reasoned discretion is replaced by an adding machine...a single wrongful act by [a defendant]...will subject him to potentially infinite penalties, regardless of the circumstances of the violation, the offender, the victim or the damage caused.”33 Although Hale did not touch upon the combination of class actions and statutory penalties, the court’s reasoning applies equally to class-aggregated damages.

In 2000, the California Supreme Court again confronted the issue of aggregated statutory damages in Linder v. Thrifty Oil Company.34 In Linder, the plaintiff alleged that Thrifty Oil Company had violated two provisions of the Song-Beverly Credit Card Act of 1971 and had engaged in other unfair business practices.35 The court of appeal upheld the trial court’s denial of certification on several bases, relying on the federal holding in Ratner to conclude that the aggregated penalties weighed against certification. In interpreting the statute, the court of appeal concluded that if a class were certified, Thrifty could be liable for hundreds of mil-

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left open the possibility that certification might not be appropriate in the context of a fixed minimum penalty scheme like the one in Ratter.

In Starbucks Corporation v. Superior Court, the court of appeal followed Hale and Linder in construing a statute to avoid an unconstitutionally excessive penalty that otherwise would have resulted from aggregating fixed statutory damages in a class action lawsuit.38 Unsuccessful job applicants brought a class action suit against Starbucks, alleging that it had illegally asked about marijuana convictions that were more than two years old. The plaintiffs sought statutory damages of $200 per applicant pursuant to California Labor Code Sections 432.7 and 432.8, which by Starbucks’s estimation could have resulted in damages of more than $26 million. After the trial court denied its motion for summary judgment, Starbucks filed a petition for writ of mandate, which the court of appeal issued. Although class certification was not directly before the court of appeal, it noted that the per se application of the statute by the plaintiffs would result in absurd consequences, including an unconstitutionally excessive penalty. However, the Starbucks court interpreted the statute to apply only to persons aggrieved by the statutory violation—i.e., those who actually had marijuana convictions on their records when they applied to work at Starbucks. Therefore, while the court of appeal did not address directly whether or not aggregated penalties are appropriate, it noted that “[t]here are better ways to filter out inapplicable [business practices] than allowing ‘lawyer bounty hunter’ lawsuits brought on behalf of tens of thousands of unafflicted [individuals].”39

While none of these California decisions squarely addressed whether the aggregation of fixed statutory damages may prevent class certification, they strongly indicate that California courts may find aggregated statutory damages in class actions unconstitutional when the penalty is out of proportion with any harm caused.

**Constitutionality of Aggregated Damages**

Some courts confronted with the issue of grossly excessive statutory damages sought in class actions have declined to consider any due process limitation until after the class has been certified and a verdict entered. As a practical matter, this often means that those courts never reach the due process issue. Once a class is certified, a statutory damages defendant faces a bet-the-company situation. The pressure to settle rather than risk annihilating damage becomes extreme, even if the company believes the claim lacks merit. Several noted jurists, including Richard Posner, have discussed the immense pressure to settle class actions with such high potential exposure and likened such lawsuits to “blackmail.”40

In Parker v. Time Warner Entertainment Company, L.P., the Second Circuit recognized the potential due process concerns raised when the class action is combined with statutory damages but stated that such concerns should be invoked not to “prevent certification, but to nullify that effect and reduce the aggregated damage award.”41 In this case, the plaintiffs sought to certify a putative class of cable television subscribers, each of whom was eligible to receive at least $1,000 in minimum statutory damages for alleged violations of his or her statutorily protected privacy rights under the Cable Communications Policy Act (Cable Act). Although the Second Circuit remanded the case back to the district court because discovery had not disclosed the exact size of the putative class or the extent of the alleged statutory violations, it acknowledged the district court’s “legitimate concern that the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues.”42 The court observed that “[i]n seeking to collect statutory damages of $1,000 for each of up to 12 million cable subscribers, the lawsuit could potentially impose on Defendant Time Warner liability for $12 billion. Even for one of the world’s largest corporations, that is a lot of money.”43

