

# Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court

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Editor's Note: The Foreword to this issue of the *California Law Review*, which reviews the activity of the California Supreme Court during the past year, has been written by two Boalt Hall students who participated in the school's extern program as members of the staff of individual justices for one semester. After a brief explanation of the internal administration of the court and the means it employs to adjust its calendar, the body of the Foreword examines several cases currently pending before the court and attempts to indicate how the decisions in these cases may demonstrate the current court's view of its role in adjusting the equities between parties of disparate bargaining power. The cases are examined with particular reference to a view of the court's role propounded by Justice Matthew Tobriner in two recent law review articles.<sup>1</sup>

## I

### INTERNAL MANAGEMENT OF THE COURT

#### *A. Regulation of the Calendar and Prerequisites for Review*

With certain exceptions, the California Supreme Court has almost complete power to regulate its calendar.<sup>2</sup> It even has jurisdiction to

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\* Both authors are third year Boalt Hall students who have spent one semester as externs with the California Supreme Court, Goodman on Chief Justice Wright's staff and Seaton on Justice Tobriner's.

1. Tobriner, *Retrospect: Ten Years on The California Supreme Court*, 20 U.C.L.A. L. REV. 5 (1972) [hereinafter cited as *Tobriner Retrospect*]; Tobriner & Grodin, *The Individual and The Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247 (1967) [hereinafter cited as *Tobriner & Grodin*].

2. The California Constitution authorizes an automatic appeal to and hearing in the supreme court in cases where the death penalty is imposed. CAL. CONST. art. 6,

transfer appeals for its consideration on its own motion either before or after judgment in the court of appeal.<sup>3</sup> With the exception of automatic appeals and those heard on its own motion, however, almost all of the supreme court's appellate jurisdiction is invoked by a petition for hearing after a decision in the court of appeal. While the supreme court shares with the lower courts the power to issue extraordinary writs, ordinarily its writ jurisdiction is also invoked by a petition for hearing after a decision in the court of appeal.<sup>4</sup>

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§ 11 (West Supp. 1974). State bar disciplinary matters and judicial disciplinary matters are also subject to mandatory review in the supreme court. See CAL. R. OF COURT 920(c), 952. Under Rule 952, a petition for a writ of review of an action by the California State Bar Board of Governors or any of its authorized boards or committees involving disbarment, suspension, and other state bar disciplinary matters is entertained directly by the supreme court. In fiscal year 1971-72, 59 disciplinary proceedings were filed in the supreme court. See 1973 JUDICIAL COUNCIL REPORT 173. Rule 920(c) authorizes supreme court review of the recommendations of the Commission on Judicial Qualifications for censure, removal, or retirement of a judge. For censure or removal to be effected, the supreme court must enter an order of discipline. See, e.g., Geiler v. Comm'n on Judicial Qualifications, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973); Willens v. Comm'n on Judicial Qualifications, 10 Cal. 3d 451, 516 P.2d 1, 110 Cal. Rptr. 713 (1973).

3. CAL. CONST. art. 6, § 12 (West Supp. 1974). The supreme court can employ this transfer power even if the parties have not sought supreme court review, although cases are usually brought to the supreme court's attention through letters to the court from the parties, the court of appeal justices, or interested third parties who are not directly involved in the litigation. This post-court-of-appeal-judgment sua sponte transfer power has been invoked where the court of appeal misinterpreted the retroactive effect of a United States Supreme Court or California Supreme Court decision. See, e.g., *People v. Rivers*, 66 Cal. 2d 1000, 429 P.2d 171, 59 Cal. Rptr. 851 (1967); *People v. Grant*, 252 Cal. App. 2d 101, 60 Cal. Rptr. 154 (1967). The court has also transferred cases sua sponte when it anticipated that other cases pending before the court involved the same issues. See, e.g., *People v. Williams*, 67 Cal. 2d 226, 430 P.2d 30, 60 Cal. Rptr. 472 (1967) (transferred to the supreme court to be disposed of in conjunction with *People v. Merriam*, 66 Cal. 2d 390, 426 P.2d 161, 58 Cal. Rptr. 1 (1967)); *People v. Coffey*, 67 Cal. 2d 204, 430 P.2d 15, 60 Cal. Rptr. 457 (1967). See generally Comment, *California Supreme Court Review: Hearing Cases on the Court's Own Motion*, 41 SO. CAL. L. REV. 749 (1968).

Before decision, the supreme court may also transfer a case in which a petition for hearing has been granted from itself to a court of appeal. CAL. CONST. art. 6, § 12 (West Supp. 1974). The supreme court may also transfer cases from one court of appeal district or division to another. *Id.* This power to grant and retransfer allows the supreme court to remand cases to the court of appeal, often with instructions to reconsider the matter in light of a recent and relevant change in the law. When the case involves a petition for an extraordinary writ and the court of appeal has denied the writ without opinion, the supreme court may exercise its transfer power when it deems it proper by granting a hearing and retransferring the case to the court of appeal with directions to issue an alternative writ to hear the case. In rare cases, because of the importance of the issue and the critical time factor involved, the supreme court has transferred a case to itself and bypassed the court of appeal entirely. See *People ex rel. San Francisco Bay Conservation and Dev. Comm'n v. Town of Emeryville*, 69 Cal. 2d 533, 466 P.2d 790, 72 Cal. Rptr. 790 (1968) (Town enjoined from further diking and filling activities in San Francisco Bay until it obtained Commission permit).

4. See CAL. CONST. art. 6, § 10 (West Supp. 1974) (supreme court jurisdiction to consider petitions for writs of mandate, prohibition, habeas corpus, review, and cer-

The California Rules of Court govern the procedure that must be followed in filing a petition for hearing in the supreme court. Rule 29 articulates the grounds for a hearing in the supreme court which includes, among others, “. . . where it appears necessary to secure uniformity of decision or the settlement of important questions of law.”<sup>5</sup> This is at once the most important and most ambiguous ground. Because it is extremely difficult to predict what four justices will consider “important questions of law,” practitioners can rely more securely on the “uniformity of decision” clause which is useful in cases involving clearly conflicting positions between two or more courts of appeal on a recurring and reasonably significant question of law that has not yet been decided by the supreme court. Such a conflict can

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tiorari). Only the supreme court has writ jurisdiction to review orders of the Public Utilities Commission. It has discretion, however, either to deny review of PUC orders or to issue a writ of review and afford a full hearing followed by written opinion. See CAL. R. OF COURT 58. In urgent matters where the time element or other factors require relief, the supreme court either denies the relief initially or hears the case itself. This has often been done in election and reapportionment matters. See, e.g., *Legislature v. Reinecke*, 6 Cal. 3d 595, 492 P.2d 385, 99 Cal. Rptr. 481 (1972), *modified*, 7 Cal. 3d 92, 496 P.2d 464, 101 Cal. Rptr. 552 (1972) (legislative and congressional reapportionment); *Mexican American Political Ass'n v. Brown*, 8 Cal. 3d 733, 505 P.2d 204, 106 Cal. Rptr. 12 (1973) (incumbent position on the ballot). In *Legislature v. Reinecke*, the court retained jurisdiction after the mandate actions were initially disposed of and the court ultimately appointed a panel of three special masters to consider and adopt reapportionment criteria and plans. *Legislature v. Reinecke*, 9 Cal. 3d 166, 507 P.2d 626, 107 Cal. Rptr. 18 (1973). The masters subsequently chose a staff, held public hearings, adopted criteria, and after considering and rejecting all of the proposed reapportionment plans submitted to them, prepared their own reapportionment plans. Their criteria and plans were submitted to the supreme court for consideration and possible adoption. The court entertained oral argument at which parties, intervenors, interested individuals, and others were permitted to speak for or against the masters plans, or for any other plans or modifications. In *Legislature v. Reinecke*, 10 Cal. 3d 396, 516 P.2d 6, 110 Cal. Rptr. 718 (1973), the supreme court adopted the masters plans with only two minor changes in the numbering of state senatorial districts.

Habeas corpus applications are treated according to more or less specialized rules because a denial of habeas relief in the trial court is not appealable and because so many of the applications are by prisoners in propria persona. There is appellate review of a final order of a superior court in a habeas corpus proceeding granting all or part of the relief sought. CAL. PENAL CODE §§ 1506, 1507 (West 1970). Detailed discussion of the complexities of habeas corpus procedure is beyond the scope of this article. The following table does, however, indicate the magnitude of habeas corpus in the California Supreme Court:

California Supreme Court Filings in Original Criminal Proceedings,

Fiscal year	Including Habeas Corpus		Filings
	Filings	Fiscal year	
1961-62	204	1966-67	1036
1962-63	239	1967-68	1057
1963-64	530	1968-69	1349
1964-65	1056	1969-70	1235
1965-66	983	1970-71	835
		1971-72	632

Source: 1973 JUDICIAL COUNCIL REPORT 173.

5. CAL. R. OF COURT 29(a).

also arise where the courts of appeal are interpreting a supreme court decision in varying and inconsistent ways.

Rule 29(b) states that the court "will not examine the record for error unless the petition shows that substantial issues of law or fact were incorrectly stated or were not considered in the opinion of the Court of Appeal and that such issues were raised in the briefs and set forth in a petition for rehearing in the Court of Appeal."<sup>6</sup> This has been a stumbling block for many petitioners who attempt to raise for the first time in a petition for hearing issues that should have been raised in the briefs and petition for rehearing before the court of appeal. The supreme court normally will refuse to grant a hearing on issues that were not properly presented in the court of appeal. But Rule 29(b) covers only an attack on the court of appeal's fact interpretation or its failure to consider a factual issue in a case. Statements of law articulated by the court of appeal need not be challenged by a rehearing petition, and the failure to file such a petition will not affect the supreme court's treatment of a petition for hearing challenging the court of appeal opinion on its face.

### B. *The Decisionmaking Process*

As the workload of the supreme court has increased,<sup>7</sup> the court's process of granting petitions and deciding cases necessarily has become more institutionalized, and the size of the justices' staffs has grown accordingly. Each of the six associate justices now has a staff of three research attorneys (law clerks), including one or two recent law school graduates who spend a year with the court. The staff of the chief justice includes twelve research attorneys under the supervision of a senior research attorney.<sup>8</sup> Since the justices may be required to consider as many as 75 petitions for hearing and as many as 25 petitions for habeas corpus at a weekly conference, it is necessary for their staff mem-

6. CAL. R. OF COURT 29(b).

7. California Supreme Court  
Petitions for Hearing in Supreme Court—Number  
Filed, Granted and Percent Granted  
Fiscal Years 1961-62 Through 1971-72

	1961- 62	1962- 63	1963- 64	1964- 65	1965- 66	1966- 67	1967- 68	1968- 69	1969- 70	1970- 71	1971- 72
Filed	803	907	945	1,111	1,205	1,379	1,769	1,874	2,064	2,198	2,417
Granted	122	121	103	148	127	157	168	158	191	204	230
Percent granted	15.2	13.3	10.9	13.3	10.5	11.4	9.5	8.4	9.3	9.3	9.5

Source: 1973 JUDICIAL COUNCIL REPORT 173.

8. The supreme court staff also includes a number of second- and third-year law student externs from California law schools who spend a semester with the court and receive course credits for their work. The two authors of this Foreword participated in the extern program.

bers to review these petitions and write conference memoranda on them prior to the conference. The responsibility for preparation of conference memos in all criminal matters, including pretrial writs in criminal cases and habeas corpus writs, presently rests with the staff of the chief justice. The responsibility for preparation of conference memos in other civil matters is distributed among the remaining six justices.

The objective of the conference memorandum is to give the justices a full understanding of the case and to recommend a disposition of the matter. Each one explores the facts of the case and the opinion, if any, of the court of appeal. It considers the legal issues presented and assesses the contentions advanced by the petitioner in support of the request for a hearing. In appraising the petition, the author of the memorandum often refers to the briefs filed in the court of appeal or in the supreme court, as well as to the court of appeal opinion. Despite the heavy caseload, each conference memorandum is approved by the assigned justice or his senior research attorney. The justices have developed personalized procedures for conferring with their research attorneys, not only on their own conference memoranda but also on those prepared by the other six staffs. This ensures that every petition for hearing is given thorough consideration and that meritorious issues overlooked by the writer are reviewed and developed either by the supervising research attorney or by supplemental memoranda prepared by other staff.

An order of the supreme court granting a hearing must be signed by at least four concurring justices.<sup>9</sup> An order of denial also requires four votes but need only be signed by the chief justice. If one or more of the justices is absent or disqualified and there are not four votes to grant or deny a hearing, the hearing is denied by operation of law. To avoid this result, the supreme court always brings in a pro tem justice or justices to ensure that seven justices will participate in the decision.

Since the court's power to grant hearings is discretionary<sup>10</sup> in almost all matters, the denial of a petition for hearing does not have any formal precedential significance.<sup>11</sup> Naturally, a pattern of denials

9. CAL. R. OF COURT 28(e).

10. See CAL. CONST. art. 6, §§ 10, 11 (West Supp. 1974).

11. The effect of the denial of a petition for hearing may not be entirely settled. See Kanner, *It's a Busy Court: The Effect of Denial of Hearing by the Supreme Court on Court of Appeal Decisions*, 47 CAL. S.B.J. 188 (1972); Gustafson, *Some Observations About California Courts of Appeal*, 19 U.C.L.A. L. REV. 167, 170-83 (1971) [hereinafter cited as Gustafson]. The supreme court has stated that the denial of a hearing

is not to be taken as an expression of any opinion by this court, or as the equivalent thereof, in regard to any manner of law involved in the case and not stated in the opinion of that court, nor, indeed, as an affirmative approval

on certain issues or in certain types of cases such as pretrial writs in criminal cases may be of some significance. If a hearing is granted in a case where there was a published court of appeal opinion,<sup>12</sup> that opinion is automatically vacated and stricken from the official reports, pursuant to Rule 976(d).<sup>13</sup> Once the hearing is granted, the court of appeal opinion ceases to exist, and in most instances cannot properly be relied upon as authority either by the parties in that case or by practitioners generally.<sup>14</sup> The supreme court also has the authority, pursuant to its plenary power, to order the "unpublishing" of an opinion certified for publication by the court of appeal. This power to unpublish permits the court to remove from the official reports correct but poorly reasoned court of appeal decisions without granting a hearing and disposing of the case by written opinion.<sup>15</sup> Conversely, the court may order the publishing of an unpublished court of appeal opinion if it has considered the case on the merits on a petition for hearing, agrees with the court of appeal disposition of the case, and finds the opinion to be worthy precedent that should be published in the official reports. This power to order publication, however, is not often exercised.

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by this court of the propositions of law laid down in such opinion. *People v. Davis*, 147 Cal. 346, 350, 81 P. 718, 720 (1905). This rather clear statement may have been somewhat undermined by the supreme court's dictum in *Di Genova v. Bd. of Education*:

Although this court's denial of a hearing is not to be regarded as expressing approval of the propositions of law set forth in an opinion of the District Court of Appeal or as having the same authoritative effect as an earlier decision of this court . . . it does not follow that such denial is without significance as to our views.

57 Cal. 2d 167, 178, 367 P.2d 865, 871, 18 Cal. Rptr. 369, 375 (1962). The courts of appeal, however, have often interpreted the supreme court's denial of a hearing as tantamount to a decision by the supreme court in accordance with the court of appeal's majority opinion. See generally 6 B. WITKIN, CALIFORNIA PROCEDURE 4582-83 (2d ed. 1971). One court of appeal justice has suggested that the supreme court hold the hearing denial to mean that four justices did not vote for a hearing. *Gustafson, supra* at 182.

12. See CAL. CONST. art. 6, § 14 (West Supp. 1974).

13. CAL. R. OF COURT 976(d).

14. The Rules of Court now contain the following provision concerning the citation of unpublished opinions:

An opinion of a Court of Appeal or of an appellate department of a superior court that is not published in the Official Reports\* shall not be cited by a court or by a party in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, *res judicata* or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent.

\*This rule shall not apply to an opinion certified for publication prior to its actual publication.

CAL. R. OF COURT 977.

15. In every case where the supreme court grants a hearing it is required to dispose of the matter by written opinion. CAL. CONST. art. 6, § 14 (West Supp. 1974).

If there was no opinion or an unpublished opinion below, the petitioner's chances for a supreme court hearing are not necessarily affected. While the supreme court is somewhat more concerned that an erroneous disposition by a published court of appeal opinion be corrected, the court frequently grants hearings where there was no opinion or an unpublished opinion. This practice is a good indication of the supreme court's desire to arrive at the correct disposition of individual cases, regardless of the significance accorded the case by the court of appeal.

