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INVITATION TO COMMENT

CACI14-02

| | |
|---|---|
| Title | Action Requested |
| Civil Jury Instructions (CACI) Revisions | Review and submit comments by August 29, 2014 |
| Proposed Rules, Forms, Standards, or Statutes | Proposed Effective Date |
| Add, revise, and revoke jury instructions and verdict forms | December 12, 2014 |
| Proposed by | Contact |
| Advisory Committee on Civil Jury Instructions | Bruce Greenlee, Attorney, 415-865-7698 bruce.greenlee@jud.ca.gov |
| Hon. H. Walter Croskey, Chair | |

Executive Summary and Origin

The Judicial Council Advisory Committee on Civil Jury Instructions has posted proposed revisions and additions to, and revocation of, the Judicial Council civil jury instructions (CACI). Under Rule 10.58 of the California Rules of Court, the advisory committee is responsible for regularly reviewing case law and statutes affecting jury instructions and making recommendations to the Judicial Council for updating, revising, and adding topics to the council's civil jury instructions. On approval by the Judicial Council, all changes will be published in the 2015 edition of the official LexisNexis CACI publication.

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

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314. Interpretation—Disputed **WordsTerm**

[Name of plaintiff] and [name of defendant] dispute the meaning of the following **wordsterm** contained in their contract: [insert *text of term* ~~disputed language~~].

[Name of plaintiff] claims that the **wordsterm** means [insert plaintiff's interpretation ~~of the term~~].
 [Name of defendant] claims that the **words term** means [insert defendant's interpretation ~~of the term~~].
 [Name of plaintiff] must prove that [his/her/its] interpretation **of the term** is correct.

In deciding what the **wordsterms** of a contract mean, you must decide what the parties intended at the time the contract was created. You may consider the usual and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract.

[The following instructions may also help you interpret the **wordsterms** of the contract:]

New September 2003; *Revised December 2014*

Directions for Use

Give this instruction if there is conflicting extrinsic evidence as to what the parties intended the language of their contract to mean. While interpretation of a contract can be a matter of law for the court (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [44 Cal. Rptr. 767, 402 P.2d 839]), it is a question of fact for the jury if ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Read any of the **following** instructions (as appropriate) on tools for interpretation (CACI Nos. 315 through 320) after reading the last bracketed sentence.

Sources and Authority

- ~~Section 200 of the Restatement Second of Contracts provides: “Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.”~~
- Contract Interpretation: Intent. Civil Code section 1636. ~~provides: “A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.”~~
- Contracts Explained by Circumstances. Civil Code section 1647. ~~provides: “A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.”~~
- “Juries are not prohibited from interpreting contracts. Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no

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conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. But when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury.” (*City of Hope National Medical Center, supra, v. Genentech, Inc.* (2008) 43 Cal.4th at p.375, 395 [~~75 Cal.Rptr.3d 333, 181 P.3d 142~~], footnote and internal citations omitted.)

- “This rule—that the jury may interpret an agreement when construction turns on the credibility of extrinsic evidence—is well established in our case law. California’s jury instructions reflect this (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 314) . . . , as do authoritative secondary sources.” (*City of Hope National Medical Center, supra*, 43 Cal.4th at pp. 395–396.)
- “The trial court’s determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. The trial court’s resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court’s resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. Furthermore, ‘[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.’ ” (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710 [50 Cal.Rptr.2d 323].)
- ~~California courts apply an objective test to determine the intent of the parties:~~ “In interpreting a contract, the objective intent, as evidenced by the words of the contract is controlling. We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made.” (*Lloyd’s Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197-1198 [32 Cal.Rptr.2d 144], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 741–743

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.04[2][b], 21.14[2]

315. Interpretation—Meaning of Ordinary Words

You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, Interpretation—Disputed Words. See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- ~~Words to Be Understood in Usual Sense. Civil Code section 1644 provides: “The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.”~~
- ~~“Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. Such intent is to be inferred, if possible, solely from the written provisions of the contract. The ‘clear and explicit’ meaning of these provisions, interpreted in their ‘ordinary and popular sense,’ unless ‘used by the parties in a technical sense or a special meaning is given to them by usage,’ controls judicial interpretation. Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning.” (Santisas v. Goodin (1998) 17 Cal.4th 599, 608 71 Cal.Rptr.2d 830, 951 P.2d 399], internal citations omitted.)~~
- “Generally speaking, words in a contract are to be construed according to their plain, ordinary, popular or legal meaning, as the case may be. However, particular expressions may, by trade usage, acquire a different meaning in reference to the subject matter of a contract. If both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage and parol evidence is admissible to establish the trade usage even though the words in their ordinary or legal meaning are entirely unambiguous. [Citation.]” (Hayter Trucking Inc. v. Shell Western E & P, Inc. (1993) 18 Cal.App.4th 1, 15 [22 Cal.Rptr.2d 229].)

Secondary Sources

- 1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 745
- 13 California Forms of Pleading and Practice, Ch. 140, Contracts, § 140.32 (Matthew Bender)
- 27 California Legal Forms, Ch. 75, Formation of Contracts and Standard Contractual Provisions, §

Draft–Not Approved by Judicial Council

75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.20

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316. Interpretation—Meaning of Technical Words

You should assume that the parties intended technical words used in the contract to have the meaning that is usually given to them by people who work in that technical field, unless you decide that the parties clearly used the words in a different sense.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words*. See the *Directions for Use and Sources and Authority* to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Technical Words. Civil Code section 1645 ~~provides: “Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.”.~~
- “The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation.”~~A court will look beyond the terms of the writing where it appears that the parties intended to ascribe a technical meaning to the terms used.~~ (*Cooper Companies, Inc. v. Transcontinental Insurance Co.* (1995) 31 Cal.App.4th 1094, 1101 [37 Cal.Rptr.2d 508].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 745

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.22

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317. Interpretation—Construction of Contract as a Whole

In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words*. See the *Directions for Use and Sources and Authority* to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Effect to Be Given to Every Part of Contract. Civil Code section 1641, ~~provides: “The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”~~
- “[T]he contract must be construed as a whole and the intention of the parties must be ascertained from the consideration of the entire contract, not some isolated portion.” (*County of Marin v. Assessment Appeals Bd. of Marin County* (1976) 64 Cal.App.3d 319, 324-325 [134 Cal.Rptr. 349].)
- “Any contract must be construed as a whole, with the various individual provisions interpreted together so as to give effect to all, if reasonably possible or practicable.” (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 473 [80 Cal.Rptr.2d 329].)
- ~~Contracts should be construed as a whole, with each clause lending meaning to the others. “[W]e should interpret contractual language in a manner which Contractual language should be interpreted in a manner that gives force and effect to every clause rather than to one that renders clauses nugatory,” inoperative, or meaningless. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 473 [80 Cal.Rptr.2d 329]; (*Titan Corp. v. Aetna Casualty and Surety Co.* (1994) 22 Cal.App.4th 457, 473-474 [27 Cal.Rptr.2d 476].)~~
- “Nor are we persuaded by [defendant]’s related claim that it was improper for [plaintiff]’s counsel to tell the jurors, during closing argument, that in resolving witness credibility issues they should consider the “big picture” and not get lost in the minutiae of the contractual language.” (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 394 [75 Cal. Rptr. 3d 333, 181 P.3d 142].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 746–747

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13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.19

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318. Interpretation—Construction by Conduct

In deciding what the words in a contract meant to the parties, you may consider how the parties acted after the contract was created but before any disagreement between the parties arose.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words*. See the *Directions for Use and Sources and Authority* to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- “In construing contract terms, the construction given the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy arises as to its meaning, is relevant on the issue of the parties’ intent.” (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242 [88 Cal.Rptr.2d 777].)
- ~~This instruction covers the “rule of practical construction.”~~ “This rule of practical construction “is predicated on the common sense concept that ‘actions speak louder than words.’ Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent.” (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754 [8 Cal.Rptr. 427, 356 P.2d 171].)
- “The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties’ intentions.” (*Kennecott Corp. v. Union Oil Co. of California* (1987) 196 Cal.App.3d 1179, 1189 [242 Cal.Rptr. 403].)
- “[T]his rule is not limited to the joint conduct of the parties in the course of performance of the contract. As stated in *Corbin on Contracts*, ‘The practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that other party had no knowledge of those words or acts when they occurred and did not concur in them. In the litigation that has ensued, one who is maintaining the same interpretation that is evidenced by the other party’s earlier words, and acts, can introduce them to support his contention.’ We emphasize the conduct of one party to the contract is by no means conclusive evidence as to the meaning of the contract. It is relevant, however, to show the contract is reasonably susceptible to the meaning evidenced by that party’s conduct.” (*Southern California Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851 [44 Cal.Rptr.2d 227], internal citations omitted.)

Secondary Sources

Draft—Not Approved by Judicial Council

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 749

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.51

Draft–Not Approved by Judicial Council

319. Interpretation—Reasonable Time

If a contract does not state a specific time in which the parties are to meet the requirements of the contract, then the parties must meet them within a reasonable time. What is a reasonable time depends on the facts of each case, including the subject matter of the contract, the reasons each party entered into the contract, and the intentions of the parties at the time they entered the contract.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words*. See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Time of Performance of Contract. Civil Code section 1657, ~~provides: “If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly as, for example, if it consists in the payment of money only it must be performed immediately upon the thing to be done being exactly ascertained.”~~
- “[A]s the contract was silent as to the time of delivery a reasonable time for performance must be implied.”~~This rule of construction applies where the contract is silent as to the time of performance. (See *Palmquist v. Palmquist* (1963) 212 Cal.App.2d 322, 331 [27 Cal.Rptr. 744].)~~
- “The question of what constituted a reasonable time was of course one of fact.”~~The reasonableness of time for performance is a question of fact that depends on the circumstances of the particular case. (*Lyon v. Goss* (1942) 19 Cal.2d 659, 673 [123 P.2d 11].); *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 381 [11 Cal.Rptr.2d 524].)~~
- “[W]hat constitutes a reasonable time is a question of fact, depending upon~~These circumstances include~~ the situation of the parties, the nature of the transaction, and the facts of the particular case.”” ~~(Sawday v. Vista Irrigation Dist. (1966) 64 Cal.2d 833, 836 [52 Cal.Rptr. 1, 415 P.2d 816].)~~

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 762–764

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.41 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

Draft—Not Approved by Judicial Council

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.49

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.30

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.46

Draft–Not Approved by Judicial Council

320. Interpretation—Construction Against Drafter

In determining the meaning of a term of the contract, you must first consider all of the other instructions that I have given you. If, after considering these instructions, you still cannot agree on the meaning of the **term words**, then you should interpret the contract **term** against [the party that drafted the **term disputed words**]/[the party that caused the uncertainty].

New September 2003; Revised December 2014

Directions for Use

~~This instruction may be given with CACI No. 314, *Interpretation—Disputed Words*. See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role. This instruction should be given only to a deadlocked jury, so as to avoid giving them this tool to resolve the case before they have truly exhausted the other avenues of approach.~~

Sources and Authority

- ~~Language Interpreted Against Party Causing Uncertainty. Civil Code section 1654. provides: “In case of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.”~~
- ~~“[T]his [Civil Code 1654] canon applies only as a tie breaker, when other canons fail to dispel Section 1654 states the general rule, but this canon does not operate to the exclusion of all other rules of contract interpretation. It is used only when none of the canons of construction succeed in dispelling the uncertainty.” (Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal.App.4th 576, 596 [19 Cal.Rptr.2d 295], disapproved on other grounds in Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal.4th 362, 376-377 [36 Cal.Rptr.2d 581, 885 P.2d 994].)~~
- “The trial court's instruction ... embodies a general rule of contract interpretation that was applicable to the negotiated agreement between [the parties]. It may well be that in a particular situation the discussions and exchanges between the parties in the negotiation process may make it difficult or even impossible for the jury to determine which party caused a particular contractual ambiguity to exist, but this added complexity does not make the underlying rule irrelevant or inappropriate for a jury instruction. We conclude, accordingly, that the trial court here did not err in instructing the jury on Civil Code section 1654's general rule of contract interpretation.” (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 398 [75 Cal.Rptr.3d 333, 181 P.3d 142].)
- ~~“[I]f the uncertainty is not removed by application of the other rules of interpretation, a contract must be interpreted most strongly against the party who prepared it. This last rule is applied with particular force This rule is applied more strongly in the case of adhesion contracts.” (Badie v. Bank of America (1998) 67 Cal.App.4th 779, 801 [79 Cal.Rptr.2d 273].) It also applies with~~
- ~~“The doctrine of contra proferentem (construing ambiguous agreements against the drafter) applies~~

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| with even ~~It also applies with~~ greater force when the person who prepared the writing is a lawyer.”
(*Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1370 [62 Cal.Rptr.2d 27].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 757

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.15

Draft–Not Approved by Judicial Council

422. ~~Sale of~~Providing Alcoholic Beverages to Obviously Intoxicated Minors (Bus. & Prof. Code, § 25602.1)

[Name of plaintiff] claims [name of defendant] is responsible for [his/her] harm because [name of defendant] ~~[sold/-or gave]~~ alcoholic beverages to [name of alleged minor], a minor who was already obviously intoxicated.