In a separate concurrence in Parker, Judge Newman suggested a way to ameliorate the harsh and potentially unconstitutional impact of aggregated statutory damages in class actions. He argued that courts could interpret the Cable Act “to authorize an award of substantially less than [the $1,000 statutory award] to all but the initially named plaintiffs who instituted the class action.” He recognized that “this approach [could not] be reconciled with the terms of the statute,” but advocated for the approach anyway because “in [his] view…statutes are not to be applied according to their literal terms when doing so achieves a result manifestly not intended by the legislature.”44

Similarly, in Murray v. GMAC Mortgage Corporation,45 a case brought under the Fair Credit Reporting Act (FCRA), Judge Frank Easterbrook of the Seventh Circuit ruled that although there were serious due process concerns with a lawsuit that sought billions of dollars in aggregated statutory penalties for “technical” violations of the FCRA, the due process concerns should not affect the decision on class certification. He wrote,

> While a statute remains on the books... it must be enforced rather than subverted. An award that would be unconstitutionally excessive may be reduced, but constitutional limits are best applied after a class has been certified.... Reducing recoveries by forcing everyone to litigate independently—so that constitutional bounds are not tested, because the statute cannot be enforced by more than a handful of victims—has little to recommend it.47

Several other courts have followed the Seventh Circuit’s example.48

Complicating matters, the First Circuit has stated that before a district court may reduce an award of aggregated statutory damages it must first consider remittitur, in which the court offers the plaintiff the choice of either a reduction in damages award or a new trial. In Sony BMG Music Entertainment v. Tenenbaum, the district court found the jury’s award of $675,000 for the infringement of 30 songs, or $2,250 per song, to be unconstitutionally excessive and reduced the award to $2,500 per work, or three times the statutory minimum, for a total award of $67,500.49

The judge reasoned that the jury’s award was “far greater than necessary to serve the government’s legitimate interests in compensating copyright owners and deterring infringement,” and bore “no meaningful relationship to these objectives.”50 On review, the First Circuit held that the district court had violated the principle of constitutional avoidance by reducing the jury’s award without first considering remittitur.51

With respect to specific laws, the problem of aggregated statutory damages at times has been addressed through legislative rather than judicial solutions. For example, after the court in Ratter elaborated on the problematic nature of aggregated damages provided for by TILA, Congress amended the statute by capping available damages to not more than “the lesser of $50,000 or 1 percent of the net worth of the [defendant].”52 Congress also applied this cap to the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, and the Electronic Funds Transfer Act.53

Some state laws restrict class action suits under statutes carrying fixed penalties. For example, New York passed a law forbidding class actions in which statutory damages are sought, unless the statute in question expressly provides for class relief.54 Florida’s class action statute contains the following similar restriction: “Notwithstanding any law to the contrary, in order to maintain a class action seeking statutory penalties... the class action claimants must allege and prove actual damages.”55

While these legislative steps partially address the issue created by the combination
of statutory penalties and the class action mechanism, they provide little comfort to defendants facing class actions brought under laws that have no caps of limits on statutory damages. Until there are more definitive legislative or judicial pronouncements, class action defendants in California will continue to grapple with the choice between unpalatable settlements and unacceptable risks.