Once a hearing is granted, the chief justice assigns one of the justices who voted to grant a hearing to prepare a calendar memorandum. The calendar memorandum, which is distributed to all the justices before oral argument, fully briefs the court on the facts and issues involved and sets forth tentative conclusions on the disposition of the case. After oral argument (which may be waived), calendar conferences are held at which the cases are further discussed and tentative positions taken. If the justice who wrote the calendar memorandum still commands a majority, that justice prepares a proposed opinion. If he no longer commands a majority, the case is reassigned to a member of the new majority. The proposed opinion is then written and circulated, changes suggested, and dissenting or concurring opinions written. If the author of the proposed opinion loses a majority while the opinion is circulating, he either revises his position in order to regain a majority or the case is reassigned to a member of the new majority. To render a judgment, the concurrence of four justices present at the oral argument is necessary.<sup>16</sup> If oral argument has been held, an absent justice may, by stipulation of the parties, be one of the four justices necessary to announce the judgment.<sup>17</sup> When four justices finally concur in an opinion, and any dissents and concurring opinions have been prepared and circulated, the opinions are filed. Ordinarily there is an opportunity for the parties to file a petition for rehearing, but the vast majority of petitions for rehearing are denied.

As the detail of the process outlined above reveals, the task of reviewing petitions and deciding cases is sometimes tedious and repetitious, and the thoroughness with which each matter is examined depends upon the ability and dedication of the individuals involved, justices and staff alike. Yet, with the development of a large research attorney staff, the petition review process has become sufficiently institutionalized to assure that relevant questions of law and fact are seldom overlooked. Furthermore, the mix of permanent and tempor-

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16. CAL. CONST. art. 6, § 2 (West Supp. 1974).

17. See *Metropolitan Water Dist. v. Adams*, 19 Cal. 2d 463, 122 P.2d 257 (1942); OP. LEGIS. COUNS., 1966 S.J. 1047.

ary staff members provides for a continuing exchange of ideas and encourages creative judicial action in many areas of California law. Of course, the quality of the court's work varies with and is somewhat dependent upon the demands made by the justices, and the judicial philosophies of the individual justices. Nevertheless, the rigorous demands made by both the justices and their supervising staff members have generated both the quantity and high quality of work that has come to be associated with the process of petition review and opinion-writing by the California Supreme Court.

## II

### AWAITING DECISION: A FURTHER WORD ON THE COURT AS EQUALIZER

Personnel changes on a major court inevitably give rise to speculation about the impact of those changes on the major theories or analytic directions of that court. The death of Justice Peters and the subsequent appointment of Justice Clark have focused such speculative inquiry upon the California Supreme Court. Scholars and practitioners both inside and outside the state undoubtedly will join in, because of the generally recognized quality of the court's work, and its position as a bellwether in developing areas of the law.<sup>18</sup>

Although too little time has elapsed to measure the effects on the court of these developments, if any, the remainder of this Foreword will discuss a group of cases currently before the court which may well be seized by commentators as indications of future direction. Decisions in these cases will help court watchers determine to what extent the present court will continue to develop some theses explicated by Justice Tobriner<sup>19</sup> and frequently espoused in past decisions of the court.

In both his scholarly writings and the decisions he authors, Justice Tobriner has emphasized how the common law continues to be a flexible tool in the hands of judges sensitive to the changing relationships in society. Sympathetic to this view of their role, the California Supreme Court and other responsive tribunals have adjusted the unequal bargaining power between workers and unions,<sup>20</sup> doctors and

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18. In discussing the recent personnel changes on the New York Court of Appeals, Governor Wilson asserted that his state's high court was second only to the United States Supreme Court in stature. *N.Y. Times*, Jan. 18, 1974, at 29, col. 1 (city ed.). This occasioned a reply by the newspaper:

Just as California has surpassed New York in population, so too has its highest court eclipsed the reputation of the New York Court, in the opinion of many legal scholars and lawyers who follow the court's work.

*Id.* at cols. 4-5.

19. Tobriner *Retrospective*, *supra* note 1; Tobriner & Grodin, *supra* note 1.

20. Tobriner & Grodin, *supra* note 1, at 1256-58, *discussing* Directors Guild of



their professional societies,<sup>21</sup> insureds and their carriers,<sup>22</sup> patients and hospitals,<sup>23</sup> depositors and their banks,<sup>24</sup> and consumers and vendors, especially vendors of defective products.<sup>25</sup> In the areas of products' liability,<sup>26</sup> insurance,<sup>27</sup> tavern-keepers' liability,<sup>28</sup> class actions,<sup>29</sup> and procedural due process for the economically downtrodden,<sup>30</sup> the California court's record is unsurpassed. A central theme, frequently articulated by Justice Tobriner, flows through many of the cases: to protect the weak from the strong and to ensure true equality under the law, a judicial decision must restore in court that equality of bargaining power which is missing in out-of-court transactions between the weak and the strong.

As one tool courts may use in this process, Justice Tobriner has urged a rejuvenation of the concept of status, a concept which held sway in medieval times and imposed duties on individuals and organizations according to the roles they played in society. Today, many organizations such as labor unions and professional societies have amassed what amounts to governmental powers; at the same time, certain suppliers of goods and services have become so indispensable to society's orderly functioning that they may be said to be affected

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America, Inc. v. Superior Court, 64 Cal. 2d 42, 409 P.2d 934, 48 Cal. Rptr. 710 (1966); Thorman v. International Alliance of Theatrical Stage Employees, 49 Cal. 2d 629, 320 P.2d 494 (1958); James v. Marimship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944).

21. *Id.* at 1258-60, discussing *Blende v. County Medical Soc'y*, 96 Ariz. 240, 393 P.2d 926 (1964); *Falcone v. County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961).

22. *Id.* at 1273-76, discussing *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966); *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

23. *Id.* at 1270-72, discussing *Tunkl v. Regents of the Univ. of Calif.*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

24. *Id.* at 1270, 1276-78, discussing *Los Angeles Invest. Co. v. Home Sav. Bank*, 180 Cal. 601, 182 P. 293 (1919); *Frankini v. Bank of America Nat'l Trust & Sav. Ass'n*, 12 Cal. App. 2d 298, 55 P.2d 232 (1936).

25. *Id.* at 1278-82, discussing *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

26. Tobriner *Retrospective*, *supra* note 1, at 6-8, discussing *Elmore v. American Motors Corp.*, 70 Cal. 2d 587, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

27. *Id.* at 7-9, discussing *Barrera v. State Farm Mut. Auto. Ins. Co.*, 71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 106 (1969); *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966); *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

28. *Id.* at 10, discussing *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

29. *Id.* at 11, discussing *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P.2d 1375, 94 Cal. Rptr. 796 (1971).

30. *Id.* at 12, discussing *Blair v. Pitchless*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971); *Randone v. Appellate Dept.*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

with the public interest. Courts, argues the Justice, should respond to the enhanced status of these entities by precluding arbitrary exclusion of prospective members, unilateral limitation of liability for negligence, or a shift of business risks to the consumer.

These are cases currently before the California Supreme Court that call for judicial adjustment of similar competitive relationships. In some, plaintiffs call upon the court to break new ground once again, utilizing the general principles set forth in the Tobriner articles; in others, plaintiffs simply assert their right to reap the harvest sown by earlier groundbreaking precedents. An othodontist, for example, continues his struggle to gain admittance to a professional society;<sup>31</sup> a seller of real property under an installment land contract tries to invalidate a bank's enforcement of the due on sale clause contained in its deed of trust;<sup>32</sup> an insured hopes to uphold the \$75,000 compensatory and \$500,000 punitive damages recovery against his insurer who, in line with its past practice, interpreted the policy as not affording coverage;<sup>33</sup> a crane oiler's family sues for wrongful death in a products' liability action claiming error in the trial court's instructions on strict liability and assumption of risk;<sup>34</sup> a woman injured in an automobile accident after her face struck exposed prongs on the steering wheel appeals the lower court's decision holding that her failure to wear a seat belt will be relevant on retrial;<sup>35</sup> a young boy rendered epileptic claims a right to recover against the seller of a golfing gadget which was labeled "completely safe."<sup>36</sup> These bare recitals themselves suggest the decisions that an application of the court's and Justice Tobriner's earlier writings would produce. A detailed examination of the cases follows, attempting to predict their resolution in that framework.

*A. The Professional versus His Society: Pinsker v.  
Pacific Coast Society of Orthodontists*<sup>37</sup>

The Pacific Coast Society of Orthodontists (PCSO) is a profes-

31. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, L.A. 30228, *hearing granted*, Cal. Sup. Ct., Dec. 5, 1973.

32. *Tucker v. Lassen Sav. & Loan Ass'n*, Sac. 8001, *hearing granted*, Cal. Sup. Ct., Nov. 28, 1973.

33. *Silberg v. California Life Ins. Co.*, L.A. 30144, *hearing granted*, Cal. Sup. Ct., May 9, 1973.

34. *Henderson v. Harnischfeger Corp.*, Sac. 8000, *hearing granted*, Cal. Sup. Ct., Nov. 15, 1973.

35. *Horn v. General Motors Corp.*, L.A. 30235, *hearing granted*, Cal. Sup. Ct., Dec. 27, 1973.

36. *Hauter v. Zogarts*, L.A. 30216, *hearing granted*, Cal. Sup. Ct., Oct. 31, 1973.

37. L.A. 30228. The *Pinsker* case has been before the California Supreme Court once before. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969) [hereinafter cited as *Pinsker I*].

sional association of dentists who specialize in orthodontics. Membership in the PCSO is essential for certification as a specialist in orthodontics by the American Board of Orthodontics (ABO), the only organization recognized by the American Dental Association as qualified to certify orthodontists. Because California does not require a licensed dentist to receive any additional certification in order to practice orthodontics, ABO certification is the only way a dentist may distinguish himself as a specialist in orthodontics.

In 1953 Dr. Leon Pinsker obtained a California dentistry license. The next year he opened up a general dentistry practice and began taking specialty courses in orthodontics. Two years later he joined Dr. Max Schleimer in the practice of orthodontia in Long Beach, California. In 1959 he enrolled in Columbia University's Division of Orthodontics and completed 1500 hours of postgraduate training, receiving a Certificate of Training in Orthodontics and satisfying the PCSO educational requirement. While at Columbia, Pinsker applied for membership in the Southern Component of the PCSO (PCSOS).<sup>38</sup>

Soon after he returned to practice with Dr. Schleimer, Pinsker's application for membership in PCSO was denied, because he commingled patients with Schleimer, who was not a PCSO member. In so doing he violated Section 3 of the society's Canon of Ethics:

The orthodontist has an obligation to protect the health of his patient in not delegating to a person less qualified any service or operation which required the professional competence of an orthodontist. The orthodontist has a further obligation of supervising the work of all auxiliary personnel in the interests of rendering the best service to his patient.<sup>39</sup>

After receiving his rejection by mail, Pinsker learned the reason for the society's action, and assured the society that he would segregate his patients from Schleimer's.<sup>40</sup> The society claimed Pinsker flatly refused to segregate patients.<sup>41</sup>

In January, 1961, the PCSO reconsidered Dr. Pinsker's application and again rejected it, partly on the basis of conversations between the PCSO secretary, Dr. Neff, and two Long Beach orthodontists who informed him that Drs. Pinsker and Schleimer still commingled patients. Dr. Pinsker was not called to testify.<sup>42</sup>

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38. Pinsker I, 1 Cal. 3d at 162-63, 460 P.2d at 496-97, 81 Cal. Rptr. at 624-25. PCSOS is a regional component of PCSO. Since their interests are substantially identical, PCSOS will hereinafter be referred to as PCSO.

39. Opening Brief for Appellant in the Court of Appeal at 4.

40. *Id.* at 10.

41. Pinsker I, 1 Cal. 3d at 164, 460 P.2d at 497, 81 Cal. Rptr. at 625.

42. Brief for Respondent in the Court of Appeal at 6. Opening Brief for Appellant in the Court of Appeal at 7-8; Brief for Respondent in the Court of Appeal at 7-8.

Dr. Pinsker brought an action against PCSO for injunction. The trial court found "no economic or other necessity for membership in defendant associations justifying judicial intervention. . . . [There fore plaintiff] has no right to judicially compel defendants to admit him to membership."<sup>43</sup> The supreme court reversed, holding that PCSO's refusal to admit Pinsker has subject to judicial review,<sup>44</sup> but remanding for a new trial, at which PCSO could show that its exclusion of the dentist was neither arbitrary nor capricious.<sup>45</sup>

At the second trial patients testified that both Pinsker and Schlei-mer were treating them. The court ruled that the PCSO had not acted summarily and noted that PCSO had conducted a thorough investigation and had considered the application several times before rejecting it.<sup>46</sup> In an unpublished opinion, the second district court of appeal held that PCSO's actions comported with standards of substantive due process because the society faithfully followed its own established procedure, the application was rejected on a reasonable and legally cognizable ground which related to the society's purpose, and the evidence reasonably supported the rejection.<sup>47</sup> The court of appeal contrasted the standards controlling admission procedure with those governing procedures for expulsion of established members:

Procedure for admission, however, need only assure that the applicant and group give and receive adequate information upon which an appraisal of eligibility may be fairly based. There is no need for an adversary or quasi-judicial type of hearing.<sup>48</sup>

The court of appeal rejected Pinsker's plea for a PCSO hearing on the alternative ground that any deprivation of rights occasioned by the lack of a hearing had been rectified by the trial.<sup>49</sup> Thus, a hearing before the society would serve no further value.

Fourteen years after he first applied for PCSO membership, Pins-

43. Pinsker I, 1 Cal. 3d at 164, 460 P.2d at 497, 81 Cal. Rptr. at 625.

44. The court acknowledged that PCSO membership was not an "economic necessity" in that a dentist could practice orthodontics without membership (and, hence, without ABO certification), but the court found that membership affords an orthodontist sufficient economic and professional advantages and protects significant public interests the combination of which warrant the imposition of a common law duty on PCSO to act reasonably and fairly when considering applications for membership. *Id.* at 165-66, 460 P.2d at 498-99, 81 Cal. Rptr. at 626-27. See *Kronen v. Pacific Coast Soc'y of Orthodontists*, 237 Cal. App. 2d 289, 46 Cal. Rptr. 808 (1st Dist. 1965); *Higgins v. American Soc'y of Clinical Pathologists*, 51 N.J. 191, 201-02, 238 A.2d 665, 671 (1968).

45. Pinsker I, 1 Cal. 3d at 166-67, 460 P.2d at 499-500, 81 Cal. Rptr. at 627-28.

46. Opening Brief for Appellant in the Court of Appeal at 12.

47. Petition of Appellant for Hearing in the Supreme Court at A. 13.

48. *Id.* at A. 15.

49. *Id.* at A. 17-18, citing *Fluker v. Alabama State Bd. of Educ.*, 441 F.2d 201

ker's case is now before the California Supreme Court for the second time. *Pinsker II* presents issues akin to federal due process questions, but there is no assertion of state action. Instead, the case turns on the extent to which California's common law duty of reasonableness is applicable to professional associations and other similar public service institutions.<sup>50</sup> At issue are (1) the validity of the PCSO substantive standard under which *Pinsker* was rejected, and (2) the sufficiency of the procedures by which *Pinsker's* application was processed.

The professional associations' duty adequately to assess applications for membership must comport with the substantial interests of the applicants in professional advancement which only the professional society can provide, and the public's interest in the delivery of the highest quality professional services.<sup>51</sup> The duty does not flow from an applicant's property or contractual rights—theories on which the law of private associations formerly rested.<sup>52</sup> The validity of an association's standards is judged by balancing the interests of the association, the applicant, and the public. The PCSO's interests encompass the freedom to choose its members as it pleases and the establishment and enforcement of stringent professional standards designed to enhance its prestige and ensure that membership denotes high professional competence. For the applicant, membership brings the opportunity for professional distinction, continuing education programs, and referrals. Distinguishing specialized and competent orthodontists from general practitioners and setting high goals for aspirant dentists further the public's interest.

*Pinsker* was not excluded, however, for failing to satisfy PCSO's professional standards, but for commingling patients with a non-PCSO-affiliated dentist, Dr. Schleimer. The PCSO rule forbidding commingling pertains not to the skill level or education of the applicant, but to the protection of patients of PCSO qualified orthodontists who reasonably expect that all their treatment will be at the hands of one so

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(5th Cir. 1971); *Bistrick v. University of S. Carolina*, 324 F. Supp. 942 (D.S.C. 1971).

50. See *Tobriner & Grodin*, *supra* note 1, at 1253 n.29.

51. *Pinsker I*, 1 Cal. 3d at 164-66, 460 P.2d at 497-99, 81 Cal. Rptr. at 625-27; *Kronen v. Pacific Coast Soc'y of Orthodontists*, 237 Cal. App. 2d 289, 304-05, 46 Cal. Rptr. 808, 818-19 (1st Dist. 1965). See *Higgins v. American Soc'y of Clinical Pathologists*, 51 N.J. 191, 199-200, 238 A.2d 665, 669 (1968); *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 596-97, 170 A.2d 791, 799 (1961). When membership does not involve substantial property rights but does confer significant economic advantage, the distinction between exclusion of an applicant and expulsion of an established member is attenuated. See *Marjorie Webster Junior College v. Middle States Ass'n of Colleges & Secondary Schools*, 432 F.2d 650, 656 n.29 (D.C. Cir. 1970); *Hurwitz v. Directors Guild of America*, 364 F.2d 67, 72-73 n.7 (2d Cir. 1966).

52. See *Chafee, The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930); *Developments in the Law—Private Associations*, 76 HARV. L. REV. 983, 998-1002 (1963).

qualified. As a practical matter, the rule restricts the practice of orthodontics by nonmember dentists.

