

Tobacco Tort Litigation in California: A Better Understanding of Civil Code Section 1714.45

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I. INTRODUCTION

In 1987, the California Legislature enacted a very confusing statute¹

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1. As enacted in 1987, California Civil Code section 1714.45 provided:
 (a) In a product liability action, a manufacturer or seller shall not be liable if:
 (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary

that some have read to give tobacco companies rather sweeping “immunity” from tort litigation.² Ten years later the California Legislature reversed itself, overturning a portion of the prior statute, by adding new provisions that also contain confusing language.³ At a

knowledge common to the community; and

(2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts.

(b) For purposes of this section, the term “product liability action” means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty.

(c) This section is intended to be declarative of and does not alter or amend existing California law, including *Cronin v. J.B.E. Olson Corp.*, (1972) 8 Cal. 3d 121, and shall apply to all product liability actions pending on, or commenced after, January 1, 1988.

Willie L. Brown Jr.-Bill Lockyer Civil Liability Reform Act of 1987, ch. 1498, § 3, 1987 Cal. Stat. 5777, 5778-79 (current version at CAL. CIV. CODE § 1714.45 (Deering Supp. 2000)).

2. Martin R. Glick & H. Joseph Escher III, *Personal Choice and Civil Code Section 1714.45: An Epilogue for California's Smoking and Health Litigation*, 25 CAL. W. L. REV. 239, 239 (1989); see Paul Glastris, *Frank Fat's Napkin: How the Trial Lawyers (and the Doctors!) Sold Out to the Tobacco Companies*, WASH. MONTHLY, Dec. 1987, at 19. Glick and Escher were and Escher remains counsel to R.J. Reynolds Tobacco Company. See also Darren O'Leary Aitken, Note, *The Product Liability Provision of the Civil Liability Reform Act of 1987: An Evaluation of Its Impact and Scope*, 62 S. CAL. L. REV. 1449, 1457 (1989).

3. In 1997 the statute was amended to provide:

(a) In a product liability action, a manufacturer or seller shall not be liable if both of the following apply:

(1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community.

(2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, and butter, as identified in comment i to section 402A of the Restatement (Second) of Torts.

(b) This section does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from product liability actions, but does exempt the sale or distribution of tobacco products by any other person, including, but not limited to, retailers or distributors.

(c) For purposes of this section, the term “product liability action” means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty.

(d) This section is intended to be declarative of and does not alter or amend existing California law, including *Cronin v. J.B.E. Olson Corp.*, (1972) 8 Cal. 3d 121, and shall apply to all product liability actions pending on, or commenced after, January 1, 1988.

(e) This section does not apply to, and never applied to, an action brought by a public entity to recover the value of benefits provided to individuals injured by a tobacco-related illness caused by the tortious conduct of a tobacco company or its successor in interest, including, but

minimum, the 1997 changes eliminate any immunity that the prior law might have created (at least for the future).

The California Supreme Court has now taken a case that concerns the interpretation of these two pieces of legislation.⁴ A major focus of the tobacco companies and the claimants is on whether the 1997 amendment is only prospective in its effect, a conclusion reached by the Court of Appeal.⁵ However, the case also raises a second important issue concerning what sorts of claims the old law actually barred.

Quite apart from the retroactivity issue, the plaintiffs' lawyers argued that at least some of their clients' claims against the tobacco company defendants (for example, claims based on fraud and misrepresentation) were valid even during the decade when the old law was in effect. Hence, whatever immunity that old law might have provided, it did not preclude these types of claims. Plaintiffs' conclusion is supported in this Article, but for reasons that are quite different from the arguments they

not limited to, an action brought pursuant to Section 14124.71 of the Welfare and Institutions Code. In such an action brought by a public entity, the fact that the injured individual's claim against the defendant may be barred by a prior version of this section shall not be a defense. This subdivision does not constitute a change in, but is declaratory of, existing law relating to tobacco products.

(f) It is the intention of the Legislature in enacting the amendments to subdivisions (a) and (b) of this section adopted at the 1997-98 Regular Session to declare that there exists no statutory bar to tobacco-related personal injury, wrongful death, or other tort claims against tobacco manufacturers and their successors in interest by California smokers or others who have suffered or incurred injuries, damages, or costs arising from the promotion, marketing, sale, or consumption of tobacco products. It is also the intention of the Legislature to clarify that such claims which were or are brought shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense.

(g) This section shall not be construed to grant immunity to a tobacco industry research organization.

Act of Sept. 29, 1997, ch. 570, sec. 1, § 1714.45, 1997 Cal. Chapters 1, 1-2 (codified as amended at CAL. CIV. CODE § 1714.45 (1997)) (amended 1998). Section 1714.45 was amended again in 1998, but the changes were not substantive. Act of Sept. 14, 1998, ch. 485, sec. 38 § 1714.45, 1998 Cal. Chapters 1, 34-35 (codified as amended at CAL. CIV. CODE § 1714.45 (1998)). For discussions of the 1997 amendment, see Rodney R. Moy, *Tobacco Companies, Immune No More—California's Removal of the Legal Barriers Preventing Plaintiffs from Recovering for Tobacco-Related Illness*, 29 MCGEORGE L. REV. 761 (1998); Benjamin C. Graves, Note, *Richards v. Owens-Illinois, Inc.: The Pyrrhic Victory of Proposition 51 and the Death of Fault Immunity for Tobacco*, 33 U.S.F. L. REV. 459 (1999).

4. *Naegele v. R.J. Reynolds Tobacco Co.*, 11 P.3d 953 (Cal. 2000).

5. *Naegele v. R.J. Reynolds Tobacco Co.*, 96 Cal. Rptr. 2d 666, 677-78 (2000).

have advanced in the case. The Court of Appeal summarily dealt with this issue in favor of the defendants.⁶

It is argued here that the 1987 statute should be read only to bar claims that are based upon legal theories at odds with comment i to section 402A of the Restatement (Second) of Torts.⁷ As of 1987, no California case had rejected comment i. However, developments in New Jersey, arguments in the scholarly literature, and dicta in a key opinion of the California Supreme Court (all discussed below) created a concern among potential defendants that the California Supreme Court might be headed towards rejecting comment i, and that such a step could mean imposing sweeping product liability on makers of inherently unsafe products like cigarettes. Hence, the 1987 statute, which itself specifically refers to comment i, should be understood as a legislative decision to head off the possibility that the common law would evolve in that way. This interpretation of the 1987 statute not only makes

6. *Id.* at 678.

7. Restatement (Second) of Torts, section 402A, provides:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965). Comment i provides:

i. Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

reasonable sense of its confusing language, but also reflects the state of thinking about tobacco tort claims at the time it was enacted.