To establish this claim, [name of plaintiff] must prove all of the following:

1. ~~[That [name of defendant] was [required to be] licensed/authorized/required to be licensed or authorized] to sell alcoholic beverages;]~~

~~[or]~~

~~[That [name of defendant] was authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave;]~~

2. ~~[That [name of defendant] ~~[sold/-or gave]~~ alcoholic beverages to [name of alleged minor];]~~

~~[or]~~

~~[That [name of defendant] caused alcoholic beverages to be ~~[sold/given away]~~ to [name of alleged minor];]~~

3. That [name of alleged minor] was less than 21 years old at the time;
4. That when [name of defendant] provided the alcoholic beverages, [name of alleged minor] displayed symptoms that would lead a reasonable person to conclude that [he/she] was obviously intoxicated;
5. That [name of alleged minor] harmed [name of plaintiff]; and
6. That [name of defendant]’s ~~[selling/-or giving]~~ alcoholic beverages to [name of alleged minor] was a substantial factor in causing [name of plaintiff]’s harm.

In deciding whether [name of alleged minor] was obviously intoxicated, you may consider whether [he/she] displayed one or more of the following symptoms to [name of defendant] before the alcoholic beverages were provided: impaired judgment; alcoholic breath; incoherent or slurred speech; poor muscular coordination; staggering or unsteady walk or loss of balance; loud, boisterous, or argumentative conduct; flushed face; or other symptoms of intoxication. The mere fact that [name of alleged minor] had been drinking is not enough.

New September 2003; Revised December 2009, June 2014, December 2014

Draft–Not Approved by Judicial Council

Directions for Use

Business and Professions Code section 25602.1 imposes potential liability on those who have or are required to have a liquor license for the selling, furnishing, or giving away of alcoholic beverages to an obviously intoxicated minor. It also imposes potential liability on a person who is not required to be licensed who sells alcohol to an obviously intoxicated minor. (See *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 711 [168 Cal.Rptr.3d 440, 319 P.3d 201].) In this latter case, omit element 1, select “sold” in the opening paragraph and, delete “or gave” in element 2, and select “selling” delete “or giving” in element 6.

If the plaintiff is the minor who is suing for his or her own injuries (see *Chalup v. Aspen Mine Co.* (1985) 175 Cal.App.3d 973, 974 [221 Cal.Rptr. 97]), modify the instruction by substituting the appropriate pronoun for “[*name of alleged minor*]” throughout.

For purposes of this instruction, a “minor” is someone under the age of 21. (*Rogers v. Alvas* (1984) 160 Cal.App.3d 997, 1004 [207 Cal.Rptr. 60].)

Sources and Authority

- Liability for Providing Alcohol to Minors. Business and Professions Code section 25602.1.
- Sales Under the Alcoholic Beverage Control Act. Business and Professions Code section 23025.
- “In sum, if a plaintiff can establish the defendant provided alcohol to an obviously intoxicated minor, and that such action was the proximate cause of the plaintiff’s injuries or death, section 25602.1--the applicable statute in this case--permits liability in two circumstances: (1) the defendant was either licensed to sell alcohol, required to be licensed, or federally authorized to sell alcoholic beverages in certain places, and the defendant sold, furnished, or gave the minor alcohol or caused alcohol to be sold, furnished, or given to the minor; or (2) the defendant was ‘any other person’ (i.e., neither licensed nor required to be licensed), and he or she sold alcohol to the minor or caused it to be sold. Whereas licensees (and those required to be licensed) may be liable if they merely furnish or give an alcoholic beverage away, a nonlicensee may be liable only if a *sale* occurs; that is, a nonlicensee, such as a social host, who merely furnishes or gives drinks away--even to an obviously intoxicated minor--retains his or her statutory immunity.” (*Ennabe, supra*, 58 Cal.4th at pp. 709–710, original italics.)
- “[W]e conclude that the placement of section 25602.1 in the Business and Professions Code does not limit the scope of that provision to commercial enterprises. First, the structure of section 25602.1 suggests it applies to noncommercial providers of alcohol. The statute addresses four categories of persons and we assume those falling in the first three categories--those licensed by the Department of ABC, those without licenses but who are nevertheless required to be licensed, and those authorized to sell alcohol by the federal government--are for the most part engaged in some commercial enterprise. The final category of persons addressed by section 25602.1 is more of a catchall: ‘any other person’ who sells alcohol. Consistent with the plain meaning of the statutory language and the views of the Department of ABC, we find this final category includes private persons and ostensible social hosts who, for whatever reason, charge money for alcoholic drinks.” (*Ennabe, supra*, 58 Cal.4th at p. 711.)

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- “[Business and Professions Code] Section 23025's broad definition of a sale shows the Legislature intended the law to cover a wide range of transactions involving alcoholic beverages: a qualifying sale includes ‘*any* transaction’ in which title to an alcoholic beverage is passed for ‘*any* consideration.’ (Italics added.) Use of the term ‘any’ to modify the words ‘transaction’ and ‘consideration’ demonstrates the Legislature intended the law to have a broad sweep and thus include both indirect as well as direct transactions.” (*Ennabe, supra*, 58 Cal.4th at p. 714, original italics.)
- In “ ‘The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are “plain” and “easily seen or discovered.” If such outward manifestations exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.’ ” (*Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1140 [19 Cal.Rptr.2d 205], original italics.)
- “[T]he standard for determining ‘obvious intoxication’ is measured by that of a reasonable person.” (*Schaffield, supra*, 15 Cal.App.4th at p. 1140.)
- “We shall make no effort to state definitively the meaning of the word ‘furnishes’ As used in a similar context the word ‘furnish’ has been said to mean: ‘ “To supply; to offer for use, to give, to hand.” ’ It has also been said the word ‘furnish’ is synonymous with the words ‘supply’ or ‘provide.’ In relation to a physical object or substance, the word ‘furnish’ connotes possession or control over the thing furnished by the one who furnishes it. The word ‘furnish’ implies some type of affirmative action on the part of the furnisher; failure to protest or attempt to stop another from imbibing an alcoholic beverage does not constitute ‘furnishing.’ ” (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 904–905 [141 Cal.Rptr. 682], internal citations omitted.)
- “As instructed by the court, the jury was told to consider several outward manifestations of obvious intoxication, which included incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, or argumentative behavior. This instruction was correct.” (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611], internal citation omitted.)
- “[S]ection 25602.1's phrase 'causes to be sold' requires an affirmative act directly related to the sale of alcohol which necessarily brings about the resultant action to which the statute is directed, i.e., the furnishing of alcohol to an obviously intoxicated minor.” (*Hernandez v. Modesto Portuguese Pentecost Assn.* (1995) 40 Cal.App.4th 1274, 1276 [48 Cal.Rptr.2d 229].)
- “The undisputed evidence shows [defendant]'s checker sold beer to Spitzer and that Spitzer later gave some of that beer to Morse. As in *Salem* [*Salem v. Superior Court* (1989) 211 Cal.App.3d 595, 600 [259 Cal.Rptr. 447]] , we conclude defendant cannot be held liable because the person to whom it sold alcohol was not the person whose negligence allegedly caused the injury at issue.” (*Ruiz v. Safeway, Inc.* (2013) 209 Cal.App.4th 1455, 1462 [147 Cal.Rptr.3d 809].)
- “[O]bviously intoxicated minors who are served alcohol by a licensed purveyor of liquor, may bring a

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cause of action for negligence against the purveyor for [their own] subsequent injuries.” (*Chalup, supra*, 175 Cal.App.3d at p. 979.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1072

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.63

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-L, *Liability For Providing Alcoholic Beverages*, ¶ 2:2101 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.21 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability*, §§ 19.12, 19.52, 19.75 (Matthew Bender)

1 California Points and Authorities, Ch. 15A, *Alcoholic Beverages: Civil Liability for Furnishing*, § 15A.21 et seq. (Matthew Bender)

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456. Defendant Estopped From Asserting Statute of Limitations Defense

[Name of plaintiff] claims that even if [his/her/its] lawsuit was not filed on time, [he/she/it] may still proceed because [name of defendant] did or said something that caused [name of plaintiff] to delay filing the lawsuit. In order to establish the right to proceed, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] said or did something that caused [name of plaintiff] to believe that it would not be necessary to file a lawsuit;**
- 2. That [name of plaintiff] relied on [name of defendant]’s conduct and therefore did not file the lawsuit within the time otherwise required;**
- 3. That a reasonable person in [name of plaintiff]’s position would have relied on [name of defendant]’s conduct;**
- 4. That after the limitation period had expired, [name of defendant]’s representations by words or conduct proved to not be true; and**
- 5. That [name of plaintiff] proceeded diligently to file suit once [he/she/it] discovered the actual facts.**

It is not necessary that [name of defendant] have acted in bad faith or intended to mislead [name of plaintiff].

New October 2008; Revised December 2014

Directions for Use

Equitable estoppel, including any disputed issue of fact, is to be decided by the court, even if there are disputed issues of fact. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745 [170 Cal.Rptr.3d 551].) This instruction is for use if the court empanels an advisory jury to make preliminary factual findings.

There is perhaps a question as to whether all the elements of equitable estoppel must be proved in order to establish an estoppel to rely on a statute of limitations. These elements are (1) the party to be estopped must know the facts; (2) the party must intend that his or her conduct will be acted on, or must act in such a way that the party asserting the estoppel had the right to believe that the conduct was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) that party must rely upon the conduct to his or her detriment. (See *Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 766–767 [41 Cal.Rptr.3d 819]; see also *Olofsson v. Mission Linen Supply* (2012) 211 Cal.App.4th 1236, 1246 [150 Cal.Rptr.3d 446] [equitable estoppel to deny family leave under California Family Rights Act].)

Most cases do not frame the issue as one of equitable estoppel and its four elements. All that is required is that the defendant’s conduct actually have misled the plaintiff, and that plaintiff reasonably have relied

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on that conduct. Bad faith or an intent to mislead is not required. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384 [2 Cal.Rptr.3d 655, 73 P.3d 517]; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43 [21 Cal.Rptr.2d 110].) Nor does it appear that there is a requirement that the defendant specifically intended to induce the plaintiff to defer filing suit. Therefore, no specific intent element has been included.

Sources and Authority

- “As the name suggests, equitable estoppel is an equitable issue for court resolution.” (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)
- “[CACI No. 456 is] appropriate for use when a trial court ‘empanel[s] an advisory jury to make preliminary factual findings’ with respect to equitable estoppel” (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)
- “Equitable tolling and equitable estoppel are distinct doctrines. ‘Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. ... Equitable estoppel, however, ... comes into play only after the limitations period has run and addresses ... the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life ... from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice.’” Thus, equitable estoppel is available even where the limitations statute at issue expressly precludes equitable tolling.” (*Lantzy, supra*, 31 Cal.4th at pp. 383–384, internal citations omitted.)
- “Accordingly, (1) if one potentially liable for a construction defect represents, while the limitations period is still running, that all actionable damage has been or will be repaired, thus making it unnecessary to sue, (2) the plaintiff reasonably relies on this representation to refrain from bringing a timely action, (3) the representation proves false after the limitations period has expired, and (4) the plaintiff proceeds diligently once the truth is discovered, the defendant may be equitably estopped to assert the statute of limitations as a defense to the action.” (*Lantzy, supra*, 31 Cal.4th at p. 384, internal citations omitted.)
- “‘An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. ... To create an equitable estoppel, ‘it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss. ... Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense.’”’” (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152–1153 [113 Cal.Rptr.2d 70, 33 P.3d 487].)
- “‘A defendant will be estopped to invoke the statute of limitations where there has been “some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action.” It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to

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refrain from instituting legal proceedings. [Citation.] “[W]hether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law.” [Citations.]’ ” (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 925–926 [73 Cal.Rptr.3d 216], internal citations omitted.)

- “It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act. Estoppel most commonly results from misleading statements about the need for or advisability of a claim; actual fraud or the intent to mislead is not essential. A fortiori, estoppel may certainly be invoked when there are acts of violence or intimidation that are intended to prevent the filing of a claim.” (*John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 445 [256 Cal.Rptr. 766, 769 P.2d 948], internal citations omitted.)
- “It is well settled that the doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations. Apropos to this rule are the following established principles: A person, by his conduct, may be estopped to rely on the statute; where the delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense; one cannot justly or equitably lull his adversary into a false sense of security and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought; actual fraud in the technical sense, bad faith or intent to mislead are not essential to the creation of an estoppel, but it is sufficient that the defendant made misrepresentations or so conducted himself that he misled a party, who acted thereon in good faith, to the extent that such party failed to commence the action within the statutory period; a party has a reasonable time in which to bring his action after the estoppel has expired, not exceeding the period of limitation imposed by the statute for commencing the action; and that whether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law. It is also an established principle that in cases of estoppel to plead the statute of limitations, the same rules are applicable, as in cases falling within subdivision 4 of section 338, in determining when the plaintiff discovered or should have discovered the facts giving rise to his cause of action.” (*Estate of Pieper* (1964) 224 Cal.App.2d 670, 690–691 [37 Cal.Rptr. 46], internal citations omitted.)
- “Although ‘ignorance of the identity of the defendant ... will not *toll* the statute’, ‘a defendant may be *equitably estopped* from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant’s actual identity’.” (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 745 [129 Cal.Rptr.3d 354], original italics, internal citation omitted.)
- “Settlement negotiations are relevant and admissible to prove an estoppel to assert the statute of limitations.” (*Holdgrafer, supra*, 160 Cal.App.4th at p. 927.)
- “The estoppel issue in this case arises in a unique context. Defendants’ wrongful conduct has given rise to separate causes of action for property damage and personal injury with separate

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statutes of limitation. Where the plaintiffs reasonably rely on defendants' promise to repair the property damage without a lawsuit, is a jury permitted to find that plaintiffs' decision to delay filing a personal injury lawsuit was also reasonable? We conclude such a finding is permissible on the facts of this case.” (*Shaffer, supra*, 17 Cal.App.4th at p. 43, internal citation omitted.)