The rationale of this rule applies to Drs. Pinsker and Schleimer only if (1) Dr. Schleimer is "less qualified" than a certified orthodontist, and (2) the work delegated to him was of the sort which did require the competence of a specialized orthodontist. Even assuming both conditions, the court is faced with evaluating the rule in the light of the extent to which it vindicates the public interests assertedly served by professional association membership. While a professional association's substantive standards frequently may be beyond the technical expertise of a court, judicial appraisal of the PCSO standard in question in this case is facilitated by legislative guidance: the California legislature has determined that dentists need not have special certification to practice orthodontics.<sup>53</sup> The implication is that the public interest is not served by restricting the practice of orthodontics to holders of specialty certification. Thus, the PCSO commingling rule may even disserve the public's interest, for instance, an interest in having access to all the dentists who can do orthodontia. Reasoning in that fashion from the legislative judgment could permit the court to invalidate the PCSO rule because it operates to exclude otherwise qualified orthodontists.<sup>54</sup>

Dr. Pinsker, however, has focused the brunt of his attack on defects in PCSO admissions procedures rather than on the invalidity of PCSO's substantive standards. Such strategy implicitly recognizes the court's greater expertise in promulgating procedural due process guidelines than in promulgating standards of competence for a technical profession. The procedures by which medical and dental societies determine prerequisites for entry largely should be immune from judicial interference so long as the standards are *prima facie* reasonable and in

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53. See CAL. BUS. & PROF. CODE § 1625 (West Supp. 1974).

54. In an analogous case, the Supreme Court of New Jersey recently voided the expulsion of a medical technologist from her professional society. *Higgins v. American Soc'y of Clinical Pathologists*, 51 N.J. 191, 238 A.2d 665 (1968). Higgins became employed in a bioanalytical laboratory owned and operated by a nonphysician in violation of the society's code of ethics. While society membership was not an economic necessity, the court found that the recognition and status attending membership were significant enough to warrant judicial review. 51 N.J. at 201-02, 238 A.2d at 670. The court also found that a state law requiring bioanalytical laboratories to be under the direction of a physician or a licensed bioanalytical laboratory director was "a legislative policy determination that the operation of bioanalytical laboratories by qualified non-doctors, as well as by physicians, is in the public interest." 51 N.J. at 203, 238 A.2d at 671. Since the society's rule appeared to be aimed at eliminating laboratories owned or operated by nonphysicians, "rather than at elevating the standards and work performance of the certificate holder," and since the rule deprived some legislatively approved laboratories of the best technologists, the court voided the expulsion as against public policy. 51 N.J. at 203-04, 238 A.2d at 671-72.

furtherance of the society's goals of maintaining high professional competence. Similarly, the court is not equipped to determine whether the quality of the applicant's work product or answers to examination questions demonstrates competence.<sup>55</sup> The court's role as protector of individuals from arbitrary action is called into play, however, when the manner in which the professional society applies its standards to applicants is questioned. And it is in reviewing the manner in which standards are applied to specific facts that the court's expertise is paramount. *Pinsker II* concerns such an application.

In assessing the validity of PCSO's application of its rules to Dr. Pinsker, the court must first determine what procedural guidelines professional societies such as PCSO are to follow in passing on applications. Procedural safeguards have traditionally been associated, of course, with state action invoked to threaten significant individual interests such as the continued receipt of welfare,<sup>56</sup> the continued use of a driver's license,<sup>57</sup> and the continued status of freedom in face of parole revocation.<sup>58</sup> The most significant enlargement of due process safeguards against state action has been in the area of debtors' protection.<sup>59</sup> The United States Supreme Court has noted, however, that state action alone is not sufficient to surround the proceedings with the cloak of due process; the *Roth* decision<sup>60</sup> suggests that only acquired interests and not the unilateral expectation of a benefit will receive protection.

The PCSO is not an instrument of the state; moreover an applicant for membership clearly seeks a benefit which he does not already possess. Yet these facts should not preclude the application of procedural due process protections to would-be members. The requirement of state action has, in the past, operated to vindicate widely held values of individualism that called for minimal judicial intrusion into "private" affairs. As Justice Tobriner has emphasized, however, a changing, evolving society mandates new judicial responses where appropriate. Increasingly organizations such as PCSO carry on activities of a public nature. These entities, like the state, pervade and regulate important segments of our lives. Like the state, therefore, they must

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55. See *Kronen v. Pacific Coast Soc'y of Orthodontists*, 237 Cal. App. 2d 289, 46 Cal. Rptr. 808 (1st Dist. 1965) (written, oral, and clinical tests, examination of work-product).

56. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

57. *Bell v. Burson*, 402 U.S. 535 (1971).

58. *Morrissey v. Brewer*, 408 U.S. 471 (1972).

59. E.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Adams v. Dep't of Motor Vehicles*, Sac. 7959 filed April 10, 1974; *Randone v. Appellate Dept.*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

60. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

carry out that regulation with fair play and substantial justice. PCSO is such an entity, as the court recognized in *Pinsker I*:

Because of the unique position in the field of orthodontics occupied by defendant AAO and its constituent organizations, membership therein, although not economically necessary in the strict sense of the word . . . , would appear to be a practical necessity for a dentist who wishes not only to make a good living as an orthodontist but also to realize maximum potential achievement and recognition in such specialty. Defendant associations hold themselves out to the public and the dental profession generally as the sole organizations recognized by the ADA, which is itself a virtual monopoly, to determine standards, both ethical and educational, for the practice and certification of orthodontics. Thus, a public interest is shown, and the associations must be viewed as having a fiduciary responsibility with respect to the acceptance or rejection of membership applications. Under the circumstances, an applicant for membership has a judicially enforceable right to have his application considered in a manner comporting with the fundamentals of due process, including the showing of cause for rejection.<sup>61</sup>

Moreover, and quite significantly, the attachment of certain incidents of due process to the admissions procedures of professional societies was explicitly called for by the court when it later cited *Pinsker I* in *Randone* as authority for the proposition that:

California courts have long preserved the individual's right to notice and a meaningful hearing in instances in which a significant deprivation is threatened by a *private* entity as well as by a governmental body.<sup>62</sup>

Thus it would be consistent with prior case law if the court were to grant PCSO applicants a right to adequate notice of the meeting at which their application is to be considered and a right to speak at such meeting if they so desire. The court may also provide a right to counsel, a right to present and cross-examine witnesses, a right to a permanent record of the proceedings, a right to written findings, and a right to judicial review.<sup>63</sup>

The argument can be raised, of course, that such procedures will transform the PCSO and other professional societies into courts ex-

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61. 1 Cal. 3d at 166, 460 P.2d at 499, 81 Cal. Rptr. at 627 (footnote omitted).

62. *Randone v. Appellate Dept.*, 5 Cal. 3d at 550 n.11, 488 P.2d at 22 n.11, 96 Cal. Rptr. at 718 n.11.

63. The extent of the required procedural safeguards will probably depend on the nature of the dispute and its complexity. Where, as in *Pinsker*, the dispute involves factual determinations other than professional competency, a hearing with a right to counsel and a right to present witnesses would be appropriate. Note that such an approach would treat PCSO as if it were an arm of the state. See note 50 and accompanying text *supra*.



pending great energy in admissions procedures to the detriment of activities concerned with maintaining professional excellence. Realistically, however, these due process protections rarely will be invoked. Although all applicants will be told when their application is to be considered and will be given the opportunity to appear, most applicants probably will be satisfied with a review of the paper record. Moreover, the court could allow the societies to prescreen applicants, thereby granting certain individuals automatic admittance. The full panoply of due process protections would only be invoked by those whose application raised questions as to their competence or ethics. Although this would, no doubt, be a small number, Pinsker would have been among them.

Whatever requirements are imposed by the court in general, a remedy must be fashioned for Dr. Pinsker. The court may (1) order PCSO to admit Pinsker, (2) order PCSO to grant him a hearing, or (3) hold that he was afforded due process by his trial. The court may order Pinsker's admittance only if (a) the substantive rule under which he was excluded was invalid or (b) the evidence showing that Pinsker was in violation was insubstantial. But if the rule is valid,<sup>64</sup> to hold that there was insufficient evidence that Pinsker was in violation would require overturning the express finding of the trial court to the contrary.

Requiring PCSO to accord Pinsker "due process" would further delay the final resolution of his membership application and may result in additional litigation.<sup>65</sup> In addition, Pinsker had the opportunity fully to present his case to an impartial trial judge, if not to the PCSO.<sup>66</sup> But the question at trial was the reasonableness of PCSO's action, not whether there was, in fact, a violation of PCSO rules. Remanding the case to the trial court<sup>67</sup> or requiring a PCSO hearing would be consist-

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64. See text accompanying notes 51-54, *supra*.

65. The case of an Arizona doctor vividly illustrates the possible delay (twelve years) and repeated litigation (three appeals to the Arizona Supreme Court) which may result from an attempt to procure a fair hearing. *Maricopa County Medical Soc'y v. Blende*, 5 Ariz. App. 454, 427 P.2d 946 (1967), *rev'd*, 104 Ariz. 12, 448 P.2d 68 (1968); *Blende v. Stanford*, 98 Ariz. 251, 403 P.2d 807 (1965); *Blende v. Maricopa County Medical Soc'y*, 96 Ariz. 240, 393 P.2d 926 (1964). Delay is particularly injurious to the applicant when, as in *Blende*, he is precluded from any practice because of his exclusion. See also *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961). Pinsker, at least, may practice orthodontics even though he is not a PCSO member.

66. This was the alternative basis for the decision of the court of appeal. See note 49 and accompanying text, *supra*.

67. Since the dispute involves a factual resolution, it may be more appropriate to provide a hearing before an impartial trial judge using strict judicial evidentiary rules. The PCSO may feel that their prior determination, although reached by insufficient procedures, must be adhered to and may harbor some animosity towards Pinsker gener-

ent with previous cases applying federal due process standards<sup>68</sup> and still allow the court an opportunity to frame the scope and purpose of further inquiry.

Whatever the exact contours of the protection afforded Dr. Pinsker and future applicants of professional societies, the *Pinsker II* opinion further can demonstrate how the California Supreme Court's treatment of entities affected with the public interest differs from its treatment of those whose character is marked by private concern. A membership society holding itself out to the public as the protector of professional standards in a particular field has the responsibility to promulgate regulations that do in fact further the public's interests; a rule which protects only the economic interest of the members at the expense of excluding qualified members cannot stand. Furthermore, the professional society's monopoly position mandates that the applicant be accorded elements of due process protection including notice and hearing to protect not only the applicant but the public which could be harmed by the exclusion of qualified applicants. Finally, the court's reliance on a common law due process argument (rather than outmoded doctrines of property or contract) will be a further manifestation of its belief that those entities affected with the public interest have a duty to act to regulate affected individuals responsibly and fairly.

*B. Borrower versus Lender: Tucker v. Lassen Savings  
and Loan Association*<sup>69</sup>

The obligation of good faith and fair dealing which the court has attached to professional societies has helped alleviate the unequal bargaining power encountered by individuals in their relationships with these entities. In a different context, Justice Tobriner has noted that an imbalance of economic power imposes similar responsibilities on the courts to adjust the consequences of unequal bargaining.

[S]ociety is becoming more and more integrated and collectivized at the same time that its economic imbalance becomes more acute.

The cases that emanate from these tensions force the courts to face issues that are largely economic, . . . .<sup>70</sup>

This interplay between unequal bargaining power and economic integration clearly is mirrored in loan transactions executed between banks and individual borrowers. The borrower's powerlessness is reflected

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ated by the extensive litigation; either could preclude an impartial resolution of the issue.

68. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Randone v. Appellate Dept.*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

69. Sac. 8001, *hearing granted*, Cal. Sup. Ct., Nov. 28, 1973.

70. Tobriner, *Retrospective*, *supra* note 1, at 5.

by not only the conditions to which he assents in the transaction but also the similarity of conditions imposed by all lenders. Although, next to the insurance agency, the bank may be the most intrusive private entity in an individual's life, the courts have made little headway in affixing a duty of fair dealing on banks which continue to insist that, absent a covenant of fair dealing in contracts with borrowers, they have no such obligation.

*Tucker* squarely challenges the enforceability of one common lender-imposed condition, the due on sale clause.<sup>71</sup> An anti-alienation provision, such a clause is included in most printed-form deeds of trust used by California institutional lenders. Although the facts of the case may allow postponement of a definitive ruling on the validity of the due on sale clause, the court's decision at least should clarify the ambiguous and confusing case law in the area.

Restraints on alienation of fee simple interests were first validated in California in an opinion by Justice Traynor in *Coast Bank v. Minderhout*.<sup>72</sup> There section 711 of the Civil Code,<sup>73</sup> which flatly voids all restraints on alienation, was construed as precluding only unreasonable restraints not "designed to protect justifiable interests of the parties."<sup>74</sup> *Coast Bank* involved an equitable mortgage created when borrowers agreed that transferring or encumbering the property without the bank's consent would allow the bank to accelerate the due date of the loan.

The court held:

it was not unreasonable for plaintiff to condition its continued extension of credit to the Enrights on their retaining their interest in the property that stood as collateral for the debt. Accordingly, plaintiff validly provided that it might accelerate the due date if the Enrights encumbered or transferred the property.<sup>75</sup>

Thus *Coast Bank* established that lending institutions may accelerate the maturity date of the loan if the property is sold or transferred, in order to protect their security. The question left unanswered was whether other justifiable interests of the lender would support the enforcement of due on sale clauses. An affirmative answer appeared in a 1969 court of appeals decision, *Cherry v. Home Savings and Loan Association*.<sup>76</sup>

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71. The due on sale clause empowers the lender to accelerate the due date of the loan if the trustor or mortgagor sells, transfers, or otherwise disposes of the secured property.

72. 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964).

73. "Conditions restraining alienation, where repugnant to the interest created, are void." CAL. CIVIL CODE § 711 (West 1954).

74. 61 Cal. 2d at 316, 392 P.2d at 268, 38 Cal. Rptr. at 508.

75. *Id.* at 317, 392 P.2d at 268, 38 Cal. Rptr. at 508.

76. 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (2d Dist. 1969).

*Cherry* handed lenders a virtual carte blanche in their application of due on sale clauses. First, the opinion held that lenders may unreasonably withhold consent to borrowers who wished to transfer the secured property. Second, it permitted lenders to justify enforcement of the due on sale clause by economic arguments wholly unrelated to the protection of their security interests. In *Cherry*, the borrowers executed a promissory note secured by a deed of trust containing a due on sale clause. When they decided to sell the property three years later the bank refused to consent to the transfer unless the purchaser agreed to assume the loan payments at a higher interest rate and to pay an assumption fee.

In a declaratory action, the purchaser and seller argued that since the debt was still secured by the trust deed and by the original borrower's personal obligation, the lender's security interest was not jeopardized; he therefore had breached an implied obligation to act reasonably before withholding consent to a proposed transfer. The court gave short shrift to this contention:

Such refusal on respondent's part demonstrated no lack of good faith or fair dealing, but merely insistence on its rights under the terms of the deed of trust. It had the power of free decision regarding use of its money by others, the right to determine in its own discretion whether it would exercise its option, and it had no obligation to act only in a manner which others might term "reasonable." Neither *Cherry* nor the *Wickershims*, all of whom were aware of the terms, can complain.<sup>77</sup>

The court recognized that lenders have an interest in finding responsible borrowers and that while they do lend money to less desirable risks, they do so at higher rates. But the court made no finding that the purchaser presented a greater risk of nonpayment than the original mortgager which necessitated the payment of higher interest rates. Instead, the court justified the exercise of the due on sale clause by the long-term interests of the savings and loan business:

When interest rates are high, a lender runs the risk they will drop and that the borrower will refinance his debt elsewhere at a lower rate and pay off the loan, leaving the lender with money to loan but at a less favorable interest rate. On the other hand, when money is loaned at low interest, the lender risks losing the benefit of a later increase in rates. As one protection against the foregoing contingency a due-on-sale clause is employed permitting acceleration of the due date by the lender so that he may take advantage of rising interest rates in the event his borrower transfers his security. This is merely one example of ways taken to minimize risks by sensible

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77. *Id.* at 579-80, 81 Cal. Rptr. at 139.

lenders.<sup>78</sup>

Thus, residential borrowers are tied to contracts which permit lenders to hedge themselves against losses regardless of the economic climate prevailing in the country.<sup>79</sup>

The due on sale clause is not the product of lenders' business acumen in arm's length bargaining as the *Cherry* court would suggest, but of the lenders' power. As a practical matter, residential borrowers—aware as they may be of the due on sale clause—are powerless to object to its inclusion in the agreement at the time of execution. Under the *Cherry* doctrine they are equally powerless when the lender enforces the clause, however unreasonably. The adhesive nature of the due on sale clause may not necessarily require its invalidation, but blind enforcement of the clause certainly runs counter to the court's attempts to adjust other relationships so that large service-oriented entities act reasonably and in good faith when dealing with consumers.