3 Id. at 416.
6 Kline v. Coldwell Banker & Co., 508 F. 2d 226 (9th Cir. 1974).
7 Id. at 234-35.
8 Id. at 233; Similarly, in 1973 the Tenth Circuit in Wilcox v. Commerce Bank of Kansas City, 474 F. 2d 336 341-47 (10th Cir. 1973), upheld a trial court’s decision to decline to certify a class of approximately 18,000 people alleging violations of the Truth in Lending Act, in which class members were not actually harmed but statutory damages ranged from $100 to $1,000 per person, for an estimated $1 million per month.
10 Id. at 1249.
11 Id. at 1250.
12 Id. at 1254.
13 Id. at 1255.
14 Id. at 1255 n.5.
15 Id.
17 Torossian, CV 07-0523 ODW SX, 2007 WL 7648594, at *5.
18 Bateman v American Multi-Cinema, Inc., 632 F. 3d 708 (9th Cir. 2010).
19 FACTA was passed in 2003. In response to misunderstandings about its truncation requirements, Congress amended FACTA in 2008 with the Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (2008) (Clarification Act). In Bateman, the Ninth Circuit addressed the fact that Congress did not limit FACTA’s application in class actions when it passed the Clarification Act:

While some courts had denied class certification under FACTA on superiority grounds at the time the Clarification Act was enacted in June 2008, other courts had granted certification despite superiority arguments like AMC’s. Because we must presume that Congress is aware of “past judicial interpretations and practices” when it legislates, we must presume

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Congress was aware of this split among district courts as to whether these types of actions should be certified. In the midst of this disagreement, Congress stepped in to amend FACTA, and yet did nothing to limit the availability of class relief or the amount of aggregate damages. Bateman, 632 F. 3d at 720 (citations omitted.)

20 Id. at 721, citing Rule 23 Advisory Committee Notes.
21 Id. at 723.
22 Id. at 716.
24 Gov’t. Code §§810 et seq.
25 Rowden, 282 F.R.D. at 587 n.9.
27 The TCPA also provides for actual monetary damages, or for willful violations, up to three times the actual damages or $500 statutory award.
32 Id. at 401.
33 Id. at 402.
34 Linder, 23 Cal. 4th 429.
35 Id. at 429.
36 Id. at 447-48.
37 Id.
39 Id. at 1451.
42 Id. at 22.
43 Id. at 26.
44 Id. at 27-28.
45 Murray v. GMAC Mortgage Corp., 434 F. 3d 948 (7th Cir. 2006).
47 Murray, 434 F. 3d at 953-54.
50 Id. at 89.
51 Sony BMG Music Entm’t v. Tenenbaum, 660 F. 3d 487 (1st Cir. 2011).
54 N.Y. C.P.L.R. 901 (McKinney); note, however, that the U.S. Supreme Court held in Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 397, 130 S. Ct. 1431, 1436, 176 L. Ed. 2d 311 (2010) that the rule could not apply to federal courts sitting in diversity, as federal procedural law would apply.
Procedures and Applications for Obtaining Electronic Signatures

At 4 P.M. on a Friday, an attorney in Los Angeles needs a client’s signature on a settlement document in the next 30 minutes, but the client is somewhere in the Australian outback. Twenty years ago, one would have worried that nothing could be done and that even if it could, it might not be legal. Ten years ago, lawyers did not need to worry about the legal issues but would still have been worried about the ability to get the signature. Today, with rapidly advancing technology, not only is a legal signature possible, it is also easily accomplished. In fact, if the signature arrives at 4:25 P.M., it is considered slow. With the wide variety of apps presently available, lawyers can now obtain signatures on documents regardless of the whereabouts of their clients.

In 1999, California joined the ranks of many other states in enacting the Uniform Electronics Transaction Act (UETA). As required, the UETA is consistent with the federal Electronic Signatures in Global and National Commerce Act—E-Sign Act. The UETA allows the use of electronic signatures in a variety of commercial transactions, with certain exceptions, including wills, divorces, and others listed in Civil Code 1633.3 that require heightened standards. That aside, the UETA provides that “[i]f a law requires a record to be in writing, an electronic record satisfies the law.” An electronic signature is an electronic sound, symbol, or process that is attached to, or logically associated with, an electronic record and executed or adopted by a person with the intent to sign the electronic record. An electronic signature is considered valid as long as it can be demonstrated that the person intended to sign the document, and this can be done in any manner “determined from the context and surrounding circumstances at the time of its creation” or execution. Once the requirements of the UETA have been met, the signature is valid, with the same ramifications and limitations as if on paper. In other words, just as with a paper signature, a party may still claim that the signature is not authentic or that it is unauthorized.