- “At the very least, [plaintiff] cannot establish the second element necessary for equitable estoppel. [Plaintiff] argues that [defendant] was estopped to rely on the time bar of section 340.9 by its continued reconsideration of her claim after December 31, 2001, had passed. But she cannot prove [defendant] intended its reconsideration of the claim to be relied upon, or acted in such a way that [plaintiff] had a right to believe it so intended.” (*Ashou, supra*, 138 Cal.App.4th at p. 767.)
- “ ‘It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act.’ Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when a plaintiff establishes by a preponderance of the evidence (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) the plaintiff was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment.” (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1239–1240 [92 Cal.Rptr.3d 1], internal citation omitted.)
- “A nondisclosure is a cause of injury if the plaintiff would have acted so as to avoid injury had the plaintiff known the concealed fact. The plaintiff's reliance on a nondisclosure was reasonable if the plaintiff's failure to discover the concealed fact was reasonable in light of the plaintiff's knowledge and experience. Whether the plaintiff's reliance was reasonable is a question of fact for the trier of fact unless reasonable minds could reach only one conclusion based on the evidence. The fact that a plaintiff was represented by counsel and the scope and timing of the representation are relevant to the question of the reasonableness of the plaintiff's reliance.” (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 187–188 [104 Cal.Rptr.3d 508], internal citations omitted.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 566–581

Haning et al., California Practice Guide: Personal Injury, Ch. 5-B, *When To Sue—Statute Of Limitations*, ¶ 5:111.6 (The Rutter Group)

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Action*, § 71.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.81 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, § 143.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.42

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457. Statute of Limitations—Equitable Tolling—Other Prior Proceeding

[Name of plaintiff] claims that even if [his/her/its] lawsuit was not filed by [insert date from applicable statute of limitations], [he/she/it] may still proceed because the deadline for filing the lawsuit was extended by the time during which [specify prior proceeding that qualifies as the tolling event, e.g., she was seeking workers' compensation benefits]. In order to establish the right to proceed, [name of plaintiff] must prove all of the following:

1. That [name of defendant] received timely notice that [name of plaintiff] was [e.g., seeking workers' compensation] instead of filing a lawsuit;
2. That the facts of the two claims were so similar that an investigation of the [e.g., workers' compensation claim] gave or would have given [name of defendant] the information needed to defend the lawsuit; and
3. That [name of plaintiff] was acting reasonably and in good faith by [e.g., seeking workers' compensation].

For [name of defendant] to have received timely notice, [name of plaintiff] must have filed the [e.g., workers' compensation claim] by [insert date from applicable statute of limitations] and the [e.g., claim] notified [name of defendant] of the need to begin investigating the facts that form the basis for the lawsuit.

In considering whether [name of plaintiff] acted reasonably and in good faith, you may consider the amount of time after the [e.g., workers' compensation claim] was [resolved/abandoned] before [he/she/it] filed the lawsuit.

New December 2009

Directions for Use

Equitable tolling, including any disputed issue of fact, is to be decided by the court, even if there are disputed issues of fact. (Hopkins v. Kedzierski (2014) 225 Cal.App.4th 736, 745 [170 Cal.Rptr.3d 551].) This instruction is for use if the court empanels an advisory jury to make preliminary factual findings. The verdict form should ask the jury to find the period of time that the limitation period was tolled on account of the other proceeding. The court can then add the additional time to the limitation period and determine whether the action is timely.

Equitable tolling is not available for legal malpractice (see *Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [statutory tolling provisions of Code Civ Proc., § 340.6 are exclusive for both one-year and four-year limitation periods]; see also CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*) nor for medical malpractice with regard to the three-year limitation period of Code of Civil Procedure section 340.5. (See *Belton v. Bowers Ambulance*

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Serv. (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [statutory tolling provisions of Code Civ. Proc., § 340.5 are exclusive only for three-year period; one-year period may be tolled on other grounds]; see also CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit*, and CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*.)

Sources and Authority

- “The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. It is ‘designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff’s claims—has been satisfied.’ Where applicable, the doctrine will ‘suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.’ ” (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 [84 Cal.Rptr.3d 734, 194 P.3d 1026], internal citations omitted.)
- “While the case law is not entirely clear, it appears that the weight of authority supports our conclusion that whether a plaintiff has demonstrated the elements of equitable tolling presents a question of fact.” (*Hopkins, supra*, 225 Cal.App.4th at p. 755.)
- “[E]quitable tolling, ‘[a]s the name suggests ... is an equitable issue for court resolution.’ ” (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)
- “[CACI No. 457 is] appropriate for use when a trial court ‘empanel[s] an advisory jury to make preliminary factual findings’ with respect to equitable ... tolling.” (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)
- “The equitable tolling doctrine rests on the concept that a plaintiff should not be barred by a statute of limitations unless the defendant would be unfairly prejudiced if the plaintiff were allowed to proceed. ‘[T]he primary purpose of the statute of limitations is normally satisfied when the defendant receives timely notification of the first of two proceedings.’ The doctrine has been applied ‘where one action stands to lessen the harm that is the subject of the second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason.’ ” (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 598 [95 Cal.Rptr.3d 18], internal citations omitted.)
- “[T]he effect of equitable tolling is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred.” (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370–371 [2 Cal.Rptr.3d 655, 73 P.3d 517].)
- “A major reason for applying the doctrine is to avoid ‘the hardship of compelling plaintiffs to pursue several duplicative actions simultaneously on the same set of facts.’ ‘[D]isposition of a case filed in one forum may render proceedings in the second unnecessary or easier and less

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expensive to resolve.’ ” (*Guevara v. Ventura County Community College Dist.* (2008) 169 Cal.App.4th 167, 174 [87 Cal.Rptr.3d 50], internal citations omitted.)

- “[A]pplication of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff. These elements seemingly are present here. As noted, the federal court, without prejudice, declined to assert jurisdiction over a timely filed state law cause of action and plaintiffs thereafter promptly asserted that cause in the proper state court. Unquestionably, the same set of facts may be the basis for claims under both federal and state law. We discern no reason of policy which would require plaintiffs to file simultaneously two separate actions based upon the same facts in both state and federal courts since ‘duplicative proceedings are surely inefficient, awkward and laborious.’ ” (*Addison v. State* (1978) 21 Cal.3d 313, 319 [146 Cal.Rptr. 224, 578 P.2d 941], internal citations omitted.)
- “ ‘ “The timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore[,] the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally this means that the defendant in the first claim is the same one being sued in the second.” “The second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put him in a position to fairly defend the second.” “The third prerequisite of good faith and reasonable conduct on the part of the plaintiff is less clearly defined in the cases. But in *Addison v. State of California, supra*, 21 Cal.3d 313[,] the Supreme Court did stress that the plaintiff filed his second claim a short time after tolling ended.” ’ ” (*McDonald, supra*, 45 Cal.4th at p. 102, fn. 2, internal citations omitted.)
- “The third requirement of good faith and reasonable conduct may turn on whether ‘a plaintiff delayed filing the second claim until the statute on that claim had nearly run ...’ or ‘whether the plaintiff [took] affirmative actions which ... misle[d] the defendant into believing the plaintiff was foregoing his second claim.’ ” (*Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494, 1505 [92 Cal.Rptr.3d 131].)
- “Where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic: ‘It has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding.’ This rule prevents administrative exhaustion requirements from rendering illusory nonadministrative remedies contingent on exhaustion.” (*McDonald, supra*, 45 Cal.4th at p. 101, internal citation omitted.)
- “The trial court rejected equitable tolling on the apparent ground that tolling was unavailable where, as here, the plaintiff was advised the alternate administrative procedure he or she was pursuing was voluntary and need not be exhausted. In reversing summary judgment, the Court of Appeal implicitly concluded equitable tolling is in fact available in such circumstances and explicitly concluded equitable tolling is not foreclosed as a matter of law under the FEHA. The Court of Appeal was correct on each count.” (*McDonald, supra*, 45 Cal.4th at p. 114.)

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- “Equitable tolling and equitable estoppel [see CACI No. 456] are distinct doctrines. ‘ “Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. . . . Equitable estoppel, however, . . . comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life . . . from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice.” ’ ” (*Lantzy, supra*, 31 Cal.4th at pp. 383–384.)
- “[V]oluntary abandonment [of the first proceeding] does not categorically bar application of equitable tolling, but it may be relevant to whether a plaintiff can satisfy the three criteria for equitable tolling.” (*McDonald, supra*, 45 Cal.4th at p. 111.)
- “The equitable tolling doctrine generally requires a showing that the plaintiff is seeking an alternate remedy in an established procedural context. Informal negotiations or discussions between an employer and employee do not toll a statute of limitations under the equitable tolling doctrine.” (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1416 [159 Cal.Rptr.3d 749], internal citation omitted.)
- “Section 340.6, subdivision (a), states that ‘in no event’ shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute.” (*Laird, supra*, 2 Cal.4th at p. 618 [applying rule to one-year limitation period].)
- “We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language.” (*Belton, supra*, 20 Cal.4th at p. 934 [rejecting application of rule to one-year limitation period].)
- “[E]quitable tolling has never been applied to allow a plaintiff to extend the time for pursuing an administrative remedy by filing a lawsuit. Despite broad language used by courts in employing the doctrine, equitable tolling has been applied almost exclusively to extend statutory deadlines for judicial actions, rather than deadlines for commencing administrative proceedings.” (*Bjornedal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1109 [150 Cal.Rptr.3d 405].)

Secondary Sources

Rylaarsdam et al., California Practice Guide: Civil Procedure Before Trial—Statutes of Limitations, Ch. 1-A, *Definitions And Distinctions* ¶ 1:57.2 (The Rutter Group)

3 California Torts, Ch. 32, *Liability of Attorneys*, § 32.60[1][g.1] (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.21 (Matthew Bender)

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14 California Points and Authorities, Ch. 143, *Limitation of Actions*, § 143.46 (Matthew Bender)

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VF-406. Negligence—~~Sale of~~Providing Alcoholic Beverages to Obviously Intoxicated Minor

We answer the questions submitted to us as follows:

1. [Was [name of defendant] [required to be] licensed] [~~authorized~~] [~~required to be licensed or authorized~~] to sell alcoholic beverages?]

[or]

[Was [name of defendant] authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave?]

___ Yes ___ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. [Did [name of defendant] [sell/~~or~~ give] alcoholic beverages to [name of alleged minor]?]
___ Yes ___ No]

[or]

[Did [name of defendant] cause alcoholic beverages to be [sold/given away] to [name of alleged minor]?]

___ Yes ___ No]

If your answer to either option for question 2 is yes, then answer question 3. If you answered no to both options, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of alleged minor] less than 21 years old at the time?
___ Yes ___ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. When [name of defendant] provided the alcoholic beverages, ~~Did~~ did [name of alleged minor] display symptoms that would lead a reasonable person to conclude that [name of alleged minor] was obviously intoxicated?
___ Yes ___ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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5. Did [name of alleged minor] later harm [name of plaintiff]?
 Yes No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [name of defendant]’s [~~selling~~/or giving] alcoholic beverages to [name of alleged minor] a substantial factor in causing [name of plaintiff]’s harm?
 Yes No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [name of plaintiff]’s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

TOTAL \$ _____

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Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2007, December 2009, December 2010, December 2014

Directions for Use

This verdict form is based on CACI No. 422, ~~Sale of~~ *Providing Alcoholic Beverages to Obviously Intoxicated Minors.*

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

~~Omit question 1 if the defendant is a person such as a social host who, though not required to be licensed, sells alcohol to an obviously intoxicated minor. (See *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 711 [168 Cal.Rptr.3d 440, 319 P.3d 201].) This verdict form is based on CACI No. 422, *Sale of Alcoholic Beverages to Obviously Intoxicated Minors.*~~

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

If the comparative fault of the plaintiff is an issue, this form should be modified. See CACI No. VF-401, *Negligence—Single Defendant—Plaintiff’s Negligence at Issue—Fault of Others Not at Issue*, for a model form involving the issue of comparative fault.

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1010. Affirmative Defense—Recreation Immunity—Exceptions (Civ. Code, § 846)

[Name of defendant] is not responsible for [name of plaintiff]’s harm if [he/she] proves that [name of plaintiff]’s harm resulted from [his/her] entry on or use of [name of defendant]’s property for a recreational purpose. However, [name of defendant] is still responsible for [name of plaintiff]’s harm if [name of plaintiff] proves that

[Choose one of the following three options:]

[unless [name of plaintiff] proves [name of defendant] willfully or maliciously failed to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property, all of the following:

- ~~1. That [name of defendant] knew or should have known of the [condition/use/structure/activity on the property] that created an unreasonable risk of serious injury;~~
- ~~2. That [name of defendant] knew or should have known that someone would probably be seriously injured by the dangerous [condition/use/structure/activity]; and~~
- ~~3. That [name of defendant] knowingly failed to protect others from the dangerous [condition/use/structure/activity].]~~

[or]

~~[unless [name of plaintiff] proves that a charge or fee was paid to [name of defendant] to use the property.]~~

[or]

~~[unless [name of plaintiff] proves that [name of defendant] expressly invited [name of plaintiff] to use the property for the recreational purpose.]~~

New September 2003; Revised October 2008, December 2014

Directions for Use

Depending on the facts, the court could instruct that the activity involved was a “recreational purpose” as a matter of law. For a comprehensive list of “recreational purposes,” refer to Civil Code section 846.