Justice Tobriner had an opportunity to delineate the extent of institutional lenders' power to protect their interests in his opinion for the court in *La Sala v. American Savings and Loan Association*.<sup>80</sup> *La Sala* involved the enforceability of a due on encumbrance clause.<sup>81</sup> Borrowers executed second deeds of trust to secure loans to third parties. The beneficiary of the senior deeds of trust threatened to accelerate the senior loans under due on encumbrance provisions unless the borrowers agreed to pay a fee and additional interest. The court attempted to balance the interests of the parties and concluded that the due on sale clause was automatically enforceable while the due on encumbrance clause was enforceable only when reasonably necessary to protect the lender's security.

The lender argued that both clauses protect two vital interests: (1) the rate of return on its lending portfolio and (2) the security of the loan. The court disposed of the first argument summarily, *Cherry*<sup>82</sup> notwithstanding. In language which seems as applicable to due on sale clauses as to due on encumbrance clauses, the court said:

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78. *Id.* at 579, 81 Cal. Rptr. at 138.

79. The due on sale clause protects the lender when interest rates rise. When rates fall, the lender is protected by the prepayment penalty clause, another way sensible lenders minimize their risks. If the borrower wishes to cash out his debt and refinance at lower interest rates, he must pay an additional amount stipulated in the prepayment penalty clause. See *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Ass'n*, 22 Cal. App. 3d 303, 99 Cal. Rptr. 417 (1st Dist. 1971); *Hellbaum v. Lytton Sav. & Loan Ass'n*, 274 Cal. App. 2d 456, 79 Cal. Rptr. 9 (1st Dist. 1969); Comment, *Secured Real Estate Loan Prepayment and the Prepayment Penalty*, 51 CALIF. L. REV. 923 (1962).

80. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

81. The due on encumbrance clause gives the lender the option to accelerate the due date of the loan if the secured property becomes further encumbered.

82. See text accompanying notes 148-50, *infra*.

In any event, a restraint on alienation cannot be found reasonable merely because it is commercially beneficial to the restrainer. Otherwise one could justify any restraint on alienation upon the ground that the lender could exact a valuable consideration in return for its waiver, and that sensible lenders find such devices profitable.<sup>83</sup>

The court was more sympathetic to the lender's second argument, that the clauses are necessary to protect the security of the loan. The lender argued that the triggering event, transfer or encumbrance of the secured property, poses two dangers: (1) the value of the security will depreciate, and (2) the likelihood of default will increase. The court found, however, that in many instances the encumbrance of the secured property would create neither danger. The borrower normally remains in possession and retains sufficient equity to ensure that he will care for the property.<sup>84</sup> That the borrower takes out a second loan does not prove that he is financially irresponsible.<sup>85</sup> But the court found that a sale of the property created the first danger insofar as the purchaser may be unscrupulous or careless and allow the value of the land to depreciate.<sup>86</sup> The court ignored the equally possible result that the purchaser would be no less conscientious or credit-worthy than the borrower.

The inconsistency in the court's appreciation of the threats to security posed by sale and/or encumbrance probably can be explained by its evaluation of the effect of the operation of each clause on the borrower:

The borrower in such sales generally receives cash sufficient to pay off his obligation. To permit the lender to accelerate ensures that all buyers of property must finance at the current interest rate, and that none obtain an advantage because of the fortuitous fact that his seller originally purchased during a period of low interest. Acceleration upon sale of the property, in other words, does not seriously restrict alienation because the sale terms can, and usually will, provide for payment of the prior trust deed.

A junior encumbrance, on the other hand . . . does not often provide the borrower with the means to discharge the balance secured by the trust deed. Thus under a due on encumbrance clause the borrower is exposed to a detriment quite different than that involved in a sale.<sup>87</sup>

In view of the disparate detriments imposed on the borrower, the court concluded that the due on encumbrance clause was enforceable only

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83. 5 Cal. 3d at 880-81 n.17, 489 P.2d at 1124 n.17, 97 Cal. Rptr. at 860 n.17.

84. *Id.* at 880, 489 P.2d at 1123, 97 Cal. Rptr. at 859.

85. *Id.* at 881, 489 P.2d at 1123, 97 Cal. Rptr. at 860.

86. *Id.* at 879-80, 489 P.2d at 1123, 97 Cal. Rptr. at 859.

87. *Id.* at 880 n.17, 489 P.2d at 1123 n.17, 97 Cal. Rptr. at 859 n.17.

when reasonably necessary to protect the lender's security,<sup>88</sup> while the due on sale clause was automatically enforceable.<sup>89</sup>

The result in *La Sala* appears consistent with Justice Tobriner's previous opinions. The interests of a large service-oriented institution were weighed against the interests of consumers and a balance was struck which protected the interests of both. Yet, the due on sale dicta in *La Sala* seemed to neglect many relevant considerations: (1) Enforcement of the due on sale clause increases real estate prices because refinancing at higher interest rates is necessitated. In a period of aggravated inflation, this may be undesirable; the greater burden may fall on the poor. (2) The court assumes that the seller receives enough cash to pay off his obligation.<sup>90</sup> But if the purchaser had intended to assume the existing loan, very little cash would have changed hands. Neither seller nor purchaser may have the cash to pay the accelerated debt. (3) Broadly worded due on sale clauses may apply when the borrower remains in possession and liable on the debt, as in an executory land sales contract, a division of community property, transfers into trust, or sale-and-leasebacks. (4) The lender may exact a prepayment penalty or fee on the payment of the accelerated debt.<sup>91</sup> Aside from the added financial burden, this interaction between clauses altogether may prevent any attempted alienation of the property.<sup>92</sup> (5) In many instances the lender's security will be enhanced by a sale, as when the purchaser is more credit-worthy, or substantially improves the property. Where property values appreciate, any impairment in the lender's security due to the integrity of the purchaser may be de minimis. In addition, other remedies exist for intentional impairment of security.<sup>93</sup> Consideration of these factors has awaited judicial or legislative action. *Tucker v. Lassen Savings and Loan Association*<sup>94</sup> will bring some of the issues to the court's attention.

The facts in *Tucker* are not in dispute. In January, 1969, the Tuckers, three of whom were real estate brokers, acquired a parcel of rental property for \$11,400, financing \$7,400 under a deed of trust naming Lassen as beneficiary. In addition to signing a deed of trust containing a standard due on sale clause, the Tuckers also executed a "Borrowers Statement of Understanding" which stated:

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88. *Id.* at 881, 489 P.2d at 1124, 97 Cal. Rptr. at 860.

89. *Id.* at 883, 489 P.2d at 1126, 97 Cal. Rptr. at 862.

90. *Id.* at 880 n.17, 489 P.2d at 1123 n.17, 97 Cal. Rptr. at 859 n.17.

91. See note 79, *supra*.

92. See *Hellbaum v. Lytton Sav. & Loan Ass'n*, 274 Cal. App. 2d 456, 79 Cal. Rptr. 9 (1st Dist. 1969).

93. See CAL. CIVIL CODE § 2929 (West 1954); CAL. PENAL CODE § 502½ (West 1970); *cf.* *U.S. Financial v. Sullivan*, 37 Cal. App. 3d 5, 112 Cal. Rptr. 18 (4th Dist. 1974).

94. Sac. 8001, *hearing granted*, Cal. Sup. Ct., Nov. 28, 1973. The Court of Appeal opinion is reported at 110 Cal. Rptr. 73 (3d Dist. 1973) (vacated).

We understand that your loan committee has approved this loan not only because they consider the property adequate security but also because of our credit rating. Therefore, should we sell or transfer the property to some other person whose credit the loan committee has had no opportunity to examine, the Association reserves the right to either approve the new party or parties or declare the entire sum due and payable.<sup>95</sup>

Eleven months later, the Tuckers entered into an installment contract of sale with the Nolls. Lassen was not notified, but when it learned of the sale in early 1970 the due date of the loan was accelerated, and payment of the balance due and a prepayment penalty of \$229.32 was demanded. The Tuckers were unable to pay the loan or to refinance so Lassen served a notice of default and election to sell under the deed of trust. In August 1970, however, Lassen entered into an agreement with the Nolls and the Tuckers by which the Tuckers deeded their entire interest in the property to the Nolls who assumed the loan, but at 9.25% interest in contrast to the Tuckers' 7.5%.<sup>96</sup> The Tuckers filed suit against Lassen claiming that the agreement by which the Nolls assumed the loan at the higher interest rate damaged them by reducing their recovery from sale of the property. They alleged, in particular, that prior to calling the loan, Lassen did not inspect the property to determine whether waste had occurred, did not examine the recorded contract of sale between the Tuckers and Nolls to determine what interest the Tuckers retained, and did not check the Nolls' credit rating. They alleged Lassen's purpose in acceding was to increase the interest rate to reflect substantial increases in the prime rate between January 1969 and March 1970.<sup>97</sup>

Supplemental briefs filed by Lassen ignore the facts of the case and instead defend enforcement of due on sale clauses as necessary to protect the lenders' interest in maintaining their portfolios at current market rates. The lenders have thus abandoned the fiction that the main function of the due on sale clause is protection of the lenders' security:

The operation of the due on sale provision, however, while it possesses a limited objective of guaranteeing the lender security, has the more important objective of allowing the savings and loan to periodically change the mix of its loan portfolio so that over all it is lending money at a higher rate than it is paying to its borrowers.<sup>98</sup>

The lenders' argument is straightforward. On the one hand they are lending money for fixed periods of up to 30 years at low rates.

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95. 110 Cal. Rptr. at 74, Supplemental Brief for Appellant at 2.

96. Petition of Respondent for a Hearing in the Supreme Court at 4.

97. *Id.* at 4-5.

98. Supplemental Brief for Appellant at 30.



On the other hand, they must pay short-term depositors who provide loan funds high rates of interest to retain their savings. Without automatic enforcement of due on sale clauses, the reasoning continues, lenders will receive insufficient payments from their borrowers, interest rates payable on savings accounts will drop, depositors will invest elsewhere, and money for the purchase of homes will dry up. Lenders must then rely on contracts which allow acceleration at any time at their option, execute contracts providing for a variable interest rate, or issue only short-term loans. Without one of these protections, borrowing would be more expensive and many who can now afford to buy homes would no longer be able to do so.<sup>99</sup>

In appraising these arguments, the court will have to look beyond the limited *La Sala* view that "a restraint on alienation cannot be found reasonable merely because it is commercially beneficial to the restrainer."<sup>100</sup> The adhesiveness of due on sale clauses must be weighed against the lenders' economic arguments with the interests of the general public figuring heavily in the balance. The lenders plead that, "the savings and loan must be afforded some sort of protection in this inflationary market,"<sup>101</sup> but certainly little, if any, special economic aid is tendered the average individual who suffers similarly from the current economic climate. And under existing law, the lenders do protect themselves through contracts executed with borrowers who lack any bargaining leverage whatsoever. For example, the Tuckers claim:

The deed of trust form containing this "due on" clause had been used by Financial and its wholly owned subsidiary, Lassen, since November of 1961. According to the president and manager of Lassen, this "due on" clause had never been deleted from any deed of trust securing a loan made by Lassen. One who wished to borrow money from Lassen either accepted this "due on" clause or he did not get the loan.<sup>102</sup>

Moreover, these clauses may be enforced by the lenders without any obligation of reasonableness to the borrower.

When equalizing bargaining power between economically divergent elements in society, the court has often stressed that its aim was to meet the reasonable expectations of the weaker party.<sup>103</sup> The present system permits the making of long-term loans at fixed interest rates and low monthly payments. The lending institutions contend that, as a result, the borrower's reasonable expectations are limited to

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99. *Id.* at 27-29; Brief for California Savings and Loan League as Amicus Curiae at 20-38.

100. 5 Cal. 3d at 880-81 n.17, 489 P.2d at 1124 n.17, 97 Cal. Rptr. at 860 n.17.

101. Supplemental Brief for Appellant at 28.

102. Petition of Respondent for Hearing in the Supreme Court at 4.

103. See, e.g., *Tahoe Nat'l Bank v. Phillips*, 4 Cal. 3d 11, 480 P.2d 320, 92 Cal. Rptr. 704 (1971) (Tobriner, J.).

paying the loan at a fixed rate, over a fixed period of time, immune from economic fluctuations; they do not include selling the property at an interest rate lower than the current market level. Furthermore, as Justice Tobriner noted in *La Sala*, due on sale clauses do not "seriously restrict alienation."<sup>104</sup>

The court's decision in *Tucker* will determine whether the due on sale clause is enforceable as an interest-adjustment device.<sup>105</sup> The decision, however, will not be easy. When faced with adhesion contracts of insurance, for example, the court has interpreted the instrument to satisfy the insured's reasonable expectations, and the insurer has had the opportunity to redraft a more explicit policy for future customers. The court's elucidation of the insurance companies' duty to act reasonably has not posed, as it does in *Tucker*, a challenge to the basis of the industry's rate structure. The banks, in contrast, readily acknowledge that their interest and payment schedules are established in light of their power to act unreasonably in the enforcement of due on sale clauses. A decision that they must use their bargaining power reasonably will affect the entire industry's lending policies. For example, at present the lender need not determine whether the sale does in fact pose a threat to its security interest in the property. Should the court hold that banks must act reasonably in the enforcement of due on sale clauses, every acceleration would be open to challenge with such serious potential consequences for the lenders that the industry would be forced to reappraise its usefulness.

Although protection of the public is clearly the court's goal, it is not clear that such a result would better afford that protection. The public clearly would be ill served by further interest rate advances or the substitution of either short-term loans or variable interest rates—all of which might result from a holding adverse to the banks. On the other hand, the law's clear trend has been to halt the exercise of arbitrary power in whatever context it exists. The ill effects on society resulting from the exercise of such power have been thought to outweigh those occasioned by the imposition of the duty to act reasonably. Whether the court will reaffirm that value calculus in *Tucker* remains to be seen, but prior court decisions imposing this duty upon insurance companies, professional societies, and the government strongly would counsel against carving a special niche for institutional lenders.<sup>106</sup>

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104. 5 Cal. 3d at 880 n.17, 489 P.2d at 1123 n.17, 97 Cal. Rptr. at 859 n.17.

105. Note that Justice Tobriner's conclusion in *La Sala*, on which the Court of Appeal decision in *Tucker* is based, is contrary to the lenders' position. Tobriner stated that "the lender may insist upon the automatic performance of the due-on-sale clause because such a provision is necessary to the lender's security." 5 Cal. 3d at 883, 489 P.2d at 1126, 97 Cal. Rptr. at 862 (emphasis added).

106. The lenders may argue that macro-economic issues should be decided by leg-

C. *Insureds versus Their Insurer: Silberg v. California Life Insurance Co.*<sup>107</sup>

The powerlessness of borrowers who must take or leave an adhesive lending agreement is not unique; the great mass of the population is a similarly situated class with respect to its lack of bargaining power and the proliferation of standardized contracts. Justice Tobriner took special note of these contracts when he wrote:

We are seeing the demise of the classic contract, freely bargained, so eloquently described by Professor Williston. In its place, we now discern the mass, standardized contract. Although the individualized, tailor-made contract may still play its role in transactions involving the super-corporations and individual entrepreneurs, it assumes a minor role in the mass market.<sup>108</sup>

Of all standardized contracts, the ones having the most universal impact on the population are insurance policies. In describing adhesion contracts, the Justice singled these out for special attention:

And so we note the development of a new kind of standardized or "adhesion" contract, particularly in the field of insurance. That kind of contract bears the same characteristics as the machine-made product: neither results from individual bargains; both emanate from the party better able to sustain a loss than the purchaser, because, of course, that party sells a standard product or policy to a mass of buyers and can distribute the loss among them; the consumer is utterly dependent upon the safety of the product and the viability of the policy; the producer completely controls the nature of the product and the policy, and the buyer has in fact nothing to say about it.<sup>109</sup>

Insurance contracts have also proven to be the type of standardized contract most susceptible to judicial scrutiny and intervention on behalf of the consumer.

The California Supreme Court in two Tobriner opinions, has not been hesitant to protect insureds from the arbitrary application of coverage-exclusion clauses in insurance policies. In *Steven v. Fidelity & Casualty Co.*,<sup>110</sup> an air traveler who bought a standardized insurance policy prior to his departure was killed when exigent circumstances

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islatures, not courts. Yet it is only through court intervention in *Coast Bank v. Minderhout* and subsequent cases that lenders have been protected from a literal reading of Civil Code section 711. See text accompanying note 144 *infra*. Thus, lenders who wish to limit section 711 and who are more able than consumers to initiate a legislative campaign should have the burden of seeking redress from the legislature. In the absence of legislative protection, judicial deference would leave consumer interests vulnerable to the superior bargaining power of lending institutions.