Under this interpretation, the plaintiffs' legal claims in *Naegele* that are based on fraud, conspiracy, and perhaps on other theories, should not be barred by the 1987 statute because such claims are not precluded by comment i. Whether plaintiffs can actually prove all the necessary elements of these permissible claims is quite another matter. But according to this interpretation of the 1987 statute, plaintiffs should at least be entitled to try.

II. BACKGROUND

Before 1963, lawsuits in California by victims of product injuries were either handled under principles of negligence or they were cast as contract claims that drew on "implied warranty" principles.⁸ For example, if someone bought a loaf of bread from a local bakery, took a bite out of the loaf, and it turned out that a sharp pin hidden in the bread injured the person, the victim could sue the bakery (1) in tort, claiming that the bakery negligently allowed the pin to get into the bread, or (2) in contract, claiming that in providing this sort of bread the bakery breached implied warranties of fitness and merchantability. (More likely, the plaintiff's lawyer would assert both tort and contract claims.)

A. *Greenman v. Yuba Power Products, Inc.*⁹ and the *Restatement (Second) of Torts*

Starting with the *Greenman* case in 1963, the California Supreme Court broke new ground by adopting the principle of "strict liability in tort" as a basis of recovery for injury caused by defectively manufactured products such as the bread with a pin in it.¹⁰ Negligence and warranty claims were essentially rendered obsolete in these settings, and in the above example the bakery would be liable to the victim regardless of fault because the bread the victim bought and that caused the injury was obviously "defective." To be more precise, the major doctrinal change this decision brought about on the tort side was that the plaintiff no longer had to prove that the bakery had failed to exercise due

8. See, e.g., *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) (affirming judgment for the plaintiff based upon the doctrine of *res ipsa loquitur*).

9. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

10. *Id.* at 900.

care in allowing the pin to get into the bread; it sufficed that the pin was there when the plaintiff bought the loaf.¹¹

In *Greenman*, the California Supreme Court embraced the rule that Justice Roger Traynor had advocated many years earlier in his now famous concurring opinion in the *Escola* case.¹² In that opinion, Traynor argued for strict liability in tort on a wide range of policy grounds, including considerations of justice, accident prevention, compensation of victims, and administrative simplification.¹³

At the time of *Greenman*, Dean William Prosser of the Law School at University of California, Berkeley (Boalt Hall) was serving as the Chief Reporter for the American Law Institute as it worked to revise the Restatement of the Law of Torts, originally issued in the 1930s.¹⁴ Prosser seized on his former faculty colleague Traynor's views, just then adopted in *Greenman*, and convinced the American Law Institute to endorse what became section 402A of the Restatement (Second) of Torts.¹⁵ As others have recounted, it was hardly the case that the California position could be fairly said to "restate" the common law throughout America at the time.¹⁶ But owing either to Prosser's prescience or a combination of his persuasiveness and the persuasiveness of the California Supreme Court's opinion in *Greenman*, in a short period of time the basic principle embodied in section 402A did become the law nearly everywhere in the nation.¹⁷ Indeed, many jurisdictions cited section 402A as a reason for adopting the principle of strict liability in tort,¹⁸ thereby rendering it a true restatement of the law.

11. See *id.* at 900–01. Under prior tort doctrine, the plaintiff almost surely could have invoked *res ipsa loquitur* in such a case, which, in effect, forced the defendant to show that he was not negligent in allowing the pin to get into the bread, and which, as a practical matter, pretty much amounted to the same thing as strict liability.

12. *Escola*, 150 P.2d at 440–44 (Traynor, J., concurring).

13. *Id.*

14. See, e.g., RESTATEMENT OF TORTS (1934); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 155, 163 (1980); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUDIES 461, 512, 517 n.358 (1985).

15. RESTATEMENT (SECOND) OF TORTS § 402A (1965); Priest, *supra* note 14, at 465, 513–14 (stating that after *Greenman*, "Prosser was back at the 1964 meetings of the [ALI] with a third draft—the present section 402A—that extended the strict liability standard to all products").

16. See, e.g., Priest, *supra* note 14, at 513–18; Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 435, 438 (1979).

17. See Priest, *supra* note 14, at 518.

18. See, e.g., *Suvada v. White Motor Co.*, 210 N.E.2d 182, 187, 188 (Ill. 1965) (citing Restatement (Second) of Torts section 402A to support the court's conclusion that a manufacturer of a brake system came within the rule of strict liability); *Buttrick v. Arthur Lessard & Sons, Inc.*, 260 A.2d 111, 113 (N.H. 1969) (citing Restatement (Second) of Torts section 402A as the basis for applying a rule of strict liability in manufacturing defect cases); *Webb v. Zern*, 220 A.2d 853, 854 (Pa. 1966) (citing

Prosser and Traynor realized that holding defendants strictly liable for defectively *manufactured* products was the analytically easy part. Those products plainly did not conform to what either the manufacturer or the consumer wanted. If a carbonated beverage bottle exploded and injured you, or a candy bar contained an impurity that made you ill, or a mismatched wheel fell off your car causing it to crash, the product was obviously defective. But not all product injuries come about from products that are defective in this way. In the years after *Greenman*, most tort scholars have adopted, as a matter of analytical convenience, two other main categories of defective products: products that are defective in *design* and products that are defective as to their *warning*.¹⁹

These three categories of defects—manufacturing, design, and warning—by no means imply that there is tort liability for all product injuries. To the contrary, most product-related injuries that occur are *not* the result of product defects,²⁰ and in those cases, if the plaintiff sues, the defendant should win. For example, if you fall off a well-made ladder and injure yourself, you probably will not be able to win a case against the ladder maker. Or, if you cut yourself with a sharp knife, you probably will not be able to win a case against the knife maker.

Prosser does not seem to have foreseen the full range of product injury cases that might occur, and he did not expressly embrace the threefold categorization of defects in section 402A. But he clearly had some important insights into the looming question of how broadly the strict liability principle should sweep. Prosser dealt with that issue in two ways. First, he restricted strict liability to products with defects, and then he defined “defect” in a way so as to exclude cases in which he felt there should be no strict liability. Specifically, section 402A applies strict liability to the seller of “any product in a defective condition unreasonably dangerous to the user or consumer.”²¹ Second, Prosser added comments to section 402A, as is typical in the Restatement, several of which describe certain types of harms that he felt were outside of a fair understanding of those caused by defective products. These included the now famous comment i, in which Prosser specifically singled out tobacco products (as well as whiskey, butter, castor oil, and

Restatement (Second) of Torts section 402A and adopting it “as the law of Pennsylvania”).

19. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

20. Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CAL. L. REV. 2403, 2419–23 (2000).

21. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

sugar).²²

In comment i, Prosser's analysis was that even if tobacco products were inherently dangerous, they were nevertheless not normally "unreasonably" dangerous because, he assumed, the dangers of cigarettes were known to the ordinary consumer and they simply could not be made safe. (It is perhaps worth recalling in this respect that section 402A was adopted in the same year the famous Surgeon General's report was issued that linked smoking to lung cancer and other diseases.)²³ Put differently, as Prosser saw it, "unreasonably" dangerous products are either products that are more dangerous than expected or products that can be made safer. And those, and only those, are products to which liability should attach regardless of fault.

Notice how, without specifically saying so, Prosser's understanding broadly covers the three categories of defects that legal analysts generally talk about today: design defects occur when products can be made safer, and products are generally more dangerous than expected when there is either a manufacturing or warning defect. Prosser also notes in passing that if a specific tobacco product were secretly laced with dangerous impurities, it would be a defective product (what we now call a manufacturing defect). His example, which may seem quaint now, was tobacco that contained marijuana.²⁴

Although section 402A was viewed from the outset as capturing (or creating) a very important expansion in tort law, in the scholarly literature of the 1960s and 1970s some writers were advocating an even more sweeping approach to strict liability in tort—one that went well beyond what Traynor and Prosser had initially imagined. Perhaps the broadest view holds that *all* of the accident costs associated with a product should be internalized into the cost of that product, whether or not the product was "defective" as that notion was understood under the Restatement's definition.²⁵ For example, well-known but unavoidable side effects of valuable pharmaceutical drugs would be considered as

22. *Id.* § 402A cmt. i.

23. U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964).

24. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i. Perhaps Prosser was moved to give that example as he witnessed life in Berkeley in the 1960s.

25. For some flavor of this "enterprise liability" approach and recent attempts to reinvigorate it, see generally, VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY (1995); Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993); Virginia E. Nolan & Edmund Ursin, *The Deacademification of Tort Theory*, 48 U. KAN. L. REV. 59 (1999); Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190 (1996).

part of the costs of those drugs, to be internalized in their price through the tort system. Under this view of sweeping strict liability, tort law would force all buyers to pay more for their drugs, but the unlucky ones who suffered the side effects would be compensated for their losses via the tort system. Using strict liability as a way to provide compensation for victims was certainly one of the policy goals Traynor pointed to in his early advocacy of strict liability for what we now call manufacturing defects.

The cost internalization approach would move the difficult products liability analysis up to a different level. That is, if the Restatement's definition of defect were abandoned, exactly which accident costs should be properly understood to be associated with which product? For example, suppose someone is hurt falling off a ladder onto the patio while cleaning the gutters. Is this a cost to be associated with gutters? With ladders? With patios? With the nursery that sold the victim the trees whose leaves were in the gutters? Guido Calabresi, then a law professor and now a federal appellate court judge, attacked this issue with gusto in many brilliant pieces over several years.²⁶ He argued that accident costs should be assigned to what he termed the "cheapest . . . cost avoider."²⁷

In the end, this sort of sweeping approach to strict liability has never really caught on in the courts. Indeed, as to the example given above of known, but unavoidable, side effects of a pharmaceutical drug, courts around the country have by now largely agreed that if an adequate warning has been provided, the product is not defective.²⁸ Prosser himself favored this result, as comment k to section 402A makes clear.²⁹

Nevertheless, back in the 1970s and 1980s, it seemed quite possible that the California Supreme Court would embrace a substantially wider role for strict liability in tort than the Restatement contemplated. For one thing, on several occasions, and most forcefully in *Cronin v. J.B.E.*

26. See, e.g., Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

27. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 135 (1970).

28. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6(b)(3), (d) (1997).

29. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k.

Olson Corp. in 1972,³⁰ the California Supreme Court made clear that, in contrast to the Restatement, “unreasonably dangerous” was not part of the test of product liability in California.³¹ Rather, it was held sufficient to show that the product is “defective.”³² To the California Supreme Court, Prosser’s definition of defect in section 402A sounded too much like negligence.³³ That is, the Restatement’s phrase “defective condition unreasonably dangerous to the user or consumer”³⁴ sounded too much like the negligence law that strict liability was intended to replace. After all, negligence itself is about dangers that are unreasonably created because they should have been avoided.

Just what defective would mean in California, however, was not determined in *Cronin*. Because the actual cases coming before the California Supreme Court through the *Cronin* case seemed to be either cases of manufacturing defects or cases of negligent designs, the ultimate scope of California law was left unresolved. *Greenman*, for example, seemed to involve a poorly designed shop tool.³⁵ *Cronin* seemed to involve a hasp on a delivery truck that was either poorly designed or defectively manufactured.³⁶

B. *Barker v. Lull Engineering Co.*³⁷ and the Possibilities of
Footnote 10

In 1978 the California Supreme Court decided the *Barker* case, in which the plaintiff was injured when a high-lift loader he was operating overturned.³⁸ The plaintiff’s claim, in effect, was that the loader was defectively designed.³⁹ The trial court had charged the jury using the Restatement’s definition of defect, but the California Supreme Court rejected that instruction, reaffirming *Cronin*’s holding that the “unreasonably dangerous” language of the Restatement was not the law in California.⁴⁰

What then would constitute a defective design? The California Supreme Court answered that there were two bases on which that might be determined. First, the product might be found to have “failed to

30. 501 P.2d 1153 (Cal. 1972).

31. *Id.* at 1155, 1163.

32. *Id.* at 1162–63.

33. *Id.* at 1161–62.

34. RESTATEMENT (SECOND) OF TORTS § 402A(1).

35. 377 P.2d 897, 898 (Cal. 1963).

36. 501 P.2d at 1155–56.

37. 573 P.2d 443 (1978).

38. *Id.* at 447.

39. *Id.* at 445–46.

40. *Id.* at 446.

perform as safely as an ordinary consumer would expect"⁴¹ (known now as the "consumer expectations" prong of *Barker*). Or, second, the product's design could be found to embody an "excessive preventable danger," as a case in which "the risk of the danger inherent in the challenged design outweighs the benefits of such design"⁴² (known now as the "risk-benefit" prong of *Barker*).

The California Supreme Court apparently thought that this risk-benefit test itself sounded rather like the negligence concept it had rejected in *Cronin*. Hence, two additional features were added to the test: (1) it would be applied by the jury "through hindsight," and (2) once the plaintiff makes a prima facie showing, the burden would shift to the defendant to prove that the product passes the risk-benefit test.⁴³

By itself, *Barker's* holding on the law of strict liability in California should not have been threatening to cigarette makers. In setting out the risk-benefit prong, the California Supreme Court emphasized that the key question under that test was a comparison between the actual design and a proposed safer alternative.⁴⁴ And, at that point, no one was suggesting a safer cigarette was possible. Under the consumer expectations prong, tobacco companies were reasonably content to rest on the argument that smokers knew what they were getting into when they decided to smoke. This is often deemed the "assumption of risk" defense.⁴⁵ In addition, the defendants could assert "no causation" in response to inadequate warning claims; that is, the defendants could argue that the plaintiff could not show that any other warning would have made any difference in the plaintiff's smoking behavior.