Whether the term “willful or malicious failure” has a unique meaning under this statute is not entirely clear. One court construing this statute has said that three elements must be present to raise a negligent act to the level of wilful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril. (See *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689-690 [217 Cal.Rptr. 522].)

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Federal courts interpreting California law have addressed whether the “express invitation” must be personal to the user. The Ninth Circuit has held that invitations to the general public do not qualify as “express invitations” within the meaning of section 846. In *Ravell v. United States* (9th Cir. 1994) 22 F.3d 960, 963, the Ninth Circuit held that California law requires a personal invitation for a section 846 invitation, citing *Johnson v. Unocal Corp.* (1993) 21 Cal.App.4th 310, 317 [26 Cal.Rptr.2d 148]. However, the issue has not been definitively resolved by the California Supreme Court.

Sources and Authority

- Recreational Immunity. Civil Code section 846 ~~provides:~~.

~~An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.~~

~~A “recreational purpose,” as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleanng, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.~~

~~An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.~~

~~This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.~~

~~Nothing in this section creates a duty of care or ground of liability for injury to person or property.~~

- “[A]n owner of ... real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come

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upon the premises.” (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099-1100 [17 Cal.Rptr.2d 594, 847 P.2d 560].)

- “Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the ‘totality of the facts and circumstances, including ... the prior use of the land. While the plaintiff’s subjective intent will not be controlling, it is relevant to show purpose.’ ” (*Ornelas, supra*, 4 Cal.4th at p. 1102, internal citation omitted.)
- “The phrase ‘interest in real property’ should not be given a narrow or technical interpretation that would frustrate the Legislature’s intention in passing and amending section 846.” (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 196 [266 Cal.Rptr. 491, 785 P.2d 1183].)
- “[D]efendants’ status as business invitees of the landowner does not satisfy the prerequisite that the party seeking to invoke the immunity provisions of section 846 be ‘[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory.’ Although such invitee may be entitled to be present on the property during such time as the work is being performed, such presence does not convey any estate or interest in the property.” (*Jenson v. Kenneth I. Mullen, Consulting Engineers, Inc.* (1989) 211 Cal.App.3d 653, 658 [259 Cal.Rptr. 552].)
- ~~“Three essential elements must be present to raise a negligent act to the level of wilful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril.” (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689-690 [217 Cal.Rptr. 522].)~~
- “The concept of willful misconduct has a well-established, well-defined meaning in California law. ‘Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results.’ ” (*New, supra*, 171 Cal.App.3d at p. 689, internal citations omitted.)
- “Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended.” (*Moore v. City of Torrance* (1979) 101 Cal.App.3d 66, 72 [166 Cal.Rptr. 192], disapproved of on other grounds in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707 [190 Cal.Rptr. 494, 660 P.2d 1168].)
- “A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under section 846 comes into play.” (*Johnson, supra*, 21 Cal.App.4th at p. 317.)
- “The purpose of section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. The trial court should therefore construe the exceptions for consideration and express invitees narrowly. (*Johnson, supra*, 21 Cal.App.4th at p. 315.)

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- “Civil Code section 846’s liability shield does not extend to acts of vehicular negligence by a landowner or by the landowner’s employee while acting within the course of the employment. We base this conclusion on section 846’s plain language. The statutory phrase ‘keep the premises safe’ is an apt description of the property-based duties underlying premises liability, a liability category that does not include vehicular negligence. Furthermore, a broad construction of that statutory phrase would render superfluous another provision of section 846 shielding landowners from liability for failure to warn recreational users about hazardous conditions or activities on the land.” (*Klein v. United States of America* (2010) 50 Cal.4th 68, 72 [112 Cal.Rptr.3d_722, 235 P.3d 42].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1103–1111

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.22 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.30 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.21 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.130 et seq. (Matthew Bender)

| 1 California Civil Practice: Torts ~~(Thomson West)~~ § 16:34 [\(Thomson Reuters\)](#)

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VF-1001. Premises Liability—Affirmative Defense—Recreation Immunity

We answer the questions submitted to us as follows:

1. Did *[name of defendant]* *[own/lease/occupy/control]* the property?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was *[name of defendant]* negligent in the *[use/maintenance]* of the property?
 Yes No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was *[name of defendant]*'s negligence a substantial factor in causing harm to *[name of plaintiff]*?
 Yes No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did *[name of plaintiff]* enter on or use *[name of defendant]*'s property for a recreational purpose?
 Yes No

If your answer to question 4 is yes, then answer question 5. If you answered no, skip the next three questions and answer question **86**.

5. Did *[name of defendant]* willfully or maliciously fail to protect others from or warn others about a dangerous *[condition/use/structure/activity]* on the property ~~know or should *[he/she/it]* have known of a *[condition/use/structure/activity]* on the property~~ that created an unreasonable risk of serious injury?
 Yes No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- ~~6. Did *[name of defendant]* know or should *[he/she/it]* have known that someone would probably be seriously injured by the dangerous *[condition/use/structure/activity]*?~~

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~~_____ Yes _____ No~~

~~If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.~~

~~7. Did [name of defendant] knowingly fail to protect others from the dangerous [condition/use/structure/activity]?~~

~~_____ Yes _____ No~~

~~If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.~~

86. What are [name of plaintiff]’s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

TOTAL \$ _____

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Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2007, October 2008, December 2010, December 2014

Directions for Use

This verdict form is based on CACI No. 1000, Premises Liability—Essential Factual Elements, and CACI No. 1010, Affirmative Defense—Recreation Immunity—Exceptions.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

~~*This verdict form is based on CACI No. 1000, Premises Liability—Essential Factual Elements, and CACI No. 1010, Affirmative Defense—Recreation Immunity.*~~

Question 5 should be modified if either of the other two exceptions to recreational immunity from Civil Code section 846 is at issue. (see CACI No. 1010.)

If specificity is not required, users do not have to itemize all the damages listed in question **86**. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

~~*This verdict form should be modified (see CACI No. 1010, Affirmative Defense—Recreation Immunity) if either of the two other grounds for countering this defense is at issue.*~~

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1123. Affirmative Defense—Design Immunity (Gov. Code, § 830.6)

[Name of defendant] claims that it is not responsible for harm caused to [name of plaintiff] based on the plan or design of the [insert type of property, e.g., “highway”]. In order to prove this claim, [name of defendant] must prove both of the following:

- 1. That the plan or design was [prepared in conformity with standards previously] approved before [construction/improvement] by the [legislative body of the public entity, e.g., city council]/[other body or employee, e.g., city civil engineer]] exercising discretionary authority to approve the plan or design;**
 - 2. That the plan or design of the [e.g., highway] was a substantial factor in causing harm to [name of plaintiff].**
-

New December 2014

Directions for Use

Give this instruction to present the affirmative defense of design immunity to a claim for liability caused by a dangerous condition on public property. (Gov. Code, § 830.6; see *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364, 369 [-- Cal.Rptr.3d --] [design immunity is an affirmative defense that the public entity must plead and prove].)

A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design before construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1, 26 P.3d 332].) The first two elements, causation and discretionary approval, are issues of fact for the jury to decide. (*Id.* at pp. 74–75; see also *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 550 [100 Cal.Rptr.3d 494] [elements may only be resolved as issues of law if facts are undisputed].) The third element, substantial evidence of reasonableness, must be tried by the court, not the jury. (*Id.* at pp. 66-67; see Gov. Code, § 830.6.)

Sources and Authority

- Design Immunity. Government Code section 830.6
- “The purpose of design immunity ‘is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design. [Citation.]’ ‘ “[T]o permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested.” ’ ” (*Martinez, supra*, 225 Cal.App.4th at p. 369, internal citations omitted.)

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- “Section 830.6 makes it quite clear that ‘the trial or appellate court’ is to determine whether ‘there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.’ ” (*Cornette, supra*, 26 Cal.4th at pp. 66-67.)
- “To prove [the discretionary approval element of design immunity], the entity must show that the design was approved ‘in advance’ of the construction ‘by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved’ Approval ‘is a vital precondition of the design immunity.’ ” (*Martinez, supra*, 225 Cal.App.4th at p. 369, internal citations omitted.)
- “In many cases, the evidence of discretionary authority to approve a design decision is clear, or even undisputed. For example, ‘[a] detailed plan, drawn up by a competent engineering firm, and approved by a city engineer in the exercise of his or her discretionary authority, is persuasive evidence of the element of prior approval. [Citation.]’ When the discretionary approval issue is disputed, however, as it was here, we must determine whether the person who approved the construction had the discretionary authority to do so.” (*Martinez, supra*, 225 Cal.App.4th at pp. 370–371, internal citations omitted.)
- “[T]he public entity claiming design immunity must prove that the person or entity who made the decision is vested with the authority to do so. Recognizing ‘implied’ discretionary approval would vitiate this requirement and provide public entities with a blanket release from liability that finds no support in section 830.6.” (*Martinez, supra*, 225 Cal.App.4th at p. 373.)

Secondary Sources

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11231124. Loss of Design Immunity (*Cornette*)

[Name of defendant] is not responsible for harm caused to [name of plaintiff] based on the plan or design of the [insert type of property, e.g., “highway”] unless [name of plaintiff] proves the following:

1. That the [insert type of property, e.g., “highway”]’s plan[s] or design[s] had become dangerous because of a change in physical conditions;
2. That [name of defendant] had notice of the dangerous condition created because of the change in physical conditions; and
3. [That [name of defendant] had a reasonable time to obtain the funds and carry out the necessary corrective work to conform the property to a reasonable design or plan;]

[or]

[That [name of defendant] was unable to correct the condition due to practical impossibility or lack of funds but did not reasonably attempt to provide adequate warnings of the dangerous condition.]

New September 2003; Revised June 2010; Renumbered from CACI No. 1123 and Revised December 2014

Directions for Use

Give this instruction if the plaintiff claims that the public entity defendant is entitled to has lost its design immunity unless because of the changed-conditions since the design or plan was originally adopted exception can be established. Read either or both options for element 3 depending on the facts of the case. If the applicability of design immunity in the first instance is disputed, give CACI No. 1123, *Affirmative Defense—Design Immunity*.

~~A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design before construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1, 26 P.3d 332].) The third element, substantial evidence of reasonableness, must be tried by the court, not the jury. (*Id.* at pp. 66-67; see Gov. Code, § 830.6.) The first two elements, causation and discretionary approval, are issues of fact for the jury to decide. (*Cornette, supra*, 26 Cal.4th at pp. 74-75; see also *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 550 [100 Cal.Rptr.3d 494] [elements may only be resolved as issues of law if facts are undisputed].) But, as a practical matter, these elements are usually stipulated to or otherwise established so they seldom become issues for the jury.~~

Users should include CACI No. 1102, *Definition of “Dangerous Condition,”* and CACI No. 1103, *Notice*, to define “notice” and “dangerous condition” in connection with this instruction. Additionally, the

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meaning and legal requirements for a “change of physical condition” have been the subject of numerous decisions involving specific contexts. Appropriate additional instructions to account for these decisions may be necessary.

Sources and Authority

- ~~Design Immunity. Government Code section 830.6 provides: “Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor. Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such legislative body or other body or employee. In the event that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by this section shall remain so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the condition not conforming to the approved plan or design or to the approved standard. However, where a person fails to heed such warning or occupies public property despite such warning, such failure or occupation shall not in itself constitute an assumption of the risk of the danger indicated by the warning.”~~
- “[W]here a plan or design of a construction of, or improvement to, public property, although shown to have been reasonably approved in advance or prepared in conformity with standards previously so approved, as being safe, nevertheless in its actual operation under *changed physical conditions* produces a dangerous condition of public property and causes injury, the public entity does not retain the statutory immunity from liability conferred on it by section 830.6.” (*Dammann v. Golden Gate Bridge, Highway & Transportation Dist.* (2012) 212 Cal.App.4th 335, 343 [150 Cal.Rptr.3d 829], quoting *Baldwin v. State* (1972) 6 Cal.3d 424, 438 [99 Cal.Rptr. 145, 491 P.2d 1121], original italics.)
- “Design immunity does not necessarily continue in perpetuity. To demonstrate loss of design immunity a plaintiff must also establish three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings.” (*Cornette, supra*, 26 Cal.4th at p. 66, internal citations omitted.)

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- “The rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design.” (*Cornette, supra*, 26 Cal.4th at p. 69, internal citation omitted.)
- “Section 830.6 makes it quite clear that ‘the trial or appellate court’ is to determine whether ‘there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.’ The question presented by this case is whether the Legislature intended that the three issues involved in determining whether a public entity has lost its design immunity should also be tried by the court. Our examination of the text of section 830.6, the legislative history of that section, and our prior decisions leads us to the conclusion that, where triable issues of material fact are presented, as they were here, a plaintiff has a right to a jury trial as to the issues involved in loss of design immunity.” (*Cornette, supra*, 26 Cal.4th at pp. 66-67.)
- “[T]echnological advances ... do not constitute the ‘changed physical conditions’ necessary to defeat the [defendant]’s defense of design immunity under *Baldwin* and *Cornette*.” (*Dammann, supra*, 22 Cal.App.4th at p. 351.)

Secondary Sources

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[3][b] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act*, § 464.85 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.12 (Matthew Bender)

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1244. Affirmative Defense—Sophisticated User

[Name of defendant] claims that [he/she/it] is not responsible for any harm to [name of plaintiff] based on a failure to warn because [name of plaintiff] is a sophisticated user of the [product]. To succeed on this defense, [name of defendant] must prove that, at the time of the injury, [name of plaintiff], because of [his/her] particular position, training, experience, knowledge, or skill, knew or should have known **all of the following**:

- 1. That [describe risk posed by the product];**
 - 2. That [describe severity of the potential consequences]; and**
 - 3. Any ways to use the [product] to reduce or avoid the risks that were known to [name of defendant].of the [product]'s risk, harm, or danger.**
-

New October 2008; Revised December 2014

Directions for Use

Give this instruction as a defense to CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*, or CACI No. 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements*.