107. L.A. 30144, *hearing granted*, Cal. Sup. Ct., May 9, 1973.

108. Tobriner, *Retrospective*, *supra* note 1, at 7.

109. *Id.*

110. 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

compelled him to fly by air taxi over part of his route. The court held that the traveler was covered by the policy because its exclusion of accidents involving nonscheduled airlines and its coverage of only substitute land travel were ambiguously written, leaving the insured with a reasonable expectation of coverage. Similarly, in *Gray v. Zurich Insurance Co.*,<sup>111</sup> the court, again finding ambiguities in the policy, held that the insurance company should have defended the insured (who was sued as the result of an altercation in which he had caused bodily injury) in spite of an exclusionary clause in the policy denying coverage in cases of intentionally inflicted bodily harm. Underlying both opinions was the doctrine of "reasonable expectations," stated by Professor Kessler in his pioneering article, and quoted by the court in *Gray*:

In dealing with standardized contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser's "calling", and to what extent the stronger party disappointed reasonable expectations based on the typical life situation.<sup>112</sup>

The court's policy of construing ambiguities against the insurer and meeting the reasonable expectations of the insured is now well settled. Yet still unresolved by the supreme court is the scope of the damages recoverable by the insured for an insurer's refusal to pay when that refusal is not grounded in a malicious motive but in the honest belief that the policy as written provides no coverage.

In an action against the California Life Insurance Company for failure to pay a claim under a family hospitalization policy, Enrique Silberg was awarded \$4,900 by the trial judge under the policy, as well as \$75,000 in compensatory and \$500,000 in punitive damages by the jury. Finding that the insurer lacked notice that a court would construe the policy against it, however, the trial judge held the evidence insufficient to warrant the damages awarded by the jury and ordered a new trial. The judge also ruled that he erroneously instructed the jury regarding (1) the jury's discretion in awarding punitive damages and (2) the weight to be accorded the declaratory judgment in plaintiff's favor.<sup>113</sup> The court of appeals deferred to the trial judge's appraisal of prejudice and affirmed,<sup>114</sup> remanding the case for redetermi-

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111. 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

112. *Id.* at 270, 419 P.2d at 172, 54 Cal. Rptr. at 108, quoting Kessler, *Contracts of Adhesion*, 43 COLUM. L. REV. 629, 637 (1943).

113. Petition of Respondent and Cross-Appellant for a Hearing in the Supreme Court at 4-5.

114. *Silberg v. Calif. Life Ins. Co.*, 2 Civ. 39,938 (2d Dist., March 16, 1973) (certified for nonpublication), reprinted in Respondent and Cross-Appellant's Petition for Hearing as Appendix, at vi-x (Modification of Opinion and Order Denying Petitions for Rehearing, filed April 5, 1973).

nation of the amount of compensatory damages and liability for and the amount of punitive damages.<sup>115</sup> Both sides petitioned the supreme court for a hearing which was granted, and the case is now awaiting decision.

Imposing liability on insurance companies for failure to meet the reasonable expectations of the policyholder is not a new phenomenon. The two landmark cases of *Comunale v. Traders & General Insurance Co.*<sup>116</sup> and *Crisci v. Security Insurance Co.*<sup>117</sup> made clear that insurance companies' power is concomitant with special responsibilities in dealing with their policyholders. In *Comunale*, the plaintiffs were struck by a truck driven by one of the defendant's insureds. Despite a warning that a jury would probably return a verdict in excess of the policy limits, the insurer denied coverage and refused to accept plaintiffs' offer to settle within policy limits. A trial resulted in a judgment against the insured in excess of the policy limits. The California Supreme Court held that the plaintiffs, as assignees of the insured's rights against the insurer, could recover the amount of the excess judgment from the insurer. The court also stated a general proposition governing the conduct of insurers:

There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. This principle is applicable to policies of insurance.<sup>118</sup>

The court's decision in *Crisci v. Security Insurance Co.*<sup>119</sup> further expanded the remedies available against insurers who refuse to settle within the limits of a policy, thereby exposing the insured to greater financial risk. A tenant in Mrs. Crisci's apartment building suffered physical injuries and developed a severe psychosis as the result of falling through a staircase. Although the insurer was advised that the tenant's chances of reaping a large recovery at trial were at least 50%, the company refused to settle for \$9,000. The jury returned a verdict of \$101,000 of which the insurer paid \$10,000, the policy limit. Settlement of the remainder by Mrs. Crisci left her financially destitute, physically wrecked, and mentally shattered. The supreme court affirmed her recovery of \$91,000, the amount unpaid by the insurer, and \$25,000 for mental distress, holding that under the covenant of good faith and fair dealing implicit in every insurance contract, the insurer is liable to the insured for damage resulting from breach of its duty to accept a reasonable settlement offer within policy limits.<sup>120</sup>

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115. *Id.* at xv.

116. 50 Cal. 2d 654, 328 P.2d 198 (1958).

117. 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

118. 50 Cal. 2d at 658, 328 P.2d at 200 (citation omitted).

119. 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

120. 66 Cal. 2d at 430-32, 426 P.2d at 177-78, 58 Cal. Rptr. at 17-18. The court

Both *Communale* and *Crisci*, unlike *Silberg*, involved actions against insurers who failed to settle claims of third parties. Moreover, neither case involved the award of punitive damages. Although the intervening years have produced several opportunities, it was not until last year, in *Gruenberg v. Aetna Insurance Co.*<sup>121</sup> that the supreme court appraised the insurer's duty to handle fairly and in good faith an insured's own claim and announced that an insurer's failure to do so would render it liable for punitive damages.

Jerome Gruenberg owned a restaurant in Los Angeles which caught fire on November 9, 1969. The following day an investigator employed by one of Gruenberg's insurers examined the scene and while there informed a fire department arson investigator that Gruenberg had excess coverage under his fire insurance policies. Several days later Gruenberg was charged with arson and defrauding an insurer. Gruenberg was requested by the insurers' attorney to submit to an examination under oath, but he refused pending resolution of the criminal charges lodged against him. The attorney then informed him that the insurers were denying liability under the policy due to plaintiff's refusal to cooperate. Although the criminal charges were dropped at the preliminary hearing, and Gruenberg subsequently advised the insurers that he was now willing to answer their questions, they remained adamant in their denial of coverage. Gruenberg brought suit in superior court, reciting the foregoing facts and seeking compensatory and punitive damages for "severe economic damage," "severe emotional upset and distress," loss of earnings and special damages. The trial court sustained defendants' demurrer and the case was dismissed.<sup>122</sup>

In an opinion by Justice Sullivan, the supreme court reviewed the holdings in *Crisci* and *Comunale*, discussed two appellate decisions in which insurers were held liable for acting in bad faith,<sup>123</sup> and concluded:

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stated:

As we have seen, the duty of the insurer to consider the insured's interest in settlement offers within the policy limits arises from an implied covenant in the contract and ordinarily contract duties are strictly enforced and not subject to the standards of reasonableness.

*Id.* at 430, 426 P.2d at 177, 58 Cal. Rptr. at 17. The court did not base its holding upon the proposal by amicus curiae that the insurer has an absolute duty to accept an offer to settle within the policy limits and should be held liable for any final judgment whether or not within the policy limits if it rejects such an offer. Yet its affinity for that proposal was explicit, and it is likely that even the reasonable rejection of an offer to settle within the policy limits will not excuse an insurer from liability for whatever final judgment results against its insured.

121. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

122. *Id.* at 570-72, 510 P.2d at 1034-35, 108 Cal. Rptr. at 482-83.

123. *Richardson v. Employers Liab. Assur. Corp.*, 25 Cal. App. 3d 232, 102 Cal.

It is manifest that a common legal principle underlies all of the foregoing decisions; namely, that in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is immanent in the contract whether the company is attending to the claims of third persons against the insured or to the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.<sup>124</sup>

Finally, Justice Sullivan explained that the requirement of alleging extreme and outrageous conduct contained in section 46, Restatement Second of Torts,<sup>125</sup> was not applicable in situations in which the infliction of mental distress resulted from the tortious invasion of another interest of the insured, in this case, his interest in recovering for loss of his property.

Two court of appeal decisions also have affirmed an award of punitive damages for an insurer's failure reasonably and in good faith to pay the insured's own claims.

In *Wetherbee v. United Insurance Co. of America*,<sup>126</sup> the plaintiff, a woman in her late fifties, bought a disability policy from the defendant which obliged it to pay \$50 per month for life in the event the plaintiff became totally disabled and required continuous confinement and attendance by a physician. After receiving the policy, however, plaintiff became concerned with the complete discretion it seemed to vest in the insurer to withdraw benefits and wrote the company seeking cancellation and a return of her premiums. The company replied that Ms. Wetherbee need not worry; if she became ill or hurt she would "draw" her benefits as long as she lived. She thereafter purchased another policy from the defendant bringing her coverage to \$150 per month in case of disability. Four years later she suffered a crippling stroke. Payments were made under the policies for approximately two years. However, after plaintiff's physician informed the insurance company that she was not continuously confined to home but could get out, albeit only with the aid of a crutch, brace, and the assistance of another person, the payments were terminated. At trial plaintiff was awarded a declaratory judgment requiring the insurer to pay \$150 per month as required by the policy and \$500,000 in punitive damages.

The court of appeal upheld the insurer's liability for punitive damages, pointing to the company's fraudulent misrepresentation, but ordered a new trial on which it deemed excessive. The court held,

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Rptr. 547 (2d Dist. 1972); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78, 47 A.L.R.3d 286 (4th Dist. 1970).

124. 9 Cal. 3d at 575, 510 P.2d at 1036, 108 Cal. Rptr. at 486.

125. RESTATEMENT (SECOND) OF TORTS § 46.

126. 265 Cal. App. 2d 921, 71 Cal. Rptr. 764 (1st Dist. 1968).

moreover, that on retrial the defendant was entitled to an instruction stating: "A sum, if any, awarded as exemplary or punitive damages must bear a reasonable relationship to the actual damages, if any."<sup>127</sup> The trial judge in *Wetherbee*, like the trial judge in *Silberg*, had instructed the jury that punitive damages were within its discretion. On retrial, the jury awarded Ms. Wetherbee \$200,000 and the court of appeal affirmed, finding that the award was neither excessive nor the result of passion or prejudice.<sup>128</sup>

A second case that probably will affect the decision in *Silberg* is *Fletcher v. Western National Life Insurance Co.*<sup>129</sup> Again an insurer refused to pay under a long-term disability policy. Fletcher was employed as a scrap operator at a rubber company. He purchased a disability policy from the defendant which provided for payment of \$150 per month for 30 years in case of permanent disability resulting from injury, but for only two years if the disability resulted from sickness. Two years later, Fletcher sustained various injuries while lifting a 361-pound bale of rubber. The subsequent examination revealed a hernia, and surgery was performed. Although he returned to work, he continued to suffer from the injuries sustained in the accident. Finally he was placed on disability and terminated. Consulting physicians were virtually unanimous in concluding that Fletcher's disability resulted from his accident and recommended spinal fusion to correct a herniated intervertebral disc. Aware of their reports, the insurer's claims manager nevertheless initiated a conscious campaign to deny Fletcher his benefits due under the policy. First, he informed the insured that the company had determined that his disability stemmed from a long-standing congenital defect and therefore payments would be made under the two-year maximum sickness rather than the 30-year injury provisions of the policy. Next, the insurer accused Fletcher of deliberately withholding information concerning this preexisting condition, sought to recover the premiums paid, and then offered to settle if Fletcher dropped his disability claim. Payments were terminated, resumed, and then terminated again at the end of the two-year period prescribed in the policy. Without sufficient funds, the Fletchers lacked adequate clothing, subsisted on macaroni and beans, borrowed money from neighbors to pay utility bills after service was terminated, and kept a daughter out of school on days the mother worked. At the trial the claims manager testified that if faced with the same situation in the

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127. *Id.* at 934, 71 Cal. Rptr. at 771. In ordering a new trial in *Silberg*, the trial judge based his ruling on the *Wetherbee* decision. Petition of Respondent and Cross-Appellant for Hearing in the Supreme Court at 4.

128. *Wetherbee v. United Ins. Co. of America*, 18 Cal. App. 3d 266, 277 95 Cal. Rptr. 678, 682 (1st Dist. 1971).

129. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (4th Dist. 1970).



future, he would follow the same procedure. The jury returned a verdict of \$60,000 compensatory and \$640,000 punitive damages against the insurer and \$10,000 punitive damages against the claims manager. The plaintiff avoided a new trial by accepting a remittitur of the punitive damages against the insurer to \$180,000.

After reviewing the facts, the court of appeal not only found that plaintiff had substantiated his claim for recovery for intentional infliction of mental distress but, foreshadowing *Gruenberg*, held that defendants' actions also gave rise to an action for tortious interference with its insured's protected property interests. As a result, Fletcher's recovery for both the emotional and the economic consequences of defendants' actions, including punitive damages, was affirmed. Echoing in large part the views of Justice Tobriner, the court emphasized the public nature and responsibility of the insurance industry:

Additionally, the special obligations of public utilities and other enterprises affected with the public interest has been noted as significant in the imposition of liability upon such defendants even in the absence of outrageous conduct, apparently upon a policy basis of encouraging fair treatment of the public whom the enterprises serve.

. . . The insurance business is governmentally regulated to a substantial degree. It is affected with a public interest and offers services of a quasi-public nature. An insurer has a special relationship to its insured and has special implied-in-law duties toward the insured. To some extent this special relationship and these special duties take cognizance of the great disparity in the economic situations and bargaining abilities of the insurer and the insured. . . . These considerations are particularly cogent in disability insurance. The very risks insured against presuppose that if and when a claim is made, the insured will be disabled and in strait financial circumstances and, therefore, particularly vulnerable to oppressive tactics on the part of the economically powerful entity.<sup>130</sup>

These factors have a special relevance to *Silberg*, for in this case now before the court, action by the insurer which was not vindictive as in *Fletcher*, nonetheless gave rise to truly Kafkaesque suffering by the insured. The underlying question presented concerns the extent of the insurance company's obligation to meet its insured's reasonable expectations notwithstanding an honest business judgment that no money was owed under the policy.

In March 1966 plaintiff *Silberg* submitted his application for a "Family Hospital Policy" to the defendant. The back of the application form stated in prominent type, "Protect yourself against the medi-

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130. *Id.* at 403-04, 89 Cal. Rptr. at 95 (citations omitted).

cal bills that can ruin you."<sup>131</sup> Six paragraphs in smaller type followed listing various affirmative features of the policy; a portion of the last paragraph stated:

The policy does not cover: pregnancy, losses covered by Workmen's Compensation or Occupational Disease Laws, mental disorders, treatment in Federal Hospitals, war or military service.<sup>132</sup>

Immediately following this paragraph, however, the form stated, in boldface type capital letters "ALL BENEFITS PAYABLE IN FULL REGARDLESS OF ANY OTHER INSURANCE YOU MAY HAVE."<sup>133</sup> The opening language of the policy itself read:

Defendant Hereby Insures \_\_\_\_\_ (herein called the Insured) and, subject to the exceptions, limitations and provisions of this policy promises to pay for loss, except losses covered by any Workmen's Compensation or Occupational Disease Law and treatment or service rendered in any Veterans Administration Hospital, covered by this policy and sustained by the Insured . . . and resulting from injury or sickness; to the extent herein provided.<sup>134</sup>

The section covering exclusions was printed on the fifth page of the policy, and the language pertinent to the *Silberg* case stated:

This policy does not cover any loss caused by or resulting from (1) injury or sickness for which compensation is payable under any Workmen's Compensation or Occupational Disease Law . . .<sup>135</sup>

At the time the policy was issued and when the accident occurred, Silberg operated his own dry cleaning business on premises owned by others and used by them for a coin operated laundry. Under an agreement with his landlord, Silberg was responsible for cleaning and rudimentary maintenance of the washing machines. On July 17, 1966 plaintiff smelled smoke in the washing machine area; as he stood on an operating washing machine to pull an electrical plug, the lid collapsed and the machine severed his right foot at the ankle. Plaintiff was treated at Burbank Community Hospital. The hospital bill totalled approximately \$1,400. Defendant was notified within three days of plaintiff's accident and hospital stay.<sup>136</sup>

The plaintiff's ordeal was compounded as the defendant, upon learning that the plaintiff had applied for workmen's compensation benefits, concluded that the exclusions in the policy precluded coverage for the injuries, notwithstanding the contention of the plaintiff's work-

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131. Petition of Respondent and Cross-Appellant for a Hearing in the Supreme Court at ii.

132. *Id.*

133. *Id.* at ii-iii.

134. *Id.* at iii.

135. *Id.*

136. Opening Brief for Appellant in the Court of Appeal at 3-4.

men's compensation carrier that it was not liable.<sup>137</sup> In the three years following his accident, Silberg experienced a prolonged trauma which not even the insurance industry's worst enemy could have conceived. In this period he had to undergo several more operations; on one occasion he only gained admittance to a hospital by falsifying the amount of funds in his checking account; on another he contrived to have the operation on a Sunday so that the hospital could not check his claim of coverage by the defendant until after the surgery. His deteriorating financial condition resulted in the termination of his lease, refusal by lenders to lend him money, cancellation of the credit card needed to buy drugs, five changes of residence after water and utilities had been cut off for nonpayment, and, finally, repossession of his wheelchair!<sup>138</sup>

Unable to cope with the foregoing, Silberg suffered a nervous breakdown and was confined in the Metropolitan State Hospital for the Mentally Disturbed for four days, two of which were spent in a cell without furniture or facilities. During these three years the defendant was repeatedly advised of the mounting claim by Silberg's agent and various hospitals, but the company adamantly maintained that the policy afforded no coverage.