Applications

The question still remains, though, how does an attorney in Los Angeles get a signature on a document from a client in Alice Springs, Australia? There are many apps that are simple to use that assist in this process. One is called GoodNotes, which allows the user to take notes on an iPhone or iPad. It is not recommended for use on an iPhone for taking notes, but its import function allows the user to simply open any document on the iPhone directly through the e-mail program. The user interface is graphically very easy to understand and has an intuitive feel. A document can be attached to an e-mail that is transmitted to the phone of a prospective signatory through an e-mail provider. The recipient opens the attachment in GoodNotes, and the PDF or Word document appears on the phone ready for the recipient's signature—or other input, since it is not exclusively a signature program. (There are at least five different ink colors so the document can be signed in red, blue, black or any other relevant color.) The e-mail recipient simply uses a finger or stylus to sign the document at the necessary spot and then presses export to e-mail the signed document back as a PDF. This app costs $4.99.

There are other apps that are designed to help with electronic signatures. One free app is called SignEasy, which allows anyone to sign a document in three quick, simple steps of opening, signing, and sending. SignEasy also allows more than one person to sign the document at the location of receipt. This is very convenient, for example, if the signatures of partners, spouses, or opposing sides are required at a remote location.

Before the program can be operated, SignEasy requires the user to create a free account, which also takes less than a minute with a personal e-mail. SignEasy then asks the user to create a signature. Once the signature is created, it moves into the document, and the size of the signature can be adjusted to fit. After “done” is pressed, the app asks if all parties agree to signing the document electronically—a helpful element under the UETA. Once the signature is uploaded, the app gives the user a variety of choices, including sending the signed document via e-mail or to a cloud storage system such as Dropbox, Evernote, or Google Drive. E-mail is the simplest method to deliver the signed document to the necessary parties. The basic account allows three documents to be signed for free, and an upgrade is available for as little as $4.99.

Other apps with similar features are SignNow and JotNot. Docusign also has similar features but boasts higher encryption and audit functions. Docusign appears to be accepted by many Fortune 500 companies. Just as with the other programs, Docusign allows a user to download a document or take a photo of it, sign it, and send it. A 14-day free trial option is available.

Many other electronic signature apps are on the market, and they will continue to improve. As society continues to become increasingly mobile and as legal procedure jumps to light speed, these simple apps can make the difference between a deal and no deal.

1 Civ. Code §§1633.1 et seq.
2 Civ. Code §1633.7(c).
3 Civ. Code §1633.9.

Steven G. Mehta is a full-time mediator in the Los Angeles area specializing in employment law, elder law, major personal injury, and business disputes.
Save the Date!

20TH ANNIVERSARY CELEBRATION DINNER
MARCH 28, 2015

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Mark your calendars and plan to join us to celebrate our 20th year as one of Orange County’s premier law schools. Be on the lookout for more information about tickets and sponsorships for this gala party, or contact Ashley Kemp at akemp@chapman.edu to make your early reservation.

We extend a special thank you to members of the bench and bar as well as the community partners who have supported the law school over the past 20 years.
Labor Certification Workshop

ON TUESDAY, SEPTEMBER 9, the Immigration and Nationality Law Section will host an evening workshop for the labor certification practitioner. Distinguished panelists will help those who attend understand and handle the most challenging aspects of the fast-changing PERM landscape, including recent BALCA decisions and DOL interpretations. Speakers Josephine Gonzalez, Catherine L. Haight, Isabel Kugler, and Ronald Y. Wada will discuss how jobs that involve telecommuting and multiple worksites can affect the PERM process and how to maneuver through special skills and educational equivalencies. Additional topics include prevailing wage issues to anticipate on the ETA-9141 and tips for successful case strategies; recruitment and advertising language, including travel and unanticipated work locations; logic and glitches in the ETA-9089 form; BALCA cases and court decisions; degree equivalencies; supervised recruitment; and issues after filing (audits, appeals, motions to reopen, and refilings). The workshop will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available on site and in nearby lots. On-site registration and the meal will begin at 5:30 P.M., with the program continuing from 6 to 8:45. The registration code number is 012370.