However, and highly significant for purposes of the case now before the California Supreme Court, in footnote 10 of *Barker*, Acting Chief Justice Tobriner stated for the California Supreme Court: "[W]e have no occasion to determine whether a product which entails a substantial risk of harm may be found defective even if no safer alternative design is feasible."⁴⁶ Justice Tobriner then went out of his way to quote from an

41. *Id.* at 454.

42. *Id.*

43. *Id.* at 454-55.

44. *Id.* at 455.

45. This idea is better understood simply to be a claim that the product was not defective because the plaintiff could not show that its warning was inadequate. Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U. L. REV. 833, 857-59 (1997).

46. *Barker*, 573 P.2d at 455 n.10.

earlier opinion of the California Supreme Court⁴⁷ that, in passing, cited a law review article written by Justice Traynor subsequent to the *Greenman* decision,⁴⁸ in which Justice Traynor suggested that “liability might be imposed as to products whose norm is danger.”⁴⁹

At least two new and expanded notions of strict products liability lurk in footnote 10, both of which could be extremely threatening to tobacco companies. One is that the California Supreme Court would allow the risk-benefit test to be applied to the product itself, with the alternative being no product at all (rather than a safer design). Here looms the possibility that a jury could decide that, as a social matter, the risks of smoking outweigh the benefits, and therefore cigarettes are “defective” products. In effect, a jury might conclude that manufacturers have no more business selling cigarettes than they have selling shop tools that could be more safely designed.

Indeed, the New Jersey Supreme Court took a step down this very road five years after *Barker* in *O’Brien v. Muskin*.⁵⁰ There, the plaintiff dove into a three and one-half feet deep, vinyl-lined, above-ground swimming pool, struck his head on the bottom, and sustained serious injuries.⁵¹ The New Jersey Supreme Court sent the case back for retrial on the central ground that the trial court should have allowed the jury to find that the “risk posed by the pool outweighed its utility” even if “there are no alternative methods” of making the pool safer.⁵²

A second possibility raised by footnote 10 in *Barker* is that strict liability should attach to very dangerous products, *whether or not* they fail the risk-benefit test. Simply put, the argument would be, not that *all* accident costs should be internalized into *all* products that cause them, but rather that accident costs should be internalized into *highly dangerous products*. This approach might avoid the dilemma raised by the earlier example of someone falling off a ladder while cleaning the gutters.⁵³

Because this latter approach would essentially discard the “defect” requirement, it would, in turn, raise a new difficulty. Precisely what would make a product sufficiently dangerous to trigger this form of strict liability? One possibility is to seek help from the law of “abnormally

47. *Jiminez v. Sears, Roebuck & Co.*, 482 P.2d 681 (Cal. 1971).

48. Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

49. *Jiminez*, 482 P.2d at 684; Traynor, *supra* note 48, at 368.

50. *O’Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983).

51. *Id.* at 302.

52. *Id.* at 306. The New Jersey court, in a different context, had already embraced true strict liability beyond the manufacturing defect setting in its 1982 decision in *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539, 549 (N.J. 1982).

53. *See supra* Part II.A.

dangerous activities,” covered by sections 519 and 520 of the Restatement (Second) of Torts, since that is the area of tort law in which strict liability is imposed on uncommon activities that are highly dangerous.⁵⁴

Alternatively, courts might simply have to be content with a traditional common law evolution of a doctrine of strict liability for highly dangerous products on a case-by-case basis. Indeed, perhaps such a doctrine would prove to be unstable at the margins (as a similar rule about “things imminently dangerous to life” proved difficult to apply in a coherent manner in the early law governing manufacturer liability for negligently made products before it was swept away in Judge Cardozo’s famous *MacPherson v. Buick Motor Co.* decision in 1916).⁵⁵ For tobacco companies, however, concerns about the details and borders of a potential rule of strict liability for highly dangerous products were beside the point. If any product was going to attract strict liability because its “norm is danger,”⁵⁶ it would be hard to imagine a more promising candidate than cigarettes.

In short, under either of these possible extensions of product liability law, comment i to section 402A would be rejected.

As it turns out, in the more than two decades since *Burker*, the California Supreme Court has not followed up on Justice Tobriner’s intimations in footnote 10. In the same vein, the new Restatement (Third) of Torts asserts (albeit over the vigorous dissent of some members⁵⁷) that warning and design defect cases really are negligence cases—the product is only defective if, at the time it was put into the market, it could have been more safely designed or could have carried a more adequate warning.⁵⁸ To be sure, in some of the California

54. RESTATEMENT (SECOND) OF TORTS §§ 519–20 (1977).

55. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051–52 (N.Y. 1916) (citing *Thomas v. Winchester*, 6 N.Y. 397 (1852), and discussing the problematic earlier rule developed in sources cited).

56. See sources cited *supra* note 49 and accompanying text.

57. See, e.g., Rebecca Korzec, *Dashing Consumer Hopes: Strict Products Liability and the Demise of the Consumer Expectations Test*, 20 B.C. INT’L & COMP. L. REV. 227 (1997); Howard A. Latin, *The Preliminary Draft of a Proposed Restatement (Third) of Torts: Products Liability—Letter 15* J. PROD. & TOXICS LIABILITY 169 (1993) (addressing the American Law Institute); John F. Vargo, *The Emperor’s New Clothes: The American Law Institute Adorns a “New Cloth” for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996); see also James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867 (1998).

58. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1–2 (1977).

Supreme Court's more recent opinions⁵⁹ it has continued to insist that, in contrast to the Restatement (Third), strict product liability in California remains truly "strict" and is not really negligence law. Nonetheless, the actual outcomes of those more recent cases make clear that the sweeping strict liability suggested by footnote 10 in *Barker* has not been adopted.⁶⁰

However, in 1987, when the statute at issue here was enacted, the picture was much less clear. For example, in 1985 the California Supreme Court imposed strict liability on landlords (for defective products provided in the apartments they leased).⁶¹

III. THE 1987 STATUTE

If one looks at the situation as of 1987, as it has been characterized here, then one can make sense of what the California Legislature seems to have been trying to do with section 1714.45. Simply put, the Legislature was trying to enact Prosser's comment i to section 402A as the law of California. That is what subsection (a) of the statute is all about. Indeed, note that subsection (a)(2) specifically mentions comment i, and it lists the very products that Prosser named.⁶² If one understands subsection (a) as so intended, one can then make sense of subsections (b) and (c) as well.