Sources and Authority

- “A manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger.” (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 71 [74 Cal.Rptr.3d 108, 179 P.3d 905].)
- “The sophisticated user defense exempts manufacturers from their typical obligation to provide product users with warnings about the products’ potential hazards. The defense is considered an exception to the manufacturer’s general duty to warn consumers, and therefore, in most jurisdictions, if successfully argued, acts as an affirmative defense to negate the manufacturer’s duty to warn.” (*Johnson, supra*, 43 Cal.4th at p. 65, internal citation omitted.)
- “Under the sophisticated user defense, sophisticated users need not be warned about dangers of which they are already aware or should be aware. Because these sophisticated users are charged with knowing the particular product’s dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause. The rationale supporting the defense is that ‘the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer’s employees or downstream purchasers.’ This is because the user’s knowledge of the dangers is the equivalent of prior notice.” (*Johnson, supra*, 43 Cal.4th at p. 65, internal citations omitted.)

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- “[T]he defense applies equally to strict liability and negligent failure to warn cases. The duty to warn is measured by what is generally known or should have been known to the class of sophisticated users, rather than by the individual plaintiff’s subjective knowledge.” (*Johnson, supra*, 43 Cal.4th at pp. 65–66, internal citations omitted.)
- “[A] manufacturer is not liable to a sophisticated user for failure to warn, even if the failure to warn is a failure to provide a warning required by statute.” (*Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal.App.4th 549, 556 [101 Cal.Rptr.3d 726].)
- “The sophisticated user defense concerns warnings. Sophisticated users ‘are charged with knowing the particular product’s dangers.’ ‘The rationale supporting the defense is that “the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer’s employees or downstream purchasers.” [Citation.]’ [¶] [Plaintiff]’s design defect cause of action was not concerned with warnings. Instead, he alleged that respondents’ design of their refrigerant was defective. We see no logical reason why a defense that is based on the need for warning should apply.” (*Johnson, supra*, 179 Cal.App.4th at p. 559, internal citations omitted.)
- “The relevant time for determining user sophistication for purposes of this exception to a manufacturer’s duty to warn is when the sophisticated user is injured and knew or should have known of the risk.” (*Johnson, supra*, 43 Cal.4th at p. 73.)
- “*Johnson* did not impute an intermediary’s knowledge to the plaintiff, or charge him with any knowledge except that which had been made available to him through his training and which, by reason of his profession and certification, he should have had. In contrast, [defendant]’s proposed instruction is not based on the theory that [plaintiff] had the opportunity to acquire any knowledge of the dangers of asbestos, let alone the obligation to do so. Instead, it contends that its customers ... knew or should have known (from public sources) of the dangers of asbestos, and that its duty to warn [plaintiff] is measured by the knowledge [the customers] should have had. It is apparent that such a theory has nothing to do with *Johnson*.” (*Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 28–29 [117 Cal.Rptr.3d 791].)
- “Thus, in actions by employees or servants, the critical issue concerns their knowledge (or potential knowledge), rather than an intermediary’s sophistication. [¶] This conclusion flows directly from [Restatement Third of Torts] section 388 itself. Under section 388, a supplier of a dangerous item to users ‘directly or through a third person’ is subject to liability for a failure to warn, when the supplier ‘has no reason to believe that those for whose use the [item] is supplied will realize its dangerous condition.’ Accordingly, to avoid liability, there must be some basis for the supplier to believe that the ultimate user knows, or should know, of the item’s hazards. In view of this requirement, the intermediary’s sophistication is not, as matter of law, sufficient to avert liability; there must be a sufficient reason for believing that the intermediary’s sophistication is likely to operate to protect the user, or that the user is likely to discover the hazards in some other manner. The fact that the user is an employee or servant of the sophisticated intermediary cannot plausibly be regarded as a sufficient reason, as a matter of law, to infer that the latter will protect the former. We therefore reject [defendant]’s contention that an intermediary’s sophistication invariably shields suppliers from liability to the intermediary’s employees or servants.” (*Pfeifer v.*

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John Crane, Inc. (2013) 220 Cal.App.4th 1270, 1296–1297 [164 Cal.Rptr.3d 112].)

- “In order to establish the defense, a manufacturer must demonstrate that sophisticated users of the product know what the risks are, including the degree of danger involved (i.e., the severity of the potential injury), and how to use the product to reduce or avoid the risks, to the extent that information is known to the manufacturer.” (*Buckner v. Milwaukee Electric Tool Corp.* (2013) 222 Cal.App.4th 522, 536 [166 Cal.Rptr.3d 202].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467, 1537, 1541–1542

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶ 2:1277 (The Rutter Group)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.185 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.246 (Matthew Bender)

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VF-1201. Strict Products Liability—Design Defect—~~Consumer Expectation Test~~—Affirmative Defense—Misuse or Modification

We answer the questions submitted to us as follows:

1. Did *[name of defendant]* [manufacture/distribute/sell] the *[product]*?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the *[product]* [misused/ [or] modified] after it left *[name of defendant]*'s possession in a way that was so highly extraordinary that it was not reasonably foreseeable to [him/her/it]?
 Yes No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. Was the [misuse/ [or] modification] the sole cause of *[name of plaintiff]*'s harm?
 Yes No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Is the *[product]* one about which an ordinary consumer can form reasonable minimum safety expectations?
 Yes No

If your answer to question 4 is yes, answer question 5. If your answer is no, skip question 5 and answer question 6.]

- 4]5. Did the *[product]* fail to perform as safely as an ordinary consumer would have expected when used or misused in an intended or reasonably foreseeable way?
 Yes No

Regardless of your answer to question 5, answer question 6. If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

6. Did the risk of the *[product]*'s design outweigh the benefits of the design?
 Yes No

If your answer to either question 5 or question 6 is yes, answer question 7. If you

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answered no to both questions 5 and 6, stop here, answer no further questions, and have the presiding juror sign and date this form.

57. Was the [product]’s design a substantial factor in causing harm to [name of plaintiff]?
 ___ Yes ___ No

If your answer to question **5-7** is yes, then answer question **68**. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

68. What are [name of plaintiff]’s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

TOTAL \$ _____

Signed: _____
 Presiding Juror

Dated: _____

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After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised October 2004, April 2007, April 2009, December 2010, June 2011, December 2011, December 2014

Directions for Use

This verdict form is based on CACI Nos. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements*, 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements*, and 1245, *Affirmative Defense—Product Misuse or Modification*. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 10 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue*, may be added at the end.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form can be used in a case in which the jury will decide design defect under both the consumer expectation and the risk-benefit tests. If only the risk-benefit test is at issue, omit questions 4 and 5. If only the consumer expectation test is at issue, omit question 6. Include question 4 if the court has decided to give to the jury the preliminary question as to whether the consumer expectation test can be applied to the product at issue in the case. (See *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233–1234 [115 Cal.Rptr.3d 151].)~~This verdict form is based on CACI No. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements*, and CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 10 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue*, may be added at the end.~~

An additional question may be needed if the defendant claims that the plaintiff's injuries were caused by some other product other than the defendant's.

If specificity is not required, users do not have to itemize all the damages listed in question 68. The breakdown is optional depending on the circumstances.

~~If there are multiple causes of action, users may wish to combine the individual forms into one form. However, do not combine this verdict form with CACI No. VF-1202, *Strict Products Liability—Design Defect—Risk-Benefit Test*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Braciseo v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431]) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer expectation test. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.~~

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to

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award prejudgment interest on specific losses that occurred prior to judgment.

VF-1202. Strict Products Liability—Design Defect—Risk-Benefit Test

Revoked December 1214; See CACI No. VF-1201

~~We answer the questions submitted to us as follows:~~

~~1. Did [name of defendant] [manufacture/distribute/sell] the [product]?
 Yes No~~

~~If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.~~

~~2. Was the [product]’s design a substantial factor in causing harm to [name of plaintiff]?
 Yes No~~

~~If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.~~

~~3. Did the risks of the [product]’s design outweigh the benefits of the design?
 Yes No~~

~~If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.~~

~~4. What are [name of plaintiff]’s damages?~~

~~{a. Past economic loss~~

~~_____ [lost earnings] _____ \$ _____]~~

~~_____ [lost profits] _____ \$ _____]~~

~~_____ [medical expenses] _____ \$ _____]~~

~~_____ [other past economic loss] _____ \$ _____]~~

~~Total Past Economic Damages: \$ _____]~~

~~{b. Future economic loss~~

~~_____ [lost earnings] _____ \$ _____]~~

~~_____ [lost profits] _____ \$ _____]~~

~~_____ [medical expenses] _____ \$ _____]~~

~~_____ [other future economic loss] _____ \$ _____]~~

~~Total Future Economic Damages: \$ _____]~~

~~{c. Past noneconomic loss, including [physical~~

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~~_____pain/mental suffering:]~~~~\$ _____]~~~~{d. _____Future noneconomic loss, including [physical
_____pain/mental suffering:]~~~~\$ _____]~~~~TOTAL \$ _____~~~~Signed: _____
_____Presiding Juror~~~~Dated: _____~~~~After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court
attendant] that you are ready to present your verdict in the courtroom.~~~~New September 2003; Revised April 2007, April 2009, December 2010, June 2011~~**Directions for Use**

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 1204, *Strict Liability—Design Defect—Risk Benefit Test—Essential Factual Elements—Shifting Burden of Proof*. If product misuse or modification is alleged as a complete defense (see CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*), questions 2 and 3 of CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification*, may be included after question 1. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 7 through 9 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue*, may be added at the end.

If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, do not combine this verdict form with CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431]) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer expectation test. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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~~This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.~~

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1305. Battery by Peace Officer

[Name of plaintiff] claims that [name of defendant] harmed [him/her] by using unreasonable force to [arrest [him/her]/prevent [his/her] escape/overcome [his/her] resistance/[insert other applicable action]]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] intentionally touched [name of plaintiff] [or caused [name of plaintiff] to be touched];
2. That [name of defendant] used unreasonable force to [arrest/prevent the escape of/overcome the resistance of/insert other applicable action] [name of plaintiff];
3. That [name of plaintiff] did not consent to the use of that force;
4. That [name of plaintiff] was harmed; and
5. That [name of defendant]’s use of unreasonable force was a substantial factor in causing [name of plaintiff]’s harm.

[A/An] [insert type of peace officer] may use reasonable force to arrest or detain a person when he or she has reasonable cause to believe that that person has committed a crime. Even if the [insert type of peace officer] is mistaken, a person being arrested or detained has a duty not to use force to resist the [insert type of peace officer] unless the [insert type of peace officer] is using unreasonable force.

In deciding whether [name of defendant] used unreasonable force, you must determine the amount of force that would have appeared reasonable to [a/an] [insert type of peace officer] in [name of defendant]’s position under the same or similar circumstances. ~~You should consider, among other factors, the following:~~

- ~~(a) — The seriousness of the crime at issue;~~
- ~~(b) — Whether [name of plaintiff] reasonably appeared to pose an immediate threat to the safety of [name of defendant] or others; and~~
- ~~(c) — Whether [name of plaintiff] was actively resisting arrest or attempting to evade arrest.~~

[[A/An] [insert type of peace officer] who makes or attempts to make an arrest is not required to retreat or cease from his or her efforts because of the resistance or threatened resistance of the person being arrested.]

New September 2003; Revised December 2012, December 2014

Directions for Use

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For additional authorities on excessive force, see the Sources and Authority for CACI No. ~~300~~[3020](#), *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*.

Sources and Authority

- California Penal Code section 835a states: “Any peace officer, who has reasonable cause to believe that the person to be arrested has committed a public offense, may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.”
- California Penal Code section 834a states: “If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.”
- A plaintiff bringing a battery action against a police officer has the burden of proving unreasonable force as an element of the tort. (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)
- “ ‘ “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. ... [T]he question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. ...” ’ In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required.” (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)
- “A police officer's use of deadly force is reasonable if ‘ ‘ ‘the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.’ ...” ...’ ” (*Brown, supra*, 171 Cal.App.4th at p. 528.)
- “[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention” (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)
- “[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer unless excessive force is used or threatened; excessive force in that event triggers the individual’s right of self-defense.” (*Evans, supra*, 22 Cal.App.4th at p. 331, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 424

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.24 (Matthew Bender)

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6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.22, 58.61, 58.92
(Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.20 et seq. (Matthew Bender)

| 1 California Civil Practice: Torts ~~(Thomson West)~~ § 12:22 (Thomson Reuters)

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1620. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Essential Factual Elements

[Name of plaintiff] claims that *[name of defendant]*'s conduct caused *[him/her]* to suffer serious emotional distress. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* was negligent;
2. That *[name of plaintiff]* suffered serious emotional distress; and
3. That *[name of defendant]*'s negligence was a substantial factor in causing *[name of plaintiff]*'s serious emotional distress.