As evidence of their client's good faith during this period, defendant's counsel cited two letters, the first written to plaintiff's agent on November 8, 1966:

Dear Mr. Brown:

We have your correspondence of November 3, 1966. Whereas you certainly have a right to receive expeditious service on any and all claims, a review of our file indicates that Mr. Silberg has been notified regularly regarding the progress of his claim. As you know the policy excludes benefits for conditions incurred for the insured's course of employment for which he has a right under the Workmen's Compensation law. In keeping with this, we have been advised that Mr. Silberg has filed a claim with the Van Nuys office of the Workmen's Compensation Accident Board and that a hearing has been set for December 6, 1966. This was the reason for the delay originally and we do not feel that we can extend any benefits until this matter has been solved by the Accident Commission Board. Service to our policyholders has always been the prime concern to us and in keeping with this we would be pleased to receive any suggestions or comments which you might have regarding the situation . . . .<sup>139</sup>

In the second letter, written to plaintiff's attorneys on April 2, 1968, approximately one week after Silberg and his workmen's compensation

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137. Petition of Respondent and Cross-Appellant for Hearing in the Supreme Court at 13.

138. Opening Brief for Appellant in the Court of Appeal at 4-14.

139. Petition of Respondent and Cross-Appellant for Hearing in the Supreme Court at 14.

carrier reached a settlement for \$3,700, the defendant asserted that no liability existed under the policy "because of the exclusion stating that the policy does not cover any loss caused by or resulting from injury or sickness for which compensation is payable under any Workmen's Compensation [Law]."<sup>140</sup> That same letter, however, did contain a settlement offer—for \$200.<sup>141</sup>

Various witnesses testified at the trial on the question of the usual interpretation of the exclusion clauses and the practice of insurers when the workmen's compensation carrier also denies liability. There was a split as to the prevailing practice, but most witnesses testified that payment of claims was withheld until a final determination by the state

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140. *Id.* at 16. The brief filed in Support of Defendant, Respondent and Cross-Appellant, by the Health Insurance Association of America contains an appendix which discusses other courts' interpretations of workmen's compensation exclusions. In summary, the research reveals the following: seven cases allowed recovery on finding that plaintiff was ineligible to receive workmen's compensation; two cases allowed recovery because other conditions necessary to the operation of the exclusion had not been met; two cases allowed recovery where a portion of the loss was recovered through workmen's compensation; eleven cases denied recovery where full compensation had been received through workmen's compensation; seven cases denied recovery where a portion of the loss had been paid under workmen's compensation; four cases denied recovery even though the plaintiff recovered no workmen's compensation benefits. Brief for the Health Ins. Ass'n of America as Amicus Curiae. A clause similar to that in Silberg's policy was interpreted in *Burkett v. Continental Cas. Co.*, 271 Cal. App. 2d 360, 76 Cal. Rptr. 476 (1st Dist. 1969), as not requiring the policyholder to file for workmen's compensation benefits to relieve the insurer from its obligation under the policy unless the policy expressly so directs. The Foreword is not discussing this aspect of the case in any detail because even if the weight of authority supports the defendant's interpretation of the exclusionary clause, the central question posed by the Foreword remains: even though the insurer honestly believes that no coverage exists under the policy, what responsibilities to the insured does its obligation of good faith and fair dealing impose. As the text emphasizes, its responsibilities are fiduciary in nature, putting the insured's interest above that of the insurer.

Moreover, although the defendant has claimed that it acted in good faith throughout its dealings with the insured, Silberg contends that after the accident the insurer investigated his prior medical history to determine whether he might have been uninsurable when it issued the policy. Opening Brief for Appellant in the Court of Appeal at 6-7. This practice of insurers was condemned by the supreme court in an opinion written by Justice Tobriner in *Barrera v. State Farm Mut. Auto. Ins. Co.*, 71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 106 (1969), an opinion emphasizing that the insurers' practice of postponing investigation of the insured's personal history until after the filing of a claim thwarted the insured's reasonable expectation that, having received the policy, he was covered. Furthermore, the insurer rested nonpayment on a second ground which, if the appellant is correct, also intimates lack of good faith. Although the policy ostensibly covered expenses incurred within two years after an accident (Opening Brief for Appellant in the Court of Appeal at 19), the respondent contended that it was only liable, if at all, for expenses incurred through December 1966 due to Silberg's failure to renew the policy in January 1967 after receiving no money since his accident the preceding July. Opening Brief for Appellant in the Court of Appeal at 12.

141. Opening Brief for Appellant in the Court of Appeal at 11.

was forthcoming.<sup>142</sup> A claims manager of one insurance company testified, however, that when conflicts developed with the workmen's compensation carrier over major claims, two approaches were available: (1) the insured's carrier and the workmen's compensation carrier could agree that the former would pay under its policy, but if a finding were made later that the latter were liable it would reimburse the claimant's insurer; or (2) the insurance carrier would pay immediately and concurrently file a lien against the workmen's compensation carrier, collectible under accident commission order should liability attach to the workmen's compensation carrier.<sup>143</sup> On the totality of these facts the judge found sufficient ambiguity in the policy to hold that, as written, it covered plaintiff's injury, but also found that the insurer's conduct did not warrant the jury's verdict of \$75,000 compensatory and \$500,000 punitive damages.

After resolving a substantial procedural obstacle,<sup>144</sup> the California Supreme Court will have an opportunity in *Silberg* to clarify the insurers' obligation of good faith and fair dealing. The court must grasp this opportunity for, if the defendant's and amicus' briefs present an accurate picture of the industry's views, insurers still do not grasp the scope of the obligation first described in *Comunale* and *Crisci*. The defendant's position is that its duty of fair play to its insureds is breached only by actual malice, oppression or fraud, and in the absence of these factors, neither compensatory nor punitive damages may be awarded. In other words, the insurers' position is that unless the elements requisite for recovery of punitive damages are proven, plaintiffs may not recover compensatory damages either. Not

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142. *Id.* at 23-25.

143. *Id.* at 21-22.

144. This obstacle is the court's own statement in *Jiminez v. Sears, Roebuck & Co.*, explaining the scope of review of orders granting a new trial:

The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not finally dispose of the matter. So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside.

4 Cal. 3d 379, 387, 482 P.2d 681, 687, 93 Cal. Rptr. 769, 775 (1971). The springboard over this obstacle and onto a discussion of insurance company obligations is furnished by Justice Mosk's opinion in *Mercer v. Perez*, 68 Cal. 2d 104, 436 P.2d 315, 65 Cal. Rptr. 315 (1968), which requires trial judges clearly to set forth their reasons for granting a new trial. Although the trial judge in *Silberg* did set forth his reasons for granting a new trial—erroneous jury instructions and the surprise of the court's declaratory judgment invalidating the defendant's long-standing practice—the supreme court could find that the allegedly erroneous instructions were not prejudicial and, as a matter of law, that the finding that the verdicts were excessive and not supported by the evidence was erroneous for reasons set forth in the body of the opinion delineating the insurer's obligations.

only is this position legally erroneous, but, when translated into policy decisions governing the day-to-day operations of insurers, it is directly responsible for predicaments such as *Silberg's*.<sup>145</sup>

The defendant's argument relies on the cases in which damages have been allowed against insurers for failing to pay claims to their insureds: *Wetherbee*, *Fletcher*, and *Gruenberg*. Although all these cases did contain the elements of egregious fraud or malevolent intent, a conclusion that either of these elements is necessary for recovery too narrowly circumscribes the limits of compensatory damages in insurance cases. A contrary position is supported not only by the policy reasons so well expressed in *Fletcher* but by the case law as well, especially *Crisci*. Liability for compensatory damages attached to the insurer in that case because its failure to settle the claim destroyed that peace of mind and security Mrs. Crisci had reasonably expected when she purchased the policy.<sup>146</sup> Security's decision not to settle was grounded neither in fraud nor in malice but rather in its honest business judgment that it would succeed at trial.<sup>147</sup> Similarly, California Life's decision in *Silberg* largely was grounded in its belief that it was not liable. *Crisci* teaches us, however, that insurance carriers, because they profit from inducing the insured to purchase and rely on their coverage rather than securing other protection against injury, must place the insureds' interests above their own.<sup>148</sup> Given this competitive inequality between insurers and their insureds, even reasonable decisions not to settle within the policy limits should be considered a breach of this duty when the insurer's failure to settle within policy limits results in a judgment against the insured in excess of those limits. Moreover, compensatory damages, as *Crisci* holds, should be recoverable for these same reasons.

The insurers' obligations are also rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements. Loyalty to the public interest may even at times conflict with industry custom and practice. Just as prac-

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145. See Supplemental Brief for Respondent at 1-3 (discussing compensatory and punitive damages).

146. 66 Cal. 2d at 434, 426 P.2d at 179, 58 Cal. Rptr. at 19.

147. *Id.* at 428, 426 P.2d at 175, 58 Cal. Rptr. at 15.

148. The court first quoted the trial court's finding that "the defendant did not give as much consideration to the financial interests of its said insured as it gave to its own interests." and then concluded, "that is all that was required." 66 Cal. 2d at 432, 426 P.2d at 178, 58 Cal. Rptr. at 18. Although the court was only speaking of the award of actual damages, it must apply to compensatory damages as well, because the insurer's breach which gave rise to actual damages in *Crisci* also resulted in the award of \$25,000 in compensatory damages.

tice and custom which permitted the production of defective products was forced to yield to the public's interest in safe products,<sup>149</sup> so, too, must insurance industry practices yield to insureds' reasonable expectations of coverage. Yet, as a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectation of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust.

It was in failing to meet its fiduciary obligations that the insurer in *Silberg* exposed itself to compensatory and even punitive damages. The company was aware of *Silberg's* predicament; its behavior during his financial, physical, and mental collapse can only be described as grossly insensitive, displaying a lack of humanity that should have insulted not only the plaintiff and jurors but California Life's competitors as well. Its actions were the direct result of its misconception of its proper loyalties. The *Silberg* opinion, hopefully, will leave insurers with no doubt that with great power goes great responsibility.

The court's resolution of the punitive damages issue in *Silberg* will also settle the ambiguities that have arisen over the requirements of Civil Code section 3294 governing punitive damages and the claim that punitive damages must bear a reasonable relation to compensatory damages. Section 3294 of the Civil Code states:

. . . where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.<sup>150</sup>

Over the last 15 years a major split has developed among the courts of appeal regarding the elements required for an award of punitive damages under the Civil Code, especially what constitutes implied malice. Some courts have held that without actual malice—without an intent to injure the plaintiff—plaintiff cannot recover punitive damages. Other courts have disagreed, reading the elements of oppression and implied malice as allowing recovery on a showing by plaintiff of the defendant's extreme recklessness. The defendant in *Silberg* has adopted the former position as it was set forth quite recently in *Canada v. Superior Court*,<sup>151</sup> a suit arising from an automobile accident

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149. See, e.g., *Marsh Wood Products Co. v. Babcock & Wilcox Co.*, 207 Wis. 209, 240 N.W. 392 (1932). In this leading case, a manufacturer's assertion that its testing methods reflected the current practice in the industry proved no defense to a negligence action in the face of testimony that another, better method of testing was available.

150. CAL. CIVIL CODE § 3294 (West 1970).

151. 34 Cal. App. 3d 467, 110 Cal. Rptr. 59 (5th Dist. 1973).

in which plaintiff's car was struck by a loaded dump truck whose driver was not only intoxicated at the time of the accident, but lacked a license as well—facts allegedly known by his employer. Distinguishing the proof requisite to showing the wilful misconduct formerly required under the guest statute and that required to show malice under section 3294, the court of appeals said:

However, when aggravated conduct is looked at from the *actor's* viewpoint for the purpose of determining whether he should be punished by being required to pay monies to the plaintiff in addition to compensatory damages his subjective state of mind becomes all-important. It is his actual intent that determines whether he should be punished; for this reason the right to punitive damages cannot be predicated on an objective concept of "recklessness" for this would permit a finding of a *fictitious* motive or intent in place of the actual malice required by section 3294.<sup>152</sup>

Contrary positions were taken in *Toole v. Richardson-Merrell, Inc.*<sup>153</sup> and *Barth v. B.F. Goodrich Tire Co.*<sup>154</sup> *Richardson-Merrell* concerned the defendant's fraudulent distribution of an anticholesterol drug which caused cataracts in the plaintiff's eyes. In response to the appellant's contention that plaintiff had not shown the requisite malice required under section 3294, the court said:

152. *Id.* at 475-76, 110 Cal. Rptr. at 65.

153. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1st Dist. 1967).

154. 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1st Dist. 1968). Another case which has been cited for the same position is *Roth v. Shell Oil Co.*, 185 Cal. App. 2d 676, 8 Cal. Rptr. 514 (4th Dist. 1960). In the *Roth* case, the plaintiffs' working agreement with Shell was abruptly terminated when, without warning, workers employed by the defendant dismantled the Shell sign and painted the gas pumps at plaintiffs' service station. In discussing the jury's award of \$2,000 punitive damages, the court recited the following:

As between oppression and malice, there must be some evidence of one or the other of these elements to justify the jury in making the award. It follows that a tort committed by mistake, in the assertion of a supposed right, or without any wrong intention, and without such recklessness as evidences malice or a conscious disregard of the rights of others, does not warrant punitive damages. Accordingly, if we accept the evidence of the defendant, the jury might well have believed that a tort was committed by mistake. The only question is whether or not a jury might rightfully draw an inference from the evidence produced that there was a conscious disregard for the rights of others which constituted an act of subjecting plaintiffs to cruel and unjust hardship. In all classes and kinds of cases in which exemplary damages are sanctioned, there must be made to appear to the satisfaction of the jury the evil motive, the *animus malus*, shown by malice in fact or by its allied malign traits and characteristics evidenced by fraud or "oppression."

*Id.* at 682, 8 Cal. Rptr. at 517-18 (citation omitted). *Roth* has been cited by both *Canady* and *Richardson-Merril* for support. Thus, while the *Roth* discussion of malice has been read as requiring an evil motive, it can also be read as allowing the jury to infer that evil motive from evidence showing the defendant's "conscious disregard for the rights of others which constituted an act of subjecting plaintiffs to cruel and unjust hardship." Such a finding could have been and apparently was made by the jury in *Silberg*.



Appellant says there was no showing of any deliberate intent to do harm to respondent, and that in the absence of a showing of deliberate intention on the part of appellant to injure respondent the award of punitive damages must fall. But malice in fact, sufficient to support an award of punitive damages on the basis of malice as that term is used in Civil Code section 3294, may be established by a showing that the defendant's wrongful conduct was wilful, intentional, and done in reckless disregard of its possible results. Where, as here, there is evidence that the conduct in question is taken recklessly and without regard to its injurious consequences, the jury may find malice in fact. Such malice is consistent with a personal intent to injure those affected by the defendant's conduct.<sup>155</sup>

In *Barth*, plaintiff's wife was killed when her car overturned after one of its tires, manufactured by the defendant, blew out. Goodrich had not taken any steps to warn buyers of the tires' load capacity and the danger of overloading. Plaintiff's complaint included a prayer for punitive damages. Although the jury failed to award such damages, the defendant on appeal charged error in allowing the punitive damage claim to go to the jury. In response, the court of appeal stated:

. . . the uncontroverted evidence, showing that Goodrich knew of the danger of overloading and deliberately neglected, for business reasons, to caution customers and the unknowing public, would clearly justify the punitive damage charge based on grounds of fraud, malice and oppression.<sup>156</sup>

Certainly Goodrich did not intend that Mrs. Barth die in an automobile accident. Yet, because its intended action was bound to have tragic consequences, it exposed itself to a claim for punitive damages.

The general rule that passion and prejudice are to play no part in the award of punitive damages is a contradiction in terms; punitive damages are nothing but a community expression of shock and outrage as expressed by the jury. To codify the jury's power in this regard is at best difficult, and therefore a broad reading of section 3294 is appropriate. The preferable construction of the statute would place its components in the same category as intentional torts wherein the required intent is not the defendant's desire to harm the plaintiff, but its intent to do an *act*. Where that act is reasonably calculated to cause harm to the plaintiff and does cause harm, the plaintiff may recover under the rubric of intent. Thus, to find the defendant liable for punitive damages in *Silberg*, it would be sufficient that California Life deliberately refused to pay its policyholder and that such refusal, under the facts as known to the defendant, was reasonably calculated to and did cause the plaintiff harm—using the term “calculated” as meaning

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155. 251 Cal. App. 2d at 713, 60 Cal. Rptr. at 415 (citation omitted).

156. 265 Cal. App. 2d at 240-41, 71 Cal. Rptr. at 313.

“apt” or “likely” rather than “intended.” This simply means that the defendant is made responsible for the consequences of his acts. The appropriateness of such a formulation is enhanced by the statutory description of the purposes ascribed to these damages—“for the sake of example and by way of punishing the defendant.”