Subsection (b) makes clear that the statute does not preclude manufacturing defect or express warranty claims,⁶³ which, of course, comment i also never intended to prevent. Comment i, as explained at length above,⁶⁴ meant to preclude plaintiffs from succeeding with what we now know as design or warning defect claims where there was no safer alternative and the danger was well understood. That is, comment i meant to preclude a more extravagant expansion of strict liability to well-understood consumer products whose "norm was danger." Clearly, both defectively manufactured products, and products that manufacturers promised to be safe but were not, were well outside comment i, and subsection (b) of the statute simply confirms that.

The purpose of subsection (c) now also becomes clear. It plainly

59. See, e.g., *Carlin v. Superior Court*, 920 P.2d 1347, 1354-55 & n.7 (Cal. 1996); *Soule v. General Motors Corp.*, 882 P.2d 298, 304 (Cal. 1994); *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 557 (Cal. 1991).

60. See Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 478-82 (1999).

61. *Becker v. IRM Corp.*, 698 P.2d 116, 122 (Cal. 1985), *overruled by Peterson v. Superior Court*, 899 P.2d 905, 920 (Cal. 1995).

62. See Willie L. Brown Jr.-Bill Lockyer Civil Liability Reform Act of 1987, ch. 1498, § 3, 1987 Cal. Stat. 5777, 5778-79 (current version at CAL. CIV. CODE § 1714.45 (Deering Supp. 2000)).

63. See *id.*

64. See *supra* Part II.A.

states that the statute is *not* intended to roll back plaintiffs' rights and thereby cut back on any existing liability that defendants had in 1987.⁶⁵ Rather, to repeat, the point of subsection (c) is to reemphasize that subsection (a) is intended to preclude the California Supreme Court from *expanding* plaintiff rights by rejecting comment i in one or both of the ways suggested in *Barker's* footnote 10, in New Jersey's *O'Brien* case, and in the scholarly literature. Regardless of how one feels about it as a policy matter, this was a legitimate action for the California Legislature to take.

Under the above interpretation, section 1714.45, as enacted in 1987, adopts the position that, for common personal consumption products that are known to be dangerous, the decision whether their risks exceed their benefits should be made in the market by individual consumers. Put differently, jurors in an individual case should not decide that question for all Californians (or paternalistically for the plaintiff in that case).

This position has considerable appeal, and it implicitly underlies Prosser's thinking. Moreover, this notion of letting the market rather than juries decide such matters has, in practice, swept the field in the years since *O'Brien*. No other state took up New Jersey's lead, and the New Jersey Legislature has essentially repealed the *O'Brien* principle.⁶⁶ Furthermore, this limited reach of products liability law is now essentially the position of the Restatement (Third)—albeit with a carefully worded and tiny escape valve that could permit a jury to impose strict liability on a ridiculously dangerous product with a “manifestly unreasonable design,”⁶⁷ perhaps such as sharp, metal-tipped, children's lawn darts. And while some tobacco control advocates would assert that cigarettes are no better, yea, even worse, than those lawn darts, no court has yet taken tort law down that road in tobacco litigation.⁶⁸ In short, rationales for expanding strict products liability that underlie the possibilities suggested by *Barker's* footnote 10 (however attractive) have failed to carry the day. Yet, this subsequent evolution of the law was by no means certain in 1987.

65. See ch. 1498, § 3, 1987 Cal. Stat. at 5778–79.

66. N.J. STAT ANN. § 2A:58C-3 (West 2000).

67. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. e (1977).

68. Thomas C. Galligan, Jr., *A Primer on Cigarette Litigation Under the Restatement (Third) of Torts: Products Liability*, 27 SW. U. L. REV. 487, 506–08 (1998) (exploring the new Restatement (Third) section 2, comments d and e, and the removal of tobacco products from the list Prosser had developed for comment i to the old section 402A).

IV. LITIGATION UNDER SECTION 1714.45

Unfortunately, the understanding of section 1714.45 presented above was not embraced in 1989 by the court of appeal in *American Tobacco Co. v. Superior Court*,⁶⁹ and that decision led to the court of appeal's decision in *Naegele v. R.J. Reynolds Tobacco Co.*⁷⁰ The California Supreme Court, however, is now presented with the opportunity to adopt the interpretation of section 1714.45 proposed here.

A. *American Tobacco*

Soon after the 1987 statute was passed, California courts were called upon to interpret it. *American Tobacco* involved eleven separate lawsuits for personal injury and wrongful death filed by plaintiffs' lawyers against several tobacco companies.⁷¹ The plaintiffs' lawyers adopted a strategy as to how to interpret section 1714.45 that convinced the trial court judge, but which, on appeal, turned out to be too clever.

Notice that the full text of subsection (a) of section 1714.45 provided:

- (a) In a product liability action, a manufacturer or seller shall not be liable if:
 - (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; *and*
 - (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter, as identified in comment i to section 402A of the Restatement (Second) of Torts.⁷²

The plaintiffs in *American Tobacco* argued that, in order to claim the benefit of subsection (a), the defendants had to show that they met *both* subsection (1) *and* subsection (2) – which is certainly a plausible, if technical, reading of the language given the “and” between subsections (1) and (2). The plaintiffs then argued that in order for defendants to satisfy subsection (1) they had to admit that their product is “inherently unsafe,” and the plaintiffs' lawyers rightly counted on the tobacco companies to refuse to do that.

At that time, in litigation around the nation, the tobacco companies were still arguing that there was no proof that cigarettes caused any injuries, and hence it could be seen as completely inconsistent with their public posture, and perhaps even disastrous in future litigation, if the

69. 255 Cal. Rptr. 280 (Ct. App. 1989).

70. 96 Cal. Rptr. 2d 666 (Ct. App. 2000) *review granted*, 11 P.3d 953 (Cal. 2000).

71. 255 Cal. Rptr. at 281.

72. Willie L. Brown Jr.-Bill Lockyer Civil Liability Reform Act of 1987, ch. 1498, § 3, 1987 Cal. Stat. 5777, 5778–79 (current version at CAL. CIV. CODE § 1714.45 (Deering Supp. 2000) (emphasis added)).

tobacco companies were to admit, even insist, that their products were indeed “inherently unsafe.”⁷³ Today, tobacco companies appear to concede that there is somewhat of a scientific consensus that cigarette smoking leads to tobacco-related disease, although the companies may hedge as to their own positions on the issue.⁷⁴

The court of appeal in *American Tobacco* rejected the plaintiffs’ interpretation, however. It found the text of subsection (a) baffling and turned to the legislative history of section 1714.45. Because (as recounted elsewhere) this section was one part of a pact reached one night in a well-known Sacramento restaurant, rushed through the legislature without committee hearings, and passed by both houses on the same day,⁷⁵ none of the usual sorts of legislative history were available. Instead, the court of appeal pointed primarily to a memo prepared for the Assembly Republican Caucus and a letter written by the president of the California Trial Lawyers’ Association (CTLA), both of which stated that section 1714.45 was intended to apply to tobacco products.⁷⁶