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003; Revised June 2014, [December 2014](#)

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. The doctrine of “negligent infliction of emotional distress” is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

A “direct victim” case is one in which the plaintiff’s claim of emotional distress is based on the violation of a duty that the defendant owes directly to the plaintiff. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 205 [147 Cal.Rptr.3d 41].) The California Supreme Court has allowed plaintiffs to recover damages as “direct victims” in only three types of factual situations: (1) the negligent mishandling of corpses (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 879 [2 Cal.Rptr.2d 79, 820 P.2d 181]); (2) the negligent misdiagnosis of a disease that could potentially harm another (*Molien, supra*, 27 Cal.3d at p. 923); and (3) the negligent breach of a duty arising out of a preexisting relationship (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1076 [9 Cal.Rptr.2d 615, 831 P.2d 1197]).

The judge will normally decide whether a duty was owed to the plaintiff as a direct victim. If the issue of whether the plaintiff is a direct victim is contested, a special instruction with the factual dispute laid out for the jury will need to be drafted.

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

If the plaintiff witnesses the injury of another, use CACI No. 1621, *Negligence—Recovery of Damages*

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for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements. For instructions for use for emotional distress arising from exposure to carcinogens, HIV, or AIDS, see CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*, and CACI No. 1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements*.

Elements 1 and 3 of this instruction could be modified for use in a strict products liability case. A plaintiff may seek damages for the emotional shock of viewing the injuries of another when the incident is caused by defendant’s defective product. (*Kately v. Wilkinson* (1983) 148 Cal.App.3d 576, 587 [195 Cal.Rptr. 902].)

The explanation in the last paragraph of what constitutes “serious” emotional distress comes from the California Supreme Court. (See *Molien, supra*, 27 Cal.3d at p.928.) In *Wong v. Jing*, an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as “severe” emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

Sources and Authority

- “[The] negligent causing of emotional distress is not an independent tort but the tort of negligence ...’ ‘The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability.’ ” (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588 [257 Cal.Rptr. 98, 770 P.2d 278], internal citations omitted.)
- “ ‘Direct victim’ cases are cases in which the plaintiff’s claim of emotional distress is not based upon witnessing an injury to someone else, but rather is based upon the violation of a duty owed directly to the plaintiff.” (*Ragland, supra*, 209 Cal.App.4th at p. 205.)
- “[D]uty is found where the plaintiff is a ‘direct victim,’ in that the emotional distress damages result from a duty owed the plaintiff ‘that is “assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two.” ’ ” (*McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1510 [97 Cal.Rptr.3d 555].)
- “We agree that the unqualified requirement of physical injury is no longer justifiable.” (*Molien, supra*, 27 Cal.3d at p. 928.)
- “[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.” (*Molien, supra*, 27 Cal.3d at pp. 927–928.)
- “In our view, this articulation of ‘serious emotional distress’ is functionally the same as the articulation of ‘severe emotional distress’ [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and

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can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury.” (*Wong, supra, v. Jing* (2010) 189 Cal.App.4th at p.1354, 1378 [~~117 Cal.Rptr.3d 747~~].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1004

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:215 et seq. (The Rutter Group)

1 California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.03 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11 (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.31 et seq. (Matthew Bender)

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1621. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements

[Name of plaintiff] claims that [he/she] suffered serious emotional distress as a result of perceiving [an injury to/the death of] [name of victim]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] negligently caused [injury to/the death of] [name of victim];**
- 2. That when the [describe event, e.g., traffic accident] that caused [injury to/the death of] [name of victim] occurred, [name of plaintiff] was present at the scene;**
- 3. That [name of plaintiff] was then aware that the [e.g., traffic accident] was causing [injury to/the death of] [name of victim];**
- 4. That [name of plaintiff] suffered serious emotional distress; and**
- 5. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s serious emotional distress.**

[Name of plaintiff] need not have been then aware that [name of defendant] had caused the [e.g., traffic accident].

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003; Revised December 2013, June 2014

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. The doctrine of “negligent infliction of emotional distress” is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

A “bystander” case is one in which a plaintiff seeks recovery for damages for emotional distress suffered as a percipient witness of an injury to another person. If the plaintiff is a direct victim of tortious conduct, use CACI No. 1620, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Essential Factual Elements*. For instructions for use for emotional distress arising from exposure to carcinogens, HIV, or AIDS, see CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*, and CACI No. 1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—*

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Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements.

This instruction should be read in conjunction with instructions in the Negligence series (see CACI No. 400 et seq.) to further develop element 1.

Whether the plaintiff had a sufficiently close relationship with the victim should be determined as an issue of law because it is integral to the determination of whether a duty was owed to the plaintiff.

The explanation in the last paragraph of what constitutes “serious” emotional distress comes from the California Supreme Court. (See *Molien, supra*, 27 Cal.3d at p.928.) In *Wong v. Jing*, an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as “severe” emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

Sources and Authority

- “California's rule that plaintiff's fear for his own safety is compensable also presents a strong argument for the same rule as to fear for others; otherwise, some plaintiffs will falsely claim to have feared for themselves, and the honest parties unwilling to do so will be penalized. Moreover, it is incongruous and somewhat revolting to sanction recovery for the mother if she suffers shock from fear for her own safety and to deny it for shock from the witnessed death of her own daughter.” (*Dillon v. Legg* (1968) 68 Cal.2d 728, 738 [69 Cal.Rptr. 72, 441 P.2d 912].)
- “As an introductory note, we observe that plaintiffs ... framed both negligence and negligent infliction of emotional distress causes of action. To be precise, however, ‘the [only] tort with which we are concerned is negligence. Negligent infliction of emotional distress is not an independent tort’” (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875–876 [104 Cal.Rptr.3d 352].)
- “In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness.” (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865, 771 P.2d 814].)
- “[T]o satisfy the second *Thing* requirement the plaintiff must experience a contemporaneous sensory awareness of the causal connection between the defendant's infliction of harm and the injuries suffered by the close relative.” (*Fortman v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 836 [151 Cal.Rptr.3d 320].)
- “[A] plaintiff need not contemporaneously understand the defendant's conduct as *negligent*, as opposed to *harmful*. But the court confused awareness of negligence, a legal conclusion, with contemporaneous, understanding awareness of the event as causing harm to the victim.” (*Bird v. Saenz* (2002) 28 Cal.4th 910, 920 [123 Cal.Rptr.2d 465, 51 P.3d 324].)

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- “*Thing* does not require that the plaintiff have an awareness of what caused the injury-producing event, but the plaintiff must have an understanding perception of the ‘event as causing harm to the victim.’ ” (*Fortman, supra*, 212 Cal.App.4th at p. 841, fn. 4.)
- “[W]e also reject [plaintiff]’s attempt to expand bystander recovery to hold a product manufacturer strictly liable for emotional distress when the plaintiff observes injuries sustained by a close relative arising from an unobservable product failure. To do so would eviscerate the second *Thing* requirement.” (*Fortman, supra*, 212 Cal.App.4th at pp. 843–844.)
- “Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim.” (*Thing, supra*, 48 Cal.3d at p. 668, fn. 10.)
- “[A]n unmarried cohabitant may not recover damages for emotional distress based on such injury.” (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 273 [250 Cal.Rptr. 254, 758 P.2d 582].)
- “Although a plaintiff may establish presence at the scene through nonvisual sensory perception, ‘someone who hears an accident but does not then know it is causing injury to a relative does not have a viable [bystander] claim for [negligent infliction of emotional distress], even if the missing knowledge is acquired moments later.’ ” (*Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149 [64 Cal.Rptr.3d 539], internal citation omitted.)
- “[I]t is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child.” (*Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1271 [3 Cal.Rptr.2d 803].)
- “[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.’ ” (*Molien, supra*, 27 Cal.3d at pp. 927–928.)
- “In our view, this articulation of ‘serious emotional distress’ is functionally the same as the articulation of ‘severe emotional distress’ [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury.” (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1007–1021

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 11-F, *Negligent Infliction Of Emotional Distress*, ¶ 11:101 (The Rutter Group)

Draft–Not Approved by Judicial Council

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.04 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11 (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, §§ 153.31 et seq., 153.45 et seq. (Matthew Bender)

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1622. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements

[Name of plaintiff] claims that *[name of defendant]*'s conduct caused *[him/her]* to suffer serious emotional distress by exposing *[name of plaintiff]* to *[insert applicable carcinogen, toxic substance, HIV, or AIDS]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* was exposed to *[insert applicable carcinogen, toxic substance, HIV, or AIDS]* as a result of *[name of defendant]*'s negligence;
2. That *[name of plaintiff]* suffered serious emotional distress from a fear that *[he/she]* will develop *[insert applicable cancer, HIV, or AIDS]* as a result of the exposure;
3. That reliable medical or scientific opinion confirms that it is more likely than not that *[name of plaintiff]* will develop *[insert applicable cancer, HIV, or AIDS]* as a result of the exposure; and
4. That *[name of defendant]*'s negligence was a substantial factor in causing *[name of plaintiff]*'s serious emotional distress.

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003; Revised June 2014

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. The doctrine of “negligent infliction of emotional distress” is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise currently injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

Recovery for emotional distress without other current harm or injury is allowed for negligent exposure to a disease-causing substance, but only if the plaintiff can establish that it is more likely than not that the plaintiff will contract the disease. (See *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 997 [25 Cal.Rptr.2d 550, 863 P.2d 795].) There may be other harmful agents and medical conditions that could support this claim for damages.

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

If plaintiff alleges that defendant's conduct constituted oppression, fraud, or malice, then CACI No.

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1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements*, should be read.

The explanation in the last paragraph of what constitutes “serious” emotional distress comes from the California Supreme Court. (See *Molien, supra*, 27 Cal.3d at p.928.) In *Wong v. Jing*, an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as “severe” emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

Sources and Authority

- “[D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact” (*Potter, supra*, 6 Cal.4th at p. 986, internal citation omitted.)
- “[T]he way to avoid damage awards for unreasonable fear, i.e., in those cases where the feared cancer is at best only remotely possible, is to require a showing of the actual likelihood of the feared cancer to establish its significance.” (*Potter, supra*, 6 Cal.4th at p. 990.)
- “[D]amages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant’s negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff’s fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure.” (*Potter, supra*, 6 Cal.4th at p. 997.)
- “[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.’ ” (*Molien, supra*, 27 Cal.3d at pp. 927-928.)
- “In our view, this articulation of ‘serious emotional distress’ is functionally the same as the articulation of ‘severe emotional distress’ [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury.” (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)
- “[W]e hold that the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff’s toxic exposure and that the recommended monitoring is reasonable.” (*Potter, supra*, 6 Cal.4th at p. 1009.)
- “All of the policy concerns expressed in *Potter* apply with equal force in the fear of AIDS context.” (*Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1074 [33 Cal.Rptr.2d 172].)
- “[Plaintiff parent] claims the likelihood of actual injury to [child] is immaterial and that, in short, the rule announced in *Potter* regarding fear of cancer should not be applied to a case involving fear of

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AIDS. We disagree.” (*Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 786 [31 Cal.Rptr.2d 709].)

- “[W]hen a defendant demonstrates that a plaintiff’s smoking is negligent and that a portion of the plaintiff’s fear of developing cancer is attributable to the smoking, comparative fault principles may be applied in determining the extent to which the plaintiff’s emotional distress damages for such fear should be reduced to reflect the proportion of such damages for which the plaintiff should properly bear the responsibility.” (*Potter, supra*, 6 Cal.4th at pp. 965, 1011.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1036

Haning, et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:218.6 (The Rutter Group)

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.02 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11[3][c] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.38 (Matthew Bender)

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1623. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements

[Name of plaintiff] **claims that** *[name of defendant]* **acted with [malice/oppression/fraudulent intent] in exposing** *[name of plaintiff]* **to** *[insert applicable carcinogen, toxic substance, HIV, or AIDS]* **and that this conduct caused** *[name of plaintiff]* **to suffer serious emotional distress. To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That** *[name of plaintiff]* **was exposed to** *[insert applicable carcinogen, toxic substance, HIV, or AIDS]* **as a result of** *[name of defendant]*'s **negligent conduct;**
2. **That** *[name of defendant]* **acted with [malice/oppression/fraudulent intent] because** *[insert one or more of the following, as applicable]:*

[[Name of defendant] intended to cause injury to [name of plaintiff];] [or]

[[Name of defendant]'s conduct was despicable and was carried out with a willful or conscious disregard of [name of plaintiff]'s rights or safety;] [or]

[[Name of defendant]'s conduct was despicable and subjected [name of plaintiff] to cruel and unjust hardship in conscious disregard of [name of plaintiff]'s rights;] [or]

[[Name of defendant] intentionally misrepresented or concealed a material fact known to [name of defendant], intending to cause [name of plaintiff] harm;]

3. **That** *[name of plaintiff]* **suffered serious emotional distress from a fear that [he/she] will develop** *[insert applicable cancer, HIV, or AIDS]* **as a result of the exposure;**
4. **That reliable medical or scientific opinion confirms that** *[name of plaintiff]*'s **risk of developing** *[insert applicable cancer, HIV, or AIDS]* **was significantly increased by the exposure and has resulted in an actual risk that is significant; and**
5. **That** *[name of defendant]*'s **conduct was a substantial factor in causing** *[name of plaintiff]*'s **serious emotional distress.**

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

“Despicable conduct” is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

New September 2003; Revised June 2014

Draft–Not Approved by Judicial Council

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. There is no separate tort or cause of action for “negligent infliction of emotional distress.” The doctrine is one that allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise currently injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

Recovery for emotional distress without other current harm or injury is allowed for negligent exposure to a disease-causing substance. If the plaintiff can prove oppression, fraud, or malice, it is not necessary to establish that it is more likely than not that the plaintiff will contract the disease. (See *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 998 [25 Cal.Rptr.2d 550, 863 P.2d 795.]) Use CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*, if plaintiff alleges exposure without oppression, fraud, or malice.