$25—CLE+ member
$99—Immigration Law Section member
$125—LACBA member
$150—all others
2.5 CLE hours

2014 Trusts and Estates Symposium

ON FRIDAY, SEPTEMBER 19, the Trusts and Estates Section will host a symposium on how trustees and beneficiaries abuse each other and the legal ramifications of that abuse. The first panel will discuss how some trustees abuse their fiduciary responsibilities and how beneficiaries may take advantage of their trustees. The second panel will discuss what constitutes criminal elder abuse, how to report elder abuse in all its forms to the authorities, and what to expect after such a report has been made. Trent Kiziah and Margaret G. Lodise will examine conflicts that arise between beneficiaries and trustees regarding administration of trusts and how litigation may be minimized. Belle Chen will present a brief overview of criminal elder abuse and financial elder abuse. She will also discuss the process of reporting a suspected crime to law enforcement. The symposium will take place at the Millennium Biltmore Hotel, 506 South Grand Avenue, Downtown. Valet parking is available for $20 and self-parking at Pershing Square for $10. On-site registration will begin at 11:30 A.M. and lunch at noon, with the program continuing from 12:45 to 4 P.M. The registration code number is 012367.

$50—CLE+ member
$125—Trusts & Estates Section member
$180—LACBA member
$225—all others, including at-the-door registrants
3 CLE hours with estate planning, trust and probate law legal specialization credit

36th Annual Child Custody Colloquium

ON SATURDAY, SEPTEMBER 20, the Family Law Section and the Los Angeles Superior Court will host the 36th Annual Child Custody Colloquium. One of the most challenging matters in family law is a child’s refusal to see a parent. Among the prominent judicial officers, attorneys, and mental health professionals who will discuss this issue is Judge Scott M. Gordon, who will provide an update on the status of family law and the courts. In addition, the film Split: Divorce Through Kids’ Eyes will be shown, followed by comments from filmmaker Ellen Bruno. One panel will discuss the reasons why children reject their parents and the dynamics involved. Following lunch, there will be a presentation on interventions in cases of visitation resistance and parental rejection. During the last panel, judges will discuss how structured and creative orders can often provide good resolutions. The colloquium will take place at the Universal City Hilton Hotel, 555 Universal Hollywood Drive in Universal City. Hotel valet parking will be available for $16 and self-parking for $11. On-site registration will begin at 8 A.M. and lunch at 12:30 P.M. The program continues until 4:30. The registration code number is 012241.

$165—CLE+ member
$240—Family Law Section member
$255—LACBA member
$280—all others, including at-the-door registrants
6.5 CLE hours, with family law legal specialization credit
Petitioning to Right a Historic Wrong

IN 1983, WHILE I WAS STUDYING LAW at UC Hastings, my cousin Lani called me. She was researching our family history. The family lore was that Hong Yen Chang, who married our great aunt Charlotte, was an admitted New York lawyer, but he was barred from practicing law once he moved to California in 1890. Lani asked me to find out why. Soon thereafter, I left a phone message for the California State Bar historian. A few days went by before the historian called me back in a state of excitement. “You won’t believe it,” he paused for full effect. “I am holding in my hand a case by the California Supreme Court specifically denying your great uncle the right to practice law!”

Indeed, in a unanimous decision, In re Hong Yen Chang, 84 Cal. 163 (1890), the California Supreme Court denied my great uncle admission to the California State Bar on the grounds he was Chinese born. The Supreme Court held that Chang’s naturalization certificate was void due to the Chinese Exclusion Act, a federal law passed in 1882. This racist law prohibited Chinese immigration for 10 years and barred all Chinese immigrants from becoming naturalized citizens. Thus, as a noncitizen, Chang was ineligible for California bar membership.