The law governing the determination of the amount of punitive damages needs clarification; and *Silberg* presents the court with an opportunity to provide it. Decisions by trial judges remitting damages awarded by juries are no less the result of visceral reaction than the juries' original awards. And the law is significantly blank on the standards which courts should apply in assessing the awards. The requirement of *Finney v. Lockhart*<sup>157</sup> that “the exemplary should bear a reasonable relation to the actual damages”<sup>158</sup> is rendered almost meaningless by that decision's concession that no fixed ratio exists by which to determine the proper proportion between the two classes of damages. The official reports of later decisions contain no standards and little reasoning; rather certain dollar amounts are sustained and others disallowed. Little more than a rule of thumb governing upper limits on damages can be ascertained from the cases. Thus in *Wetherbee I*, punitive damages of \$500,000 in light of actual damages of \$1,050 were held excessive;<sup>159</sup> in *Wetherbee II* punitive damages of \$200,000 in light of the same actual damages were upheld (ratio of 500-1 too great, 200-1 acceptable).<sup>160</sup> In *Fletcher*, the judge reduced the \$640,000 punitive damages to \$180,000 in light of plaintiff's recovery of compensatory damages of \$60,000 and payments under the policy of \$54,000 over 30 years<sup>161</sup> (punitive-compensatory ratio of 10-1 rejected by the trial court, reduction to 3-1 approved on appeal).<sup>162</sup> In *Silberg*, punitive damages of \$500,000 were ruled excessive in light of the \$75,000 compensatory damages (also considered excessive) and the \$4,900 owing under the policy.<sup>163</sup> Thus where very high compensatory damages are awarded, punitive awards will be allowed only up to a maximum of around \$200,000, regardless of the resulting low ratio of punitive to compensatory damages.

A fixed rule establishing a maximum ratio with an upper limit on allowable awards would not, however, be beneficial, while an upper limit might be excessive against one defendant, it might be an insignifi-

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157. 35 Cal. 2d 161, 217 P.2d 19 (1950).

158. *Id.* at 164, 217 P.2d at 21.

159. 265 Cal. App. 2d 921, 933, 71 Cal. Rptr. 764, 771.

160. 18 Cal. App. 3d 266, 272, 95 Cal. Rptr. 678, 682.

161. 10 Cal. App. 3d 376, 385, 89 Cal. Rptr. 78, 82.

162. *Id.* at 408-09, 89 Cal. Rptr. at 98-99.

163. Petition of Respondent and Cross-Appellant for Hearing in the Supreme Court at 4.

cant sanction of another better able to bear it. The flexibility required to respond to successive, novel fact situations precludes arbitrary limits. The court, however, can improve upon the mere "reasonable relation" requirement by setting forth the specific considerations which courts must take into account and illustrating their proper application in the *Silberg* case now before it. Among the considerations the court might list would be: the defendant's intent, his motive, the actual effect of his actions, the foreseeability that his actions would lead to these effects, the deterrent effect of the award in the particular case, and the financial condition of the defendant.

Applying these considerations to *Silberg*, we find recklessness rather than an intent to injure the insured. The defendant's motive, if one existed, was the protection of its financial position. While defendant knew that *Silberg's* financial and emotional deterioration was caused by its continuing refusal to pay (a key element in this extraordinary case), the extent of its knowledge is not clear from the record. Finally, weighing the defendant's financial condition and the probable deterrent effect of the damages, we have an award which may well affect the conduct of an entire industry imposed against a defendant with a very deep pocket. Taking all these factors together, it appears that punitive damages are justified in *Silberg* although the award need not have been as substantial as that granted by the jury. The lack of evil intent (such as was present in *Fletcher*) must result in a reduction of the award. In making this clear, the court should not set a dollar figure but should emphasize those factors which the trial court must consider on remand.

Combining specific standards with the requirement of Code of Civil Procedure section 657 that trial courts must specify in detail their reasons for granting new trials should improve the currently hazy law governing punitive damages. Flexibility will remain, as will great variances in punitive damages. But at least these variances will reflect the application of specific standards set down by the supreme court. It is hoped that the court will take the important first step in deciding the issues in *Silberg*.

#### *D. Consumers Versus Manufacturers: Renewed Vigor for the Doctrine of Products Liability*

The California Supreme Court has made great strides in protecting individuals from the exercise of arbitrary power—whether manifested in decisions of professional societies, irrational legislation, or adhesion contracts. Particularly far-reaching has been the protection afforded consumers of defectively manufactured products by the doctrine of strict liability in tort, propounded in Chief Justice Traynor's land-

mark opinion, *Greenman v. Yuba Power Products, Inc.*<sup>164</sup> As Justice Tobriner has pointed out, the individual's inability to bargain effectively is a central justification for this doctrine:

The philosophy behind this momentous pronouncement fundamentally issued from the kind of society in which we live—a society in which the individual is dependent for safety and even survival upon institutions over which he has no control. In the mass market the consumer must purchase a standardized product; he has no opportunity to bargain with the producer as to the kind or quality of the product. The least protection that the law should afford him is an assurance that the product perform properly; that it meet its reasonable expectation that it operate safely in the manner that the producer implicitly represents.<sup>165</sup>

Several cases now pending will determine whether the court will continue to expand the scope of consumer protection as it has in the years since *Greenman*, or will call a halt to this shift in the balance of power between business and the consuming public. The cases now before the court come in the wake of three recent decisions construing strict liability doctrine. These recent advances have included the expansion of the concept of design defect in *Pike v. Frank G. Hough Co.*;<sup>166</sup> elimination of the requirement that a product be not only defective, but "unreasonably dangerous" in *Cronin v. J.B.E. Olson Corp.*;<sup>167</sup> and rejection of a requirement that a plaintiff prove he was unaware of the defect which caused injury in *Luque v. McLean*.<sup>168</sup>

In *Pike v. Frank G. Hough Co.*, the plaintiff's decedent was a construction worker, directing dump trucks at a dam construction site. He was standing approximately 30 to 40 feet behind a paydozer when it backed into him, causing his death. The paydozer, manufactured by the defendant, was designed without either rearview mirrors or an audible or visible backup signal. The machine's design created a rectangular blind spot measuring 48 by 20 feet behind the operator. At the close of plaintiff's case, the trial judge granted a nonsuit on the issues of negligent design and strict liability for defective design. Writing for a unanimous court, Justice Mosk reversed on both issues, finding sufficient evidence from which the jury could find for the plaintiffs on both counts. Speaking to the issue of defective design under strict liability, he said:

Most reported cases in California and other jurisdictions have applied strict liability to products containing defects in their manufacture;

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164. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

165. Tobriner *Retrospective*, *supra* note 1, at

166. 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

167. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

168. 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

few have involved defects in design. However, there is no rational distinction between design and manufacture in this context, since a product may be equally defective and dangerous if its design subjects protected persons to unreasonable risk as if its manufacture does so.<sup>169</sup>

Thirty months to the day after *Pike*, in the *Cronin* case, the court eliminated the need for plaintiffs proceeding under strict liability theories to prove that a defective product was “unreasonably dangerous.” When a collision forced Cronin’s bread delivery truck into a roadside ditch, the impact snapped a safety hasp intended to hold the bread trays in place. Loaded trays were driven forward by the impact, striking plaintiff in the back and hurling him through the windshield. Plaintiff’s expert witness testified that the hasp broke because it had been designed and made with porous metal, incapable of withstanding “any force—reasonable forces at all.”<sup>170</sup> The jury awarded Cronin \$45,000.

Defendants contended on appeal that the jury instructions on strict liability should have required a finding that the defective hasp was unreasonably dangerous, the standard used in the Restatement of Torts, Second, section 402 A.

Justice Sullivan explained that the Restatement, while usually authoritative, did not supercede *Greenman*, which nowhere conditioned recovery on the showing that the product was not only defective but also unreasonably dangerous. In rejecting this requirement, the court noted that its acceptance would place on the plaintiff a of proof burden similar to that in negligence cases, a burden strict liability doctrine expressly had sought to remove. Turning to the application of this holding to defects in design rather than manufacture, the court said:

We can see no difficulty in applying the *Greenman* formulation to the full range of products liability situations, including those involving “design defects.” A defect may emerge from the mind of the designer as well as from the hand of the workman. . . . Although it is easier to see the “defect” in a single, imperfectly fashioned product than in an entire line badly conceived, a distinction between manufacture and design defects is not tenable.<sup>171</sup>

In *Luque v. McLean*, decided the same day as *Cronin*, Justice Sullivan corrected a deviation that had entered the doctrine of strict liability when the drafters of California’s Book of Approved Jury Instructions (BAJI)<sup>172</sup> strayed from the path marked for them by the court in *Greenman*. This error was occasioned not by reliance on the

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169. 2 Cal. 3d at 475, 467 P.2d at 236, 85 Cal. Rptr. at 636.

170. 8 Cal. 3d at 126, 501 P.2d at 1157, 104 Cal. Rptr. at 437.

171. *Id.* at 134, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

172. BOOK OF APPROVED JURY INSTRUCTIONS (West 1969).

Second Restatement, but by an ambiguity in *Greenman* itself. At one point in the opinion of the court Justice Traynor explicitly set forth the factors giving rise to strict liability in tort:

a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.<sup>173</sup>

The clarity of this statement, however, was diminished by the opinion's conclusion, which implied that a plaintiff must prove lack of awareness of the defect.<sup>174</sup> In *Luque*, plaintiff's hand had been mangled by the rotary blade of a lawnmower. At the close of trial the jury was instructed that plaintiff's lack of awareness of the alleged defect was one of the facts plaintiff had to establish by a preponderance of the evidence before he was entitled to recover from the lawnmower manufacturer. The jury returned a verdict for the defendant.

On appeal Justice Sullivan explained with Talmudic skill that *Greenman* did not place the burden of proof on this issue on the plaintiff. Traynor's conclusion, he said, was not intended to list all factors essential to a strict liability case but rather to emphasize that under a theory of strict liability, plaintiff was not required to prove the elements that comprise a claim under a theory of warranty. The instruction given at Luque's trial deviated from *Greenman* in two ways:

[S]uch an instruction in effect told the jury either that plaintiff was required to prove that the defect was latent or that plaintiff was required to prove that he had not assumed the risk of the defect. Under either interpretation, the instruction was an incorrect statement of the law.<sup>175</sup>

Finding it probable that the verdict may have been influenced by the erroneous instruction the court adhered to its policy precluding speculation about the basis of the verdict and remanded the case for a new trial.<sup>176</sup>

The court's appreciation for the principles enunciated in *Pike*, *Cronin* and *Luque* will determine the outcome of two cases now before the court: *Hauter v. Zogarts*,<sup>177</sup> and *Henderson v. Harnischfeger*

173. 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

174. To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use. *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

175. 8 Cal. 3d at 146, 501 P.2d at 1170, 104 Cal. Rptr. at 450.

176. "Where it seems probable that the jury's verdict may have been based on the erroneous instruction, prejudice appears, and this court should not speculate on the basis for the verdict." *Id.* at 146-47, 501 P.2d at 1170, 104 Cal. Rptr. at 450, quoting *Vistica v. Presbyterian Hosp.*, 67 Cal. 2d 465, 471, 432 P.2d 193, 197, 62 Cal. Rptr. 577, 581 (1967).

177. L.A. 30216, hearing granted, Cal. Sup. Ct., Oct. 31, 1973.

*Corp.*<sup>178</sup> While neither decision is likely to produce a significant breakthrough in products liability, taken together the cases offer the current court an opportunity to express its views of the strict liability doctrine and to strengthen it.<sup>179</sup> The decisions also should clarify two elements of the strict liability doctrine: whether products must be “accident proof,” and the defenses of misuse and assumption of the risk. After sketching the facts of each case and noting the issues unique to each one, the Foreword will discuss the questions common to both.

### 1. *Hauter v. Zogarts*

In the fall of 1966, the mother of 13 year old Fred Hauter selected

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178. Sac. 8000, *hearing granted*, Cal. Sup. Ct., Nov. 15, 1973.

179. Also before the court awaiting decision is another products liability case, *Horn v. General Motors Corp.*, L.A. 30235, *hearing granted*, Cal. Sup. Ct., Dec. 27, 1973, in which the court will consider the application of the seat belt defense in a strict liability setting. The plaintiff swerved into an embankment to avoid an oncoming car. Before impact, she knocked the horn cap off the steering wheel. On impact her face struck the exposed prongs. She was not wearing a lap belt. At the trial, the judge rejected the defendant's offer of proof that the injuries to Ms. Horn's face either would not have occurred or would have been minimized had she been wearing a seat belt. The jury awarded her \$45,000.

The court of appeals reversed, ruling that defendant could introduce its evidence to raise the defense of assumption of risk, to attempt to show the plaintiff's misuse of an overall safe vehicle, or at least to demonstrate through expert testimony that plaintiff's injuries would have been minimized had she been wearing a seat belt.

Although one court of appeals has held that failure to wear a seat belt could be evidence of contributory negligence, *Truman v. Vargas*, 275 Cal. App. 2d 976, 80 Cal. Rptr. 373 (2d Dist. 1969), the policies underlying a defense of contributory negligence are inapposite in a strict liability action.

Ordinarily contributory negligence does not bar recovery in a strict liability action. “The only form of plaintiff's negligence that is a defense to strict liability is that which consists in *voluntarily and unreasonably proceeding to encounter a known danger*, more commonly referred to as assumption of risk.

For such a defense to arise, the user or consumer must become aware of the defect and danger and still proceed unreasonably to make use of the product.”

*Luque v. McLean*, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169-1170, 104 Cal. Rptr. 443, 449-450, *quoting* *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 243, 71 Cal. Rptr. 306, 314 (1st Dist. 1968). Permitting such a defense would thwart the law's aim of forcing manufacturers to build safe products. Moreover, the defendants' reliance on assumption of risk in this case is quite misplaced. No evidence exists that Ms. Horn was aware of the defective horn cap, or that she voluntarily encountered it.

Finally, although the plaintiff's verdict in *Horn* takes any question regarding the accident-proof instruction out of the case, the rule of law supporting that instruction is at the heart of the appeal. The defendants' argument that automobiles need not be accident-proof is met by the plaintiff's contention that cars must be somewhat crash-worthy because accidents are reasonably foreseeable by the manufacturer. This issue, however, should raise little difficulty for the court. The second-collision injury in which the injuries are sustained as a consequence of the vehicle's inability to withstand the collision is not new to the court. *Cronin* was such a case; the plaintiff's injuries were caused not by the truck's impact in the ditch but by a bread rack which became unfastened as a result of a defective hasp which could not withstand the crash. 8 Cal.

her son's Christmas present from a mail order catalogue.<sup>180</sup> Called a "Gizmo," the present was touted as a "completely equipped backyard driving range"<sup>181</sup> and included a golf ball, tee, cords and stakes. When Fred opened the package he noticed a label which stated in part, "completely safe ball will not hit player."<sup>182</sup> When assembled, the "Gizmo" consisted of an elastic cord looped over two stakes driven into the ground 25 inches apart. Attached to the elastic cord at a right angle was a cotton cord 21 feet in length which, in turn, was attached to a golf ball at the other end, forming a T with the ball at the base and the two stakes at the T's arms.<sup>183</sup> The golfer was to stretch the cotton cord to its full length perpendicular to the elastic cord, place the attached ball on a tee, and swing. The "Gizmo" functioned as a self-teaching device; its instructions informed the user that balls returning to the left indicated a slice, balls returning to the right indicated a hook, and balls that were topped would not return.<sup>184</sup> No mention was made of balls that were undercut. One June day in 1967, Fred assembled the "Gizmo," having used it approximately a dozen times in the past.<sup>185</sup> Using a seven iron, Fred took a full swing<sup>186</sup> and undercut the ball which struck him in the head, rendering him epileptic.

In support of plaintiff's claim for personal injury, one safety engineer, terming the product "a major safety hazard," explained that the injury occurred after the club became entangled in the cord, causing the ball to hit plaintiff's temple.<sup>187</sup> The defendants adopted a singular trial strategy: they presented no expert witnesses; instead they readily acknowledged that the injury occurred exactly as plaintiff's witnesses explained and could have happened to anyone, countering that such injury did not warrant labeling the product defective.<sup>188</sup> Their strategy

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3d 121, 501 P.2d 1153, 104 Cal. Rptr. 629 (1972). *Horn*, however, offers the court an excellent opportunity to explain the exact nature of the manufacturer's duty to produce safe products.

180. Petition of Respondent for a Hearing in the Supreme Court at 9.

181. *Hauter v. Zogarts*, 2 Civ. 40868 (unpub.), reprinted as the Appendix in Petition of Respondent for a Hearing in the Supreme Court at A 3.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at A 4.

186. *Id.*

187. *Id.*

188. This strategy is reflected in defending counsel's response to plaintiff's successful attempt to introduce expert testimony to explain the accident and evaluate the "Gizmo's" safety:

Your Honor, I don't know if it really calls for expert testimony because it is obvious if you miss the ball and you come along, you touch the cord, that you could possibly get it either in the head or some other part of your person, and there is no way in the world that I am going to be able to show that couldn't happen to any of us here, and I don't think this would require expert testimony. It is not the type of testimony that in any way needs any expert.



won over the jury; it returned unanimous verdicts rejecting plaintiff's causes of action of strict liability in tort, misrepresentation, and breach of warranty. The trial judge, however, entered judgment notwithstanding the verdict on all counts.