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

“Oppression, fraud, or malice” is used here as defined by Civil Code section 3294, except that the higher “clear and convincing” burden of proof is not required in this context. (See *Potter, supra*, 6 Cal.4th at p. 1000.)

In some cases the judge should make clear that the defendant does not need to have known of the individual plaintiff where there is a broad exposure and plaintiff is a member of the class that was exposed.

The explanation in the last paragraph of what constitutes “serious” emotional distress comes from the California Supreme Court. (See *Molien, supra*, 27 Cal.3d at p.928.) In *Wong v. Jing*, an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as “severe” emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

Sources and Authority

- Punitive Damages: Malice, Oppression, and Fraud Defined. Civil Code section 3294(c).
- “[D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact” (*Potter, supra*, 6 Cal.4th at p. 986.)
- “[A] toxic exposure plaintiff need not meet the more likely than not threshold for fear of cancer recovery in a negligence action if the plaintiff pleads and proves that the defendant’s conduct in causing the exposure amounts to ‘oppression, fraud, or malice’ as defined in Civil Code section 3294.” (*Potter, supra*, 6 Cal.4th at p. 998.)
- “[S]erious mental distress may be found where a reasonable man, normally constituted, would be

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unable to adequately cope with the mental stress engendered by the circumstances of the case.’ ”
(*Molien, supra*, 27 Cal.3d at pp. 927-928.)

- “[D]amages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant’s negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff’s fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure.” (*Potter, supra*, 6 Cal.4th at p. 997.)
- “In our view, this articulation of ‘serious emotional distress’ is functionally the same as the articulation of ‘severe emotional distress’ [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury.” (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)
- “All of the policy concerns expressed in *Potter* apply with equal force in the fear of AIDS context.” (*Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1074 [33 Cal.Rptr.2d 172].)
- “[Plaintiff parent] claims the likelihood of actual injury to [child] is immaterial and that, in short, the rule announced in *Potter* regarding fear of cancer should not be applied to a case involving fear of AIDS. We disagree.” (*Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 786 [31 Cal.Rptr.2d 709].)
- “Despicable conduct is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.” (*Mock v. Mich. Millers Mut. Ins. Co.* (1992) 4 Cal.App.4th 306, 331 [5 Cal.Rptr.2d 594].)
- “Used in its ordinary sense, the adjective ‘despicable’ is a powerful term that refers to circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.’ ” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- [Although] “Civil Code section 3294 requires a plaintiff to prove oppression, fraud, or malice by ‘clear and convincing evidence’ for purposes of punitive damages,” this higher burden of proof has not been applied to fear-of-cancer cases. (*Potter, supra*, 6 Cal.4th at p. 1000, fn. 20.)
- “[W]hen a defendant demonstrates that a plaintiff’s smoking is negligent and that a portion of the plaintiff’s fear of developing cancer is attributable to the smoking, comparative fault principles may be applied in determining the extent to which the plaintiff’s emotional distress damages for such fear should be reduced to reflect the proportion of such damages for which the plaintiff should properly bear the responsibility.” (*Potter, supra*, 6 Cal.4th at p. 1011.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1036

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Haning, et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:218.6 (The Rutter Group)

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.02 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11[3][c] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.38 (Matthew Bender)

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1803. Appropriation of Name or Likeness—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] violated [his/her] right to privacy. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] used [name of plaintiff]’s name, likeness, or identity without [his/her] permission;
2. That [name of defendant] gained a commercial benefit [or some other advantage] by using [name of plaintiff]’s name, likeness, or identity;
3. That [name of plaintiff] was harmed; [and]
4. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm; [and]

~~5. That the privacy interests of [name of plaintiff] outweigh the public interest served by [name of defendant]’s use of [his/her] name, likeness, or identity.~~

~~In deciding whether [name of plaintiff]’s privacy interest outweighs the public’s interest, you should consider where the information was used, the extent of the use, the public interest served by the use, and the seriousness of the interference with [name of plaintiff]’s privacy.~~

New September 2003; Revised December 2014

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person’s right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

If the alleged “benefit” is not commercial, the judge will need to determine whether the advantage gained by the defendant qualifies as “some other advantage.”

If suing under both the common law and Civil Code section 3344, the judge may need to explain that a person’s voice, for example, may qualify as “identity” if the voice is sufficient to cause listeners to identify the plaintiff. The two causes of action overlap, and the same conduct should be covered by both.

Even if the elements are established, the First Amendment may require that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information. The last bracketed element and the last bracketed paragraph are appropriate in cases that implicate a defendant’s First Amendment right to freedom of expression and freedom of the press. (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409–410 [114 Cal.Rptr.2d 307].) In a closely related right-of-publicity claim, the California Supreme Court has held that an artist who is faced

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with a challenge to his or her work may raise as affirmative defense that the work is protected by the First Amendment because it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity’s fame. (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797]; see CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III)*.) Therefore, if there is an issue of fact regarding a First-Amendment balancing test, it most probably should be considered to be an affirmative defense. (cf. *Gionfriddo, supra* [“Given the significant public interest in this sport, plaintiffs can only prevail if they demonstrate a substantial competing interest.”].)

Sources and Authority

- “A common law cause of action for appropriation of name or likeness may be pleaded by alleging (1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 417 [198 Cal.Rptr. 342], internal citations omitted.)
- “The common law cause of action may be stated by pleading the defendant's unauthorized use of the plaintiff's identity; the appropriation of the plaintiff's name, voice, likeness, signature, or photograph to the defendant's advantage, commercially or otherwise; and resulting injury.” (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 684–685 [166 Cal.Rptr.3d 359].)Section 652C of the Restatement Second of Torts provides: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”
- “California common law has generally followed Prosser’s classification of privacy interests as embodied in the Restatement.” (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)
- “[T]he appearance of an ‘endorsement’ is not the *sine qua non* of a claim for commercial appropriation.” (*Eastwood, supra*, 149 Cal.App.3d at p. 419.)
- “[N]o cause of action will lie for the ‘[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.’ ” (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)
- “The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals’ interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person’s privacy.” (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278-279 [239 P.2d 630].)
- “Even if each of these elements is established, however, the common law right does not provide relief for every publication of a person’s name or likeness. The First Amendment requires that the right to

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be protected from unauthorized publicity ‘be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.’ ” (*Gionfriddo, supra*, 94 Cal.App.4th at pp. 409-410, internal citations and footnote omitted.)

- “Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities.” (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)
- “[T]he fourth category of invasion of privacy, namely, appropriation, ‘has been complemented legislatively by Civil Code section 3344.’ complements the common law tort of appropriation. (*Eastwood, supra*, 149 Cal.App.3d at pp. 416–417.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 676–678

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, §§ 429.35, 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.21 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ § 20:16 (Thomson Reuters)

Draft—Not Approved by Judicial Council

2336. Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements

[Name of plaintiff] claims *[he/she/it]* was harmed by *[name of defendant]*'s breach of the obligation of good faith and fair dealing because *[name of defendant]* failed to defend *[name of plaintiff]* in a lawsuit that was brought against *[him/her/it]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* was insured under an insurance policy with *[name of defendant]*;
2. That a lawsuit was brought against *[name of plaintiff]*;
3. That *[name of plaintiff]* gave *[name of defendant]* timely notice that *[he/she/it]* had been sued;
4. That *[name of defendant]*, unreasonably or without proper cause, failed to defend *[name of plaintiff]* against the lawsuit;
5. That *[name of plaintiff]* was harmed; and
6. That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.

New October 2004; Revised December 2007, December 2014

Directions for Use

The instructions in this series assume that the plaintiff is an insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

~~This instruction also assumes that the judge~~The court will decide the issue of whether the claim was potentially covered by the policy. (See *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 52 [221 Cal.Rptr. 171].) If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute establishes a possibility of coverage and thus a duty to defend. (*North Counties Engineering, Inc. v. State Farm General Ins. Co.* (2014) 224 Cal.App.4th 902, 922 [169 Cal.Rptr.3d 726].) Therefore, the jury does not resolve factual disputes that determine coverage.~~If there are factual disputes regarding this issue, a special interrogatory could be used.~~

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

~~If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified. Note that an excess insurer generally owes no duty to defend without exhaustion of the primary coverage by judgment or~~

~~settlement.~~

Sources and Authority

- “A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause. On the other hand, ‘[i]f the insurer’s refusal to defend is reasonable, no liability will result.’” (*Shade Foods, Inc., supra*, 78 Cal.App.4th at p. 881, internal citations omitted.)
- “To prevail in an action seeking declaratory relief on the question of the duty to defend, ‘the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.’ The duty to defend exists if the insurer ‘becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement.’” (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308 [97 Cal.Rptr.3d 298, 211 P.3d 1083], original italics, internal citation omitted.)
- “ ‘ [A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. ... This duty ... is separate from and broader than the insurer’s duty to indemnify. ... ’ ‘[F]or an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. ... Hence, the duty ‘may exist even where coverage is in doubt and ultimately does not develop.’ ... ” ... ’ ” (*State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323 [78 Cal.Rptr.3d 828], internal citations omitted.)
- “If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer’s duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance.” (*GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1506 [86 Cal.Rptr.3d 515].)
- “In determining its duty to defend, the insurer must consider facts from any source—the complaint, the insured, and other sources. An insurer does not have a continuing duty to investigate the potential for coverage if it has made an informed decision on coverage at the time of tender. However, where the information available at the time of tender shows no coverage, but information available later shows otherwise, a duty to defend may then arise.” (*American States Ins. Co. v. Progressive Casualty Ins. Co.* (2009) 180 Cal.App.4th 18, 26 [102 Cal.Rptr.3d 591], internal citations omitted.)
- “The duty does not depend on the labels given to the causes of action in the underlying claims against the insured; ‘instead it rests on whether the *alleged facts or known extrinsic facts* reveal a *possibility* that the claim may be covered by the policy.’” (*Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal.App.4th 969, 976 [144 Cal.Rptr.3d 12], original italics.)

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- “The obligation of the insurer to defend is of vital importance to the insured. ‘In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his insurer than if compelled to handle and finance the presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own.’ ‘The insured’s desire to secure the right to call on the insurer’s superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability.’ ” (*Amato v. Mercury Casualty Co. (Amato II)* (1997) 53 Cal.App.4th 825, 831–832 [61 Cal.Rptr.2d 909], internal citations omitted.)
- “An anomalous situation would be created if, on the one hand, an insured can sue for the tort of breach of the implied covenant if the insurer accepts the defense and later refuses a reasonable settlement offer, but, on the other hand, an insured is denied tort recovery if the insurer simply refuses to defend. ... This dichotomy could have the effect of encouraging an insurer to stonewall the insured at the outset by simply refusing to defend.” (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319–1320 [52 Cal.Rptr.2d 385].)
- “[T]he mere existence of a legal dispute does not create a potential for coverage: ‘However, we have made clear that where the third party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance, and the insurer may properly deny a defense. *Moreover, the law governing the insurer’s duty to defend need not be settled at the time the insurer makes its decision.*’ ” (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 209 [97 Cal.Rptr.3d 568], original italics.)
- “The trial court erroneously thought that because the case law was ‘unsettled’ when the insurer first turned down the claim, that unsettledness created a potential for a covered claim. ... [I]f an insurance company’s denial of coverage is reasonable, as shown by substantial case law in favor of its position, there can be no bad faith even though the insurance company’s position is *later* rejected by our state Supreme Court.” (*Griffin Dewatering Corp., supra*, 176 Cal.App.4th at p. 179, original italics.)
- “Unresolved factual disputes impacting insurance coverage do not absolve the insurer of its duty to defend. ‘If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend.’ ” (*Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 520 [115 Cal.Rptr.3d 42].)
- ~~“A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause. On the other hand, ‘[i]f the insurer’s refusal to defend is reasonable, no liability will result.’ ” (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 881 [93 Cal.Rptr.2d 364], internal citations omitted.)~~
- “ ‘If the insurer is obliged to take up the defense of its insured, it must do so as soon as possible, both to protect the interests of the insured, and to limit its own exposure to loss. . . . [T]he duty to defend must be assessed at the outset of the case.’ It follows that a belated offer to pay the costs of defense may mitigate damages but will not cure the initial breach of duty.” (*Shade Foods, Inc., supra*, 78

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Cal.App.4th at p. 881, internal citations omitted.)

- “No tender of defense is required if the insurer has already denied coverage of the claim. In such cases, notice of suit and tender of the defense are excused because other insurer has already expressed its unwillingness to undertake the defense.” (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group) ¶ 7:614.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 297

Croskey et al., California Practice Guide: Insurance Litigation, ¶¶ 12:598–12:650.5 (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Defend, §§ 25.1–26.38

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.10–82.16 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

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2407. Employee’s Duty to Mitigate Damages

[Name of defendant] claims that if [name of plaintiff] is entitled to any damages, they should be reduced by the amount that [he/she] could have earned from other employment. To succeed, [name of defendant] must prove all of the following:

- 1. That employment substantially similar to [name of plaintiff]’s former job was available to [him/her];**
- 2. That [name of plaintiff] failed to make reasonable efforts to seek [and retain] this employment; and**
- 3. The amount that [name of plaintiff] could have earned from this employment.**

In deciding whether the employment was substantially similar, you should consider, among other factors, whether:

- (a) The nature of the work was different from [name of plaintiff]’s employment with [name of defendant];**
- (b) The new position was substantially inferior to [name of plaintiff]’s former position;**
- (c) The salary, benefits, and hours of the job were similar to [name of plaintiff]’s former job;**
- (d) The new position required similar skills, background, and experience;**
- (e) The job responsibilities were similar; [and]**
- (f) The job was in the same locality; [and]**
- (g) [insert other relevant factor(s)].**

[In deciding whether [name of plaintiff] failed to make reasonable efforts to retain comparable employment, you should consider whether [name of plaintiff] quit or was discharged from that employment for a reason within [his/her] control.]