In effect, the court of appeal read subsection (2) as intended, not to provide an additional requirement, but instead merely to provide a list of examples of some of the products that satisfied the “inherently unsafe” and “known to be unsafe” requirements of subsection (1). On that reading, the defendants would not have to admit that tobacco products are “inherently unsafe,” but rather could simply note that, for the purposes of strict products liability, the legislation so identified them. In other words, to give effect to the legislative intent the court found in the memo and letter described above, it effectively read the “and” between subsections (1) and (2) out of the statute.⁷⁷

One can sympathize with the court of appeal’s puzzlement over the words of the statute. What was the point of having a separate subsection (2) that seemed on its face to provide an additional requirement, when

73. Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 110, 113–15 (Robert L. Rabin & Stephen D. Sugarman eds., 1993); Gary T. Schwartz, *Tobacco Liability in the Courts*, in *SMOKING POLICY: LAW, POLITICS AND CULTURE*, *supra*, at 131, 132.

74. See, e.g., Chris Proctor, British American Tobacco, *Smoking and Health*, at <http://www.bat.com> (last visited Nov. 15, 2001); Philip Morris USA, *Health Issues for Smokers*, at <http://www.philipmorrisusa.com> (last visited Nov. 15, 2001).

75. *Glastris*, *supra* note 2, at 19.

76. *American Tobacco Co.*, 255 Cal. Rptr. at 283.

77. A more aggressive reading of the court of appeal decision is that the court converted “and” into “or.”

subsection (2) and its reference to comment i to section 402A of the Restatement (Second) seemed essentially to repeat, with specified examples, exactly what subsection (1) was stating more generally? To be sure, subsection (2) includes the phrase “intended for personal consumption.”⁷⁸ Yet, that phrase too seems not to create an important limit on subsection (1). Rather, it merely rephrases the language “ordinary consumer who consumes” in subsection (1). Subsection (2) does contain the additional narrowing phrase “*common* consumer product”⁷⁹; but again, that is just a further explication of what the legislature was talking about when it spoke of products that consumers knew to be dangerous.

The best way to understand those hastily drafted subsections (a)(1) and (a)(2), as argued in Part III of this Article, is to see them as a package designed to embrace Prosser’s ideas as to where to draw the line on strict liability, as expressed in comment i, and thereby to head off California courts from imposing strict liability on products like cigarettes merely because they are “inherently unsafe” (at least when those dangers were well-known to those who consumed those products). On this score, the *American Tobacco* decision (and the memo and letter to which the opinion referred) was correct: section 1714.45(a) was indeed meant to apply to tobacco products, and to apply without any additional proof or concession by defendants on a case-by-case basis that their products were “inherently unsafe.” However, the court of appeal stumbled when it stated the implications of this interpretation of subsection (a) and its compatibility with subsection (c), which flatly states that section 1714.45 as a whole was not meant to change California law, but only to declare it.

The court of appeal jumped to the conclusion that, by rejecting plaintiffs’ interpretation of the interaction of subsections (a)(1) and (a)(2), it somehow had to find that subsection (a) as a whole gave the tobacco companies “immunity” from liability (discussed more below). The court of appeal stated that giving “immunity” to these defendants *did* change California law—since before the statute was passed, plaintiffs had the right to claim that cigarettes were “defective” products under either prong of the two-part *Barker* test. Having reached that conclusion, the court of appeal found subsection (c)’s statement that the law was not being changed impossible to support. Hence, the court of appeal announced that it was reading subsection (c) as not intending to

78. See Willie L. Brown Jr.-Bill Lockyer Civil Liability Reform Act of 1987, ch. 1498, § 3, 1987 Cal. Stat. 5777, 5778–79 (current version at CAL. CIV. CODE § 1714.45 (Deering Supp. 2000)).

79. See *id.* (emphasis added).

change California law “*except as specifically provided in section 1714.45.*”⁸⁰

With all due respect, the court’s reading is a misinterpretation of subsection 1714.45(c). In effect, the court of appeal read subsection (c) out of the statute altogether. Every statute only changes existing law to the extent that it does, and so it would seem strange in the extreme to read subsection (c) as the court did for this statute, when, on its face, it so clearly says something different. But one can see the dilemma that the court of appeal was in, given its sweeping take on the implications of subsection (a), together with its limited analysis of what California law was before section 1714.45 was adopted.

What the court of appeal seemingly failed to appreciate was that under the *Barker* tests, as then developed, plaintiffs would *lose* their case if they merely claimed that cigarettes were inherently unsafe consumer products that users knew were unsafe. If those were the only claims that subsection (a) barred, then it barred claims that, at the time, were not yet good claims in California. This is precisely the point.

To repeat, the whole purpose of the original section 1714.45 should be seen as preventing the California courts from *changing* the law and embracing a more sweeping rule that reflected the ideas suggested by *Barker’s* footnote 10. This understanding of the legislative intent makes subsection (c) altogether coherent. It also captures the clear gist of subsection (a)—as embracing comment i. It does grant a limited “immunity” to manufacturers and sellers of tobacco products and the like, but only against claims that they should be held liable to consumers merely because their products are “inherently unsafe.”

In terms of the exact language of subsection (a), my interpretation requires only a history-based understanding of the word “if.” Notice again that subsection (a) starts, “In a product liability action, a manufacturer or seller shall not be liable if . . .,” which is then followed by subsections (1) and (2).⁸¹ The “if” should be understood to mean “because” or “based on claims that” or “on the ground that,” but this “if” should *not* mean that “in no event should any such action be allowed.” In other words, no sweeping immunity should arise from this “if.” Rather, immunity should only be granted from efforts to reject comment i. As the CTLA president’s letter stated, “Since the dangers cannot be

80. *American Tobacco Co.*, 255 Cal. Rptr. at 285.

81. *See* ch. 1498, § 3, 1987 Cal. Stat. at 5778–79.

further reduced, minimized or alleviated without removing the product from the market, product liability suits would only require or cause their removal. The policy decision has already been made by society in favor of their availability.”⁸² The phrase “product liability suits” in the CTLA letter surely referred to those seeking to deem cigarettes “defective” on grounds of their inherent dangers alone. Furthermore, as discussed earlier, the letter concedes that it may be wiser for individuals in society through their market behavior to conduct the risk-benefit test, rather than allow a jury to decide that the risks exceed the benefits and thus imply (as with all other defective products) that cigarettes should no longer be sold.