The court of appeal reversed. Applying the standard of review on appeals from judgment *n.o.v.*, the court found that evidence existed from which the jury could reach its verdict. First, the court noted that the simplicity of the mechanism allowed the jury to look beyond the expert testimony and conclude that no design defect existed.<sup>189</sup> Second, the court held that the jury properly could conclude that the representation of complete safety was applicable only if the ball were hit squarely in the approved manner, and that plaintiffs had no right to rely thereon as a guarantee against all possible injury. Such finding would constitute sufficient evidence to support the jury's verdict as to plaintiff's theory of false representation, whether the representation be deemed one of fact or opinion.<sup>190</sup>

## 2. Henderson v. Harnischfeger Corp.

In June 1969, Thomas Henderson was working as a crane oiler at a construction job. On the morning of the accident, Henderson's supervisor had reminded him that the crane operator could not see the rear of the crane where the counterweight was located. Later that morning, rather than use an adjacent rest room, Henderson urinated against a wheel of the crane; he was standing in the operator's blind spot and was killed when struck by the turning crane. The crane had no rearview mirror to aid the operator or sounding device to warn bystanders.<sup>191</sup> At the close of evidence in the suit against the crane manufacturer for wrongful death, the court presented both strict liability and assumption of risk instructions. In the former, the judge directed the jury that the manufacturer need not design an accident proof product, and explained that in order to recover plaintiff had the burden of proving that the deceased was unaware of the claimed defect and that the defect, if it existed, made the product unreasonably dangerous and unsafe for its intended use.<sup>192</sup> During its deliberations the jury re-

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It is open and obvious. If someone gets out there, they hit the ball, they are going to get hit in the head or they are going to get hit someplace else.

*Id.* at 5.

189. *Id.* at A 6.

190. *Id.* at A 8.

191. Henderson v. Harnischfeger Corp., 3 Civ. 13253 (unpub.) (3d Dist. 1973), reprinted as Exhibit A to Petition of Appellant for a Hearing in the Supreme Court at A 2-3.

192. *Id.* at A 4-5. The instruction followed BAJI instruction 9.01:

The defendant . . . is not required under the law so to create and deliver its product as to make it accident proof; however, he is liable to the plaintiff

quested the court to reread the strict liability instruction on two occasions.<sup>193</sup> The jury returned a general verdict for the defendant.

During the pendency of the appeal, the supreme court decided *Cronin* and *Luque*, the former discarding the "unreasonably dangerous" prerequisite to recovery, the latter holding that plaintiff does not shoulder the burden of proving his unawareness of the defect prior to the accident. Although confronted with clear error under *Cronin* and *Luque*, the court of appeal sustained the jury's verdict in *Henderson*. After noting that the jury had been given proper instructions covering assumption of risk,<sup>194</sup> the court found sufficient evidence in the record from which the jury could have found that Henderson had indeed assumed the risk and thus the court sustained the verdict.<sup>195</sup> It concluded that the jury had not been misled on assumption of risk by the court's error in instructions regarding plaintiff's awareness of the defect as precluding recovery. Moreover, the court implied that by failing to request a special verdict the plaintiff was estopped from attacking the erroneous instruction.<sup>196</sup> Finally, it determined that a remand was not required for although the combination of a general verdict and erroneous jury instructions had sufficed to secure a remand in *Luque*. The court distinguished *Luque* by noting that only one issue was left to the jury there, while here there were two,<sup>197</sup> citing *Gillespie v. Rawlings*<sup>198</sup> for the proposition that "a general verdict will not be disturbed

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for any injury suffered by him if the plaintiff establishes by a preponderance of the evidence all of the facts necessary to prove each of the following conditions:

First: The defendant placed the \_\_\_\_\_ in question on the market for use, and the defendant knew, or in the exercise of reasonable care should have known, that the particular \_\_\_\_\_ would be used without inspection for defects in the particular part, mechanism or design which is claimed to have been defective;

Second: The \_\_\_\_\_ was defective in design or manufacture at the time it was placed on the market and delivered.

Third: The plaintiff was unaware of the claimed defect.

Fourth: The claimed defect was a (proximate) (legal) cause of any such injury to the plaintiff occurring while the \_\_\_\_\_ was being used in the way and for the general purpose for which it was designed and intended, and,

Fifth: The defect, if it existed, made the product unreasonably dangerous for its intended use.

(An article is unreasonably dangerous if it is 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.)

BOOK OF APPROVED JURY INSTRUCTIONS 9.01 (West 1969).

193. Petition of Appellant for a Hearing in the Supreme Court at 22.

194. *Id.* at A 10-11.

195. *Id.* at A 11.

196. *Id.* at A 13-14, citing *McCloud v. Roy Riegels Chemicals*, 20 Cal. App. 3d 928, 936, 97 Cal. Rptr. 910, 915 (3d Dist. 1971).

197. *Id.* at A 14.

198. 49 Cal. 2d 359, 317 P.2d 601 (1957).

by an appellate court if a single one of several issues is supported by substantial evidence and unaffected by error."<sup>199</sup>

### 3. *Anticipating the Developments*

In these pending cases, the supreme court will continue its efforts to define the scope of the suppliers' obligations and to describe those actions of injured plaintiffs which will preclude judicial vindication of their claims. These efforts will be best guided by the principle upon which strict liability doctrine is based: the purchaser's reasonable expectation of safety should be protected by placing the responsibility for ensuring safety where it will have the greatest impact—on the manufacturer. As Justice Traynor aptly described the doctrine's purpose in *Greenman*:

The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons who are powerless to protect themselves.<sup>200</sup>

In each of the products liability cases awaiting decision, the court will have to rule on the applicability of defendants' arguments that products need not be accident-proof, and that the plaintiffs' conduct and not the alleged defect was the proximate cause of their injuries. Thus in *Hauter v. Zogarts* the defendants argued that the obvious possibility of accident resulting from the use of the "Gizmo" did not render the product defective, and this claim is buttressed by the appellate court's conclusion that the jury could have found that the "Gizmo's" "completely safe" label applied only if the player hit the ball squarely. In *Henderson v. Harnischfeger Corp.*, the appellate court held that decedent's actions warranted a jury finding that he had assumed the risk of the defect but prefaced that holding with an express approval of that portion of the standard products liability jury instruction cautioning that the law did not require the defendant to create and deliver an accident-proof product.

These cases provide an opportunity for the supreme court to protect consumers' reasonable expectation of product safety by eliminating the superfluous accident-proof instruction and further restricting the assumption of risk defense. The court should excise the accident-proof instruction because (a) it emasculates the law's protection in those cases in which the product has actually been labeled "accident-

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199. Actually a quote from *Posz v. Burchell*, 209 Cal. App. 2d 324, 335-36, 25 Cal. Rptr. 896, 903 (5th Dist. 1962). This quote also appears in *McCloud v. Roy Riegels Chemicals*, 20 Cal. App. 3d at 935-36, 97 Cal. Rptr. at 915, quoting *Posz v. Burchell*. Petition of Appellant for a Hearing in the Supreme Court at A 14.

200. 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

proof;" and (b) any function the instruction promotes is adequately protected by proper judicial administration of the assumption of risk defense.

Whatever the reasonable expectations of the purchaser or user typically may be, expectations of safety are increased by labels which describe the product as accident-proof. Any manufacturer or supplier who so warrants his product creates in himself a duty to create or deliver products in such condition. Although such labels can be contested by charging breach of warranty, securer protection is afforded the injured party suing under tort law by section 402 B of the Second Restatement:

One engaged in the business of selling chattles who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

- (a) it is not made fraudulently or negligently, and
- (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.<sup>201</sup>

The accident-proof instruction may influence a jury wrongly to undervalue the seller's representation of safety. For example, the record in *Hauter* does not disclose whether an accident-proof instruction was given, but the verdict indicates that the defense successfully undercut the scope of its claim on the label that the "Gizmo" was "completely safe." Elimination of the accident-proof instruction will foster the aims of the Restatement by eliminating a source of potential, if not actual, jury confusion on the issue of representation.<sup>202</sup>

The accident-proof instruction will not be missed, for not only can it confuse the jury on the manufacturer's liability for misrepresentation but it adds nothing to the defendant's protection against a

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201. RESTATEMENT (SECOND) OF TORTS § 402 B (1965).

202. In those cases in which an alleged defect has resulted in injury but no express claims of safety have been made by the supplier, the instruction obfuscates the jury's role of determining whether a specific injury was proximately caused by a defect in a product manufactured, delivered, or sold by the defendant and used in a reasonably foreseeable manner by an individual not voluntarily assuming the risk posed by the defect. Contentions that there is no duty to produce accident-proof products notwithstanding, a jury's affirmative response to the foregoing query attaches liability to the defendant. Nothing more, nothing less is required. This applies to the "Gizmo" which struck Hauter, the horn assembly which was struck by Horn and the crane which crushed Henderson. The accident-proof instruction only diverts the jury from determining whether the elements of strict liability have been shown; it should therefore be eliminated.

finding of liability. The only possible purpose served by the accident-proof instruction is informing the jury that under certain circumstances an accident proximately caused by a defect in defendant's product will not result in liability. The instruction can have no other purpose for, under *Greenman*, strict liability automatically attaches whenever a manufacturer places an article on the market knowing it is to be used without inspection for defects, and that article "proves to have a defect that causes injury to a human being."<sup>203</sup> Only where a particular misuse of the product is not reasonably foreseeable by the supplier or where there is assumption of the risk does the injured party forfeit his reasonable expectation of product safety. These defenses, however, may adequately be tendered to the jury by separate instructions noting first, that the defendant is only liable for injuries incurred during use foreseeable by the supplier, and second, that the plaintiff cannot recover for injury resulting from the voluntary and unreasonable encounter of the danger posed by the defect. An accident-proof instruction adds nothing.

The specific goal of allocating the costs of producing safe products to the suppliers is enhanced by limiting the available defenses to assumption of the risk<sup>204</sup> and misuse not reasonably foreseeable by the manufacturer.<sup>205</sup> The manufacturer is in a unique position to prevent injuries, including those resulting from misuse. Developments in product design may suggest uses beyond the ambit of the obvious or of that specifically intended by the manufacturer. Furthermore, misuse is so subjective a term that the public is best protected by requiring the manufacturer to guard against all reasonably foreseeable alternative uses for the product. This policy of placing the responsibility for product safety on manufacturers compels a clear rejection of the defense of misuse in *Hauter* and a holding remanding *Henderson* for a new trial under properly restricted instructions on assumption of risk. The defendants' contention in *Hauter* that they should not be strictly liable if the golf ball causing plaintiff's injuries was not hit squarely is totally devoid of merit. Leaving aside the misrepresentation of safety on the label, and even acknowledging that undercutting the ball was a misuse of the "Gizmo," such a misuse was foreseeable to a manufacturer labeling his product as an instructional device. On the other hand, the

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203. 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

204. RESTATEMENT (SECOND) OF TORTS § 402 A, comment n (1965).

205. This is a combination of language in *Greenman*, 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701, emphasizing that the injury resulted from the intended use of a product, and from court of appeal decisions holding that the defendant was responsible for injuries resulting from misuse, if that misuse was reasonably foreseeable by the manufacturer. *Thompson v. Package Machinery Co.*, 22 Cal. App. 3d 188, 99 Cal. Rptr. 281 (2d Dist. 1971); *Thomas v. General Motors Corp.*, 13 Cal. App. 3d 81, 91 Cal. Rptr. 301 (4th Dist. 1970).

jury may have concluded, as the defense argued, that common sense dictated to anyone who inspected the "Gizmo" that injury could result. Yet such a conclusion was error as a matter of law, for the defendants introduced no evidence that young Fred either knew that a defect existed or appreciated the danger it posed. To admit a "common sense" defense, especially when consumers are likely to be children, is to abandon the balancing of interests represented by strict liability, since failure to use common sense would be at most contributory negligence, not a proper strict liability defense.<sup>206</sup>

*Henderson* calls for clarification by the court of the assumption of risk defense, a clarification that either could narrow or enlarge the scope of protection against unsafe products offered by strict liability in California. The court is faced with several uncontroverted facts. No doubt exists that Henderson, an experienced workman, was in the danger zone when killed. Moreover, he had been warned earlier in the day of the blind spot to the crane operator's left. Yet, for all this circumstantial evidence, no one knows what Thomas Henderson was thinking when he entered the forbidden area. Was his foray the result of mere inadvertence? Was he so lazy that he weighed the distance of the walk to the rest room against the risk of injury from the crane's boom and chose the latter? Or was his death simply the result of a missed signal? While the present state of the law allows the jury in a products liability action to infer any of these conclusions from the undisputed facts, the court could restrict the jury's discretion by holding that the assumption of the risk defense is only available when the defendant proves that the injured individual had actual knowledge and appreciation of the risk assumed at the time he entered the danger zone. Appreciation of the danger evidenced at a time not directly proximate to the accident should be insufficient. Limiting the defense in this way where cases involve death would be tantamount to requiring that the defendant show deliberate recklessness or else suicidal intent on the part of the victim. Because witnesses usually will have little knowledge of a victim's actual appreciation of the danger at the time of his death, this requirement effectively would remove the defense in product liability cases.

*Henderson* itself, however, reveals the benefits of such a result. No doubt exists that Henderson was warned earlier in the day. But no doubt exists also that a rearview mirror or sounding device—together costing a miniscule amount when compared to the enhancement of safety they would achieve—would have prevented the tragedy. Moreover, it is not unreasonable to conclude that the defendant could

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206. RESTATEMENT (SECOND) OF TORTS § 402 A, comment *n* (1965); see note 179, *supra*.

have foreseen that workmen might stray into the danger zone during the crane's operation. Not all would have been warned; not all would have been as experienced as Henderson. More significantly, a decision explicitly allowing the jury wide discretion in inferring an assumption of the risk would not result in fewer workmen entering zones of danger: men at job sites have neither the time nor inclination to follow the advance sheets. A ruling restricting the assumption of risk defense, however, would have an impact. It would not only place the cost of insuring safe machines on the manufacturer, but it is quite likely that manufacturers, unlike workmen, would be spurred to action by a court decision.

### CONCLUSION

The preceding pages have applied the maxim, "the past is prologue" by analyzing cases now awaiting decision by the California Supreme Court through the perspective of doctrines fashioned by Justice Tobriner and his colleagues in prior cases. These doctrines have been developed to equalize the bargaining power of the economically disparate elements of society by ensuring that weaker parties' reasonable expectations are met. They emanate from the court's deeply held belief that the massive public and private entities with which the public continuously deals must be accountable for their actions. At a minimum, these entities have a duty to act reasonably and fairly with whom they deal—the quid pro quo of their public charters. In this effort Justice Tobriner has not stood alone by any means. If such were the case, his opinions would be but dissents, vainly crying in the wilderness. He has been joined by able and farsighted colleagues: Justice Raymond Sullivan, whose devotion to precedent and intellectual honesty while forcing the court to avoid easy solutions, enables it to render decisions that should stand the test of time; Justice Louis Burke, whose so-called conservative outlook includes a passion for fairness and due process; Justice Stanley Mosk, whose loyalty to the underdog sometimes finds him as Justice Tobriner's sole ally in dissent; and Chief Justice Donald Wright whose blend of courage, kindness, and an open mind has brought out the best in each of his colleagues and enabled the court to excel.

Yet it is Justice Tobriner whose work has been a focal point for this piece. Underlying his decisions has been the realization that the common law must be steeped in the realities of the present and not the myths of the past. Even his leading decisions of constitutional law are simply restatements of his belief in replacing the common law tailored to old relationships with decisions respecting present condi-

tions. Thus, the use of "due process" in *Randone*<sup>207</sup> was simply the employment of the best available tool to bring about equality of bargaining power in another sphere, debtor-creditor relations. His use of "equal protection" in *Brown v. Merlo*<sup>208</sup> was nothing more than the employment of the best available tool to reflect his abiding belief that the legislature, like other entities affected with the public interest, must act rationally and will be held accountable when it does not. Both *Randone* and *Brown* manifest Tobriner's awareness that changing conditions mandate changes in the common law: what was fair may be no longer fair; what was rational may be no longer rational.

Nowhere is this sensitivity to current conditions more evidenced than in Justice Tobriner's opinion in *Green v. Superior Court*,<sup>209</sup> the recent decision decreeing that warranties of habitability are part and parcel of residential leases. As the opinion unfolds, it carries with it his unmistakable hand: he notes the changing relationship of landlord and tenant, the current economic disparity which now often exists between the two, the renter's reasonable expectation of habitable premises, and concludes that the traditional common law rule is not reasonably related to realities of today's relationships. His closing quote from Cardozo's "The Growth of the Law" is also a fitting conclusion for this piece:

A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* or the day, may be abrogated by courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience. . . . This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.<sup>210</sup>

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207. *Randone v. Appellate Dept.*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

208. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

209. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

210. B. CARDOZO, *THE GROWTH OF THE LAW* 136-37, *quoted in* *Green v. Superior Court*, 10 Cal. 3d 616, 640, 517 P.2d 1168, 1184, 111 Cal. Rptr. 704, 720 (1974).