This devastating blow did not keep my great uncle from having a stellar career, which included being an attorney. At age 13, after the death of his father, Chang was sent to America in 1872 through the Chinese Educational Mission program. This program brought Chinese boys to America to study, destined for Chinese government service. Chang distinguished himself as a top scholar and, in 1879, graduated from the prestigious Phillips Academy at Andover.

For two years, Chang attended Yale College, but he was forced to withdraw when the Chinese government recalled all the mission program students. Reluctantly, Chang returned to a Chinese naval school. He left China again in 1882, sailing for Honolulu to join his brother and to study law in a law office. Chang somehow finagled his way into Columbia Law School. The only Asian in the class, he graduated in 1886. Dean Theodore Dwight said of Chang in his commencement address, “You cannot have failed to recognize in this stranger a gentleman fit in every respect to be a professional brother to any one of us.”

At that time, law graduates had to meet two criteria to be admitted to the New York State bar: 1) they had to pass an examination—which Chang sailed through with flying colors, and 2) be a U.S. citizen. Due to the Chinese Exclusion Act, Chang was ineligible for U.S. citizenship. It took a special act of the legislature to waive his alien status and allow the Supreme Court of New York the discretion to admit him to practice law. Chang met with the governor, who decided to allow the act to become law in May 1887. But when Chang applied for admission to the bar in New York City, the Supreme Court justices refused to admit him because of his alien status.

Undaunted, Chang found a judge in the Court of Common Pleas Bench for New York, who agreed to grant a naturalization order for Chang in 1887. With that in hand, in 1888, Chang went north to apply for bar admission in the friendly jurisdiction of Poughkeepsie, where he was granted the right to be the first Chinese person to be admitted to practice law in the United States. Chang practiced law in New York for two years.

In 1890, he moved to California. This move may have resulted from his desire to serve the larger Chinese community there. The California Supreme Court heard a motion to admit him as a lawyer. According to California law at the time, a U.S. citizen who had been admitted to practice law in a sister state may be allowed to practice upon production of the applicant’s law license and evidence of good character. In the case found by the historian, four justices unanimously rejected Chang’s application. Justice Charles Fox wrote that a “person of Mongoloid nativity” was not entitled to naturalization under U.S. law. It said the fact Chang held a license to practice law in New York did not matter since it had been obtained through the voided naturalization certificate.

This California Supreme Court decision spelled the end of Chang’s legal career. Undaunted, he went on to enjoy a highly successful career in finance and diplomacy, including service in Washington, D.C., as a senior attaché with the Chinese Embassy.

This year, the Asian Pacific American Law Students Association of the University of California, Davis, School of Law prepared a petition to the California Supreme Court to right this historic wrong. The association has asked the State Bar to posthumously admit Chang. Precedent exists. In 2001, the State of Washington inducted Takuji Yamashita into the state bar. In 1902, he was barred from the practice of law by the state’s supreme court based on his Japanese ancestry. In 2010, the Pennsylvania Supreme Court admitted George Vashon, an African American, to the practice of law. The same court had denied his application in 1847 on grounds of his race.

My family is honored that the UC Davis students have taken up my great uncle’s case. A Change.org petition has been signed by over 3,000 persons asking that this injustice be remedied, and Senate Resolution 46 passed unanimously in support. I join in asking the California Supreme Court and the California State Bar to grant this petition, repudiate the terrible injustice done to my great uncle, and make a bold statement about the Bar’s commitment to diversity.

Rachelle Chong is a Chinese American regulatory lawyer who was the first Asian American Commissioner of the Federal Communications Commission and the first Asian American Commissioner of the California Public Utilities Commission.
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California Women Lawyers Association 40th Anniversary Dinner Keynote Speaker

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