Clearly, the CTLA president was not saying that the adoption of section 1714.45 precluded all product liability suits against tobacco manufacturers. For one thing, as explored above, subsection (b) itself expressly notes that claims for manufacturing defect and express warranty could still be brought.⁸³ Contrary to claims made by the tobacco companies in their brief to the California Supreme Court in *Naegele*,⁸⁴ there is no good reason to treat subsection (b) as *exhaustive*. The California Legislature understandably explicitly reserved victims’ ongoing right to sue on theories that were very familiar and clearly not intended to be preempted. If subsection (a) is read as suggested here it only cuts out one specific theory. All other theories are left for the courts to deal with outside of the statute.

In defining the term “product liability action” as used in subsection (a), subsection (b) uses the phrase “any action for injury or death caused by a product.”⁸⁵ But this definition is no roadblock to the argument advanced here. The phrase simply means that no matter how a plaintiff phrases his or her product liability claim, if it seeks to impose liability where comment i would reject it, that claim is barred.

Suppose that a tobacco company adds a new ingredient to its cigarettes to enhance their flavor, and suppose it turns out that many smokers are highly allergic to this ingredient and suffer serious harm from it. Suppose further that the victims can prove that scientists inside the company knew of the dangerous nature of the additive and told managers of the risks, but, because of pressures from the marketing department, the additive was used anyway. It would be astounding if the California Supreme Court were to conclude that section 1714.45

82. *American Tobacco Co.*, 255 Cal. Rptr. at 283.

83. See ch. 1498, § 3, 1987 Cal. Stat. at 5778–79.

84. Respondents’ Answer Brief at 45–49, *Naegele v. R.J. Reynolds Tobacco Co.*, 96 Cal. Rptr. 2d 666 (Ct. App. 2000) (No. S090420), 2001 WL 664446, *review granted*, 11 P.3d 953 (Cal. 2000).

85. See ch. 1498, § 3, 1987 Cal. Stat. at 5778–79 (emphasis added).

precluded lawsuits against that tobacco company for injuries arising from the additive. However, notice that these lawsuits could readily be cast as claiming a design defect (there is a safer design without that additive) or a warning defect (the company should have warned of the dangers of the additive). Those lawsuits would not raise manufacturing defect or express warranty claims as covered by subsection (b). But if the court of appeal's language in *American Tobacco* is to be taken literally, then, under subsection (a), the defendants would be immune from such claims concerning the additive. Surely, such a result cannot be right.

Part of the problem stems from the way the court of appeal in *American Tobacco* cast the case at the outset. It says simply that the plaintiffs allege that the victims "became ill, and in some cases died, allegedly as a result of being exposed to tobacco."⁸⁶ This statement gives no feel whatsoever for the precise nature of their theory of the case. It is as though the plaintiffs were claiming liability solely on the basis of causation, which they certainly were not. But the court of appeal seemed to see no need to go any further into the matter. This apparently occurred because the case seems to have been understood as one in which the plaintiffs were conceding that their claims should be thrown out *unless* their reading of the statute was accepted (that is, that the defendants had to admit their products were "inherently unsafe").

*B. Richards v. Owens-Illinois, Inc.*⁸⁷

The interpretation of section 1714.45 set forth in this Article is by no means precluded by the California Supreme Court's 1997 decision in *Richards*. *Richards* concerned the application of Proposition 51, adopted by California voters in 1986, which provides that in cases with multiple tortfeasors, each defendant is liable only for its share of the victim's noneconomic damages (pain and suffering) in proportion to its share of overall responsibility or fault.⁸⁸ In *Richards*, defendant asbestos manufacturers and employers sought to avoid full responsibility for the noneconomic losses associated with a smoker plaintiff's asbestos-related lung injury by arguing that some of those damages were properly the responsibility

86. *American Tobacco Co.*, 255 Cal. Rptr. at 281.

87. 928 P.2d 1181 (Cal. 1997).

88. CAL. CIV. CODE §§ 1431-1431.5 (West 1982 & Supp. 2001) (codifying initiative measure Proposition 51 as adopted on June 3, 1986).

of the tobacco companies (who were not named as defendants in the plaintiff's case).⁸⁹

The California Supreme Court treated the issue before it very narrowly. The asbestos defendants argued that, even if the tobacco companies were free from *direct* liability to the plaintiffs under section 1714.45, nonetheless, the asbestos defendants should not have to shoulder all of the plaintiff's noneconomic losses (seemingly on the ground that, absent section 1714.45, the tobacco makers would be liable to the plaintiffs, a highly uncertain assumption in any event).⁹⁰ However, the California Supreme Court responded to this argument by stating that "to the extent section 1714.45 affords tobacco suppliers immunity,"⁹¹ the asbestos makers may not point to those suppliers as a way of trying to escape from their own full liability to the plaintiff. The California Supreme Court then made clear in footnote 8 of the *Richards* opinion, "[I]t is not necessary to determine the exact substantive scope of the immunity described by section 1714.45."⁹² Indeed, in that footnote the Court then goes out of its way to say, "[W]e need not and do not take any position on the exact parameters of the immunity provided by section 1714.45, or on the correctness of the *American Tobacco* decision in this regard."⁹³

V. APPLYING THE SENSIBLE INTERPRETATION OF SECTION 1714.45 TO THE *NAEGELE* CASE

Assuming the California Supreme Court were to interpret section 1714.45 as suggested in this Article, how should the complaint in *Naegele* be handled? Clearly, any cause of action seeking strict liability on the theory of *Barker's* footnote 10 (that is, the inherent dangers of cigarettes) should be barred—at least to the extent that the original section 1714.45 applies to the case.⁹⁴ But what of other theories plaintiffs in tobacco cases might be alleging?

Suppose first that a plaintiff were to claim either that the warnings given by the defendants as to the dangers of smoking are legally insufficient, or that cigarettes can in fact be made much safer and the defendants have failed to do so. In other words, suppose a plaintiff

89. 928 P.2d at 1184.

90. *Id.* at 1189–90.

91. *Id.* at 1191 (emphasis added).

92. *Id.* at 1193 n.8.

93. *Id.*

94. This assumes, among other things, that the California Supreme Court finds that the amended statute is not "retroactive" and that plaintiffs' claims arose during the time original section 1714.45 was applicable—two issues on which the author expresses no opinion here.

makes legal claims based upon factual assertions that are directly contrary to Prosser's understanding of the facts when he drafted comment i. Prosser, as explained above, assumed cigarettes were inherently unsafe and that people well understood their dangers (even back in 1964 when the Surgeon General's first report was released).⁹⁵ Yet, in 2001, it is at least possible to imagine plaintiffs mounting factual cases that are contrary to Prosser's understanding. For example, suppose a plaintiff offers to show that a filter, different from the filter that most tobacco companies now use, really does prevent cancer in smokers. Or suppose a plaintiff concedes that people have long known that smoking is dangerous, but argues that young people did not realize how addictive smoking is, at least during, say, the 1970s and 1980s when they began to smoke as teenagers and before the Surgeon General's later report on "nicotine addiction."⁹⁶

Prosser would have said that if such facts were proven then the predicate for including tobacco products in the list of products he created for comment i would be undermined. No longer would the product be inherently unsafe (on the "safer filter" theory) or its dangers well understood in the community (on the "we did not realize it was addictive" theory). On such facts, tobacco products no longer illustrate the principle underlying comment i and should be removed from its list.

It is admittedly a somewhat more difficult question as to how section 1714.45 should be interpreted in the face of factual allegations of the sort just imagined. The language of the statute reflects the legislature's factual understanding at that time that cigarettes were inherently unsafe and their dangers well known. The question might be thought of as whether the statute creates a conclusive presumption as to the facts, regardless of what the plaintiff claims the *real* facts to be. But the better way to treat the matter is simply to interpret section 1714.45 in the narrow way already suggested—that it only rules out more sweeping strict liability claims based upon "inherent danger." On that approach, design and warning defect claims based upon the new factual allegations imagined here (a "safer filter" or there was a "warning failure as to addiction") would not be barred by section 1714.45 (putting aside, of course, whether or not a plaintiff could actually prove such facts).

To reemphasize the point, when section 1714.45 was adopted in 1987,

95. See *supra* Part II.A.

96. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION—A REPORT OF THE SURGEON GENERAL (1988).

it was generally understood in the legal community that the basic warning defect and design defect claims that were *then* being brought were also losers—not because of some particular doctrinal reason, but rather because of factual problems. That is, like Prosser, judges and juries in California and elsewhere were just not being convinced that cigarettes could either be made safer or that people were not fairly aware of their dangers. Indeed, it was because of this very failure of plaintiffs to win product liability claims against tobacco companies using either of the *Barker* prongs, that made seeking footnote 10-based liability for cigarettes alluring. Moreover, in this same light, it is easy to see why, once the footnote 10-based theory of liability was cut off by subsection (a) of section 1714.45, most observers at the time believed that cigarette tort litigation was pretty much over.⁹⁷ Indeed, one might be forgiven for casually using the word “immunity” in this context. Put differently, if plaintiffs at that time could not win on existing doctrine, and if they were prevented from asserting footnote 10’s wider theory of liability, then the campaign might well have seemed lost.

But it turns out that the way things stood in 1987 is not the way they stand today. Moreover, perhaps the most promising way for individual plaintiffs to proceed in 2001 is neither on the ground that cigarettes can be made safer (since it remains doubtful that such a claim can actually be sustained) nor on the ground that the tobacco companies failed to warn as to addiction (for reasons described below), but on the ground that the tobacco companies engaged in intentional wrongdoing, reckless misconduct, or fraud. Ironically, this latter line of attack was clearly opened up as a result of a tobacco industry victory in the United States Supreme Court in 1992.⁹⁸

In *Cipollone*, the United States Supreme Court held that 1969 Congressional amendments to the 1965 Federal Cigarette Labeling and Advertising Act⁹⁹ preempted state tort claims based on failure to warn (at least claims brought with respect to warnings made, or not made, after 1969).¹⁰⁰ Of course, even before *Cipollone*, for reasons already explained, plaintiffs were having great difficulty with product liability cases based on failure to warn.¹⁰¹ As a legal matter, not only would they have to convince jurors that the common warnings seen on billboard and magazine ads and on the packages themselves were too mild, but also

97. See *supra* note 2 and accompanying text.

98. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

99. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331–41 (1994)) (amending the Federal Cigarette Labeling and Advertising Act, Pub L. No. 89-92, 79 Stat. 282 (1965)).

100. *Cipollone*, 505 U.S. at 524.

101. See Schwartz, *supra* note 73, at 149–53.

that a stronger warning would have actually made a difference in the victim's smoking behavior—a daunting task. But *Cipollone* took away the right even to try to make that case (at least as to post-1969 warnings).¹⁰² Note that this decision not only preempted warning-related complaints about the dangers of smoking (like lung cancer, heart disease, and so on) but also warning-related complaints about addiction (again, at least for post-1969 warnings).¹⁰³ The essence of the United States Supreme Court's opinion was that Congress had determined both what appropriate cigarette warnings were and that there should be a uniform national system of warnings which would be undercut if state tort law could, in effect, insist that tobacco companies provide different warnings.

Nevertheless, the *Cipollone* Court went out of its way to make clear that not all possible tort claims against the tobacco companies are preempted by federal law. Justice Stevens' plurality opinion specifically stated that tort claims resting on theories of express warranty, fraudulent misrepresentation, intentional concealing of facts, conspiracy, and the like are not preempted.¹⁰⁴ As a result of that decision, plaintiffs in tobacco cases around the nation have increasingly taken to alleging fraud, conspiracy, and other types of intentional or reckless wrongdoing—claims that have become somewhat more plausible to prove in the years since 1990 as secret tobacco company documents have come to light.¹⁰⁵ Indeed, these are among the very claims that plaintiffs have alleged in *Naegele*.¹⁰⁶

In conclusion, the California Supreme Court should construe section 1714.45 narrowly in the way argued above, and then send the *Naegele*

102. 505 U.S. at 524.

103. *Id.* at 530–31.

104. *Id.* at 526–31.

105. See generally STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996); PHILIP J. HILTS, *SMOKE SCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP* (1996); DAVID KESSLER, *A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY* (2001); RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* (1996); MIKE A. MALES, *SMOKED: WHY JOE CAMEL IS STILL SMILING* (1999); CARRICK MOLLENKAMP ET AL., *THE PEOPLE VS. BIG TOBACCO: HOW THE STATES TOOK ON THE CIGARETTE GIANTS* (1998); MICHAEL OREY, *ASSUMING THE RISK: THE MAVERICKS, THE LAWYERS, AND THE WHISTLE-BLOWERS WHO BEAT BIG TOBACCO* (1999); TARA PARKER-POPE, *CIGARETTES: ANATOMY OF AN INDUSTRY FROM SEED TO SMOKE* (2001).

106. *Naegele v. R.J. Reynolds Tobacco Co.*, 96 Cal. Rptr. 2d 666, 669 (Ct. App. 2000), *review granted*, 11 P.3d 953 (Cal. 2000).

case back to the trial court to sort out the various claims that were alleged. Some of those claims, including claims of fraud and related wrongdoing, should be allowed to go ahead—provided, of course, that the plaintiffs' evidence concerning such claims is strong enough to get them past motions for summary judgment or directed verdict using normal standards.

Whether plaintiffs, in the end, would win any of these claims is not a matter that concerns this Article. But the approach recommended here would provide a coherent, textually sensible, and historically rooted interpretation of section 1714.45 as it was enacted in 1987.