New September 2003; Revised February 2007, [December 2014](#)

Directions for Use

This instruction may be given when there is evidence that the employee’s damages could have been mitigated. The bracketed language at the end of the instruction regarding plaintiff’s

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failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502-1503 [44 Cal.Rptr.2d 565].

In deciding whether the plaintiff could have obtained a substantially similar job, the trier of fact may consider several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system. (See *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250-255 [106 Cal.Rptr. 283].) Read only those factors that have been shown by the evidence.

This instruction should be given in all employment cases, not just in breach of contract cases. See Chin et al., Cal. Practice Guide: Employment Litigation, ~~(Rutter Group)~~ ¶ 17:492 ~~(Rutter Group)~~.

This instruction should not be used for wrongful demotion cases.

Sources and Authority

- “The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee’s rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages.” (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see also *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98 [127 Cal.Rptr. 222] [“Plaintiff concedes that the trial court was entitled to deduct her actual earnings”]; but see *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432 [165 Cal.Rptr.3d 441] [wages actually earned from an inferior job may not be used to mitigate damages].)
- “The burden is on the employer to prove that substantially similar employment was available which the wrongfully discharged employee could have obtained with reasonable effort.” (*Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 616 [46 Cal.Rptr.2d 459].)
- “[W]e conclude that the trial court should not have deducted from plaintiff’s recovery against defendant the amount that the court found she might have earned in employment which was substantially inferior to her position with defendant.” (*Rabago-Alvarez, supra, v. Dart Industries, Inc.* (1976) 55 Cal.App.3d at p.91, 99 ~~[127 Cal.Rptr. 222]~~.)
- “[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have earned by retaining that employment should be deducted from the amount of damages

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which otherwise would have been awarded to the employee under the terms of the original employment agreement.” (*Stanchfield, supra*, 37 Cal.App.4th at pp. 1502-1503.)

- “The location of the new job is one of the factors to consider in determining whether the new job is inferior.” (*Villacorta, supra*, 221 Cal.App.4th at p. 1432.)
- “There is some authority for the proposition that whether or not the other employment is comparable or substantially similar or equivalent to the prior position is a question of fact. On the other hand the issue of substantial similarity or inferiority of employment is one that has often been decided as a matter of law in California.”~~In deciding whether a school bus driver could have obtained a substantially similar job in other nearby school districts, the court looked at several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system.~~ (*California School Employees Assn., supra, v. Personnel Commission (1973)* 30 Cal.App.3d at pp. 253–254 241, 250-255 [106 Cal.Rptr. 283], internal citations omitted.)
- “[S]elf-employment is not unreasonable mitigation as long as the discharged employee applies sufficient effort trying to make the business successful, even if those efforts fail.” (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1284–1285 [134 Cal.Rptr.3d 883].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-F, *Mitigation Of Damages (Avoidable Consequences Doctrine)*, ¶¶ 17:490, 17:495, 17:497, 17:499–17:501 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.40–8.41

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[4] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.65 (Matthew Bender)

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2431. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy

[Name of plaintiff] claims that [he/she] was forced to resign rather than commit a violation of public policy. **It is a violation of public policy for an employer to require that an employee [specify claim in case, e.g., engage in price fixing].** To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] was employed by [name of defendant];
 2. That, [name of defendant] required [name of plaintiff] to [specify alleged conduct in violation of public policy, e.g., “engage in price fixing”];
 3. That this requirement was so intolerable that a reasonable person in [name of plaintiff]’s position would have had no reasonable alternative except to resign;
 4. That [name of plaintiff] resigned because of this requirement;
 5. That [name of plaintiff] was harmed; and
 6. That the requirement was a substantial factor in causing [name of plaintiff]’s harm.
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| New September 2003; Revised June 2014, December 2014

Directions for Use

This instruction should be given if a plaintiff claims that his or her constructive termination was wrongful because the defendant required the plaintiff to commit an act in violation of public policy. If the plaintiff alleges he or she was subjected to intolerable working conditions that violate public policy, see CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*.

This instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages*. See also CACI No. 2510, “*Constructive Discharge*” Explained.

The judge should determine whether the purported reason for plaintiff’s resignation would amount to a violation of public policy. The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Sources and Authority

- “[W]hen an employer’s discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions.” (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610])

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P.2d 1330].)

- “[A]n employer’s authority over its employees does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer.” (*Tameny, supra*, 27 Cal.3d at p. 178.)
- “[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be ‘public’ in the sense that it ‘inures to the benefit of the public’ rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be ‘fundamental’ and ‘substantial.’ ” (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote omitted.)
- “[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance.” (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090–1091 [4 Cal.Rptr.2d 874, 824 P.2d 680], internal citations and fn. omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046]; accord *Stevenson, supra*, 16 Cal.4th at p. 889.)
- “In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer’s right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes.” (*D’sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)
- “Constructive discharge occurs when the employer’s conduct effectively forces an employee to resign. Although the employee may say, ‘I quit,’ the employment relationship is actually severed involuntarily by the employer’s acts, against the employee’s will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation.” (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245 [32 Cal.Rptr.2d 223, 876 P.2d 1022], internal citation omitted.)
- “Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, ‘[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]’ ” (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)
- “In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee’s resignation that a reasonable employer would realize that a reasonable person in the employee’s position would be compelled to resign.” (*Turner, supra*, 7 Cal.4th at p. 1251.)
- “The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to

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overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee.” (*Turner, supra*, 7 Cal.4th at p. 1246.)

- “In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer’s ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found ‘aggravated.’ ” (*Turner, supra*, 7 Cal.4th at p. 1247, fn. 3.)
- “The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee.” (*Turner, supra*, 7 Cal.4th at p. 1254.)
- “[T]he standard by which a constructive discharge is determined is an objective one—the question is ‘whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.’ ” (*Turner, supra*, 7 Cal.4th at p. 1248, internal citations omitted.)
- “The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person.” (*Turner, supra*, 7 Cal.4th at p. 1254.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 222

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 4:405–406, 4:409–410, 4:421–422, 5:2, 5:45–47, 5:50, 5:70, 5:105, 5:115, 5:150–151, 5:170, 5:195, 5:220

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–5.46

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.31, 100.35–100.38 (Matthew Bender)

| California Civil Practice: Employment Litigation (~~Thomson West~~) §§ 6:23–6:25 ([Thomson Reuters](#))

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2432. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy

[Name of plaintiff] claims that [name of defendant] forced [him/her] to resign for reasons that violate public policy. **It is a violation of public policy for an employer to require an employee to [specify claim in case, e.g., work more than forty hours a week for less than minimum wage].** To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] was employed by [name of defendant];
2. That [name of plaintiff] was subjected to working conditions that violated public policy, in that [describe conditions imposed on the employee that constitute the violation, e.g., “[name of plaintiff] was treated intolerably in retaliation for filing a workers’ compensation claim”];
3. That [name of defendant] intentionally created or knowingly permitted these working conditions;
4. That these working conditions were so intolerable that a reasonable person in [name of plaintiff]’s position would have had no reasonable alternative except to resign;
5. That [name of plaintiff] resigned because of these working conditions;
6. That [name of plaintiff] was harmed; and
7. That the working conditions were a substantial factor in causing [name of plaintiff]’s harm.

To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [name of plaintiff]’s position.

New September 2003; Revised December 2014

Directions for Use

This instruction should be given if plaintiff claims that his or her constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy. The instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages*. See also CACI No. 2510, “*Constructive Discharge*” *Explained*.

The judge should determine whether the purported reason for plaintiff’s resignation would amount to a violation of public policy. The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

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Sources and Authority

- “[W]hen an employer’s discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions.” (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)
- “[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be ‘public’ in the sense that it ‘inures to the benefit of the public’ rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be ‘fundamental’ and ‘substantial.’ ” (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], fn. omitted.)
- “In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer’s right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes.” (*D’sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)
- In *Rojo v. Kliger* (1990) 52 Cal.3d 65, 88-91 [276 Cal.Rptr. 130, 801 P.2d 373], the court held that an employee terminated in retaliation for refusing her employer’s sexual advances may state a wrongful termination cause of action in tort.
- “Constructive discharge occurs when the employer’s conduct effectively forces an employee to resign. Although the employee may say, ‘I quit,’ the employment relationship is actually severed involuntarily by the employer’s acts, against the employee’s will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation.” (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245 [32 Cal.Rptr.2d 223, 876 P.2d 1022], internal citation omitted.)
- “Although situations may exist where the employee’s decision to resign is unreasonable as a matter of law, ‘[w]hether conditions were so intolerable as to justify a reasonable employee’s decision to resign is normally a question of fact. [Citation.]’ ” (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)
- “In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee’s resignation that a reasonable employer would realize that a reasonable person in the employee’s position would be compelled to resign.” (*Turner, supra*, 7 Cal.4th at p. 1251.)
- “The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee.” (*Turner, supra*, 7 Cal.4th at p. 1246.)

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- “In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer’s ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found ‘aggravated.’ ” (*Turner, supra*, 7 Cal.4th at p. 1247, fn. 3.)
- “The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee.” (*Turner, supra*, 7 Cal.4th at p. 1254.)
- “[T]he standard by which a constructive discharge is determined is an objective one—the question is ‘whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.’ ” (*Turner, supra*, 7 Cal.4th at p. 1248, internal citations omitted.)
- “The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person.” (*Turner, supra*, 7 Cal.4th at p. 1254.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 222

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 4:405–4:406, 4:409–4:411, 4:421–4:422, 5:2, 5:45–5:47

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–5.46

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.15, 249.50 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.31, 100.32, 100.36–100.38 (Matthew Bender)

| California Civil Practice: Employment Litigation–(~~Thomson West~~) §§ 6:23–6:25 (Thomson Reuters)

Draft—Not Approved by Judicial Council

2442. Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements (Gov. Code 8547.8(c))

[Name of plaintiff] **claims that [he/she] made a protected disclosure in good faith and that [name of defendant] discharged [him/her] as a result. In order to establish this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of plaintiff] [specify protected disclosure, e.g., reported waste, fraud, abuse of authority, violation of law, threats to public health, bribery, misuse of government property];**
 2. **That [name of plaintiff]’s communication [disclosed/ [or] demonstrated an intention to disclose] evidence of [an improper governmental activity/ [or] a condition that could significantly threaten the health or safety of employees or the public];**
 3. **That [name of plaintiff] made this communication in good faith [for the purpose of remediating the health or safety condition];**
 4. **That [name of defendant] discharged [name of plaintiff];**
 5. **That [name of plaintiff]’s communication was a contributing factor in [name of defendant]’s decision to discharge [name of plaintiff];**
 6. **That [name of plaintiff] was harmed; and**
 7. **That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.**
-

New December 2014

Directions for Use

Under the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.) (the Act), a state employee or applicant for state employment has a right of action against any person who retaliates against him or her for having made a “protected disclosure.” The statute prohibits a “person” from intentionally engaging in acts of reprisal, retaliation, threats, coercion, or similar acts against the employee or applicant. (Gov. Code, § 8547.8(c).) A “person” includes the state and its agencies. (Gov. Code, § 8547.2(d).)

While retaliatory discharge is clearly within the statute, adverse employment actions short of discharge are also prohibited. For adverse actions other than termination, replace “discharged” in the opening paragraph and in elements 4 and 5 with the applicable action. See CACI No. 2509, “*Adverse Employment Action Explained*,” and CACI No. 2510, “*Constructive Discharge Explained*,” for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

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Element 2 alleges a protected disclosure. (See Gov. Code, § 8547.2(e) [“protected disclosure” defined].)

If an “improper governmental activity” is alleged in element 2, it may be necessary to expand the instruction with language from Government Code section 8547.2(c) to define the term. If the court has found an improper governmental activity is involved as a matter of law, the jury should be instructed that the issue has been resolved.

If a health or safety violation is alleged in element 2, include the bracketed language at the end of element 3.

The statute addresses the possibility of a mixed-motive adverse action. If the plaintiff can establish that a protected disclosure was a “contributing factor” to the adverse action (see element 5), the employer may offer evidence to attempt to prove by clear and convincing evidence that it would have taken the same action for other permitted reasons. (Gov. Code, § 8547.8(e); see CACI No. 2443, *Affirmative Defense—Same Decision*.)

The affirmative defense includes refusing an illegal order as a second protected matter (along with engaging in protected disclosures). (See Gov. Code, 8547.8(e); see also Gov. Code, § 8547.2(b) [defining “illegal order”].). However, Government Code section 8547.8(c), which creates the plaintiff’s cause of action under the Act, mentions only making a protected disclosure; it does not expressly reference refusing an illegal order. But arguably, there would be no need for an affirmative defense to refusing an illegal order if the refusal itself is not protected. Therefore, whether a plaintiff may state a claim based on refusing an illegal order may be unclear, thus the committee has not included refusing an illegal order as within the elements of this instruction.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Civil Action Under California Whistleblower Protection Act. Government Code section 8547.8(c).
- “Improper Governmental Activity” Defined. Government Code section 8547.2(c).
- “Person” Defined. Government Code section 8547.2(d).
- “Protected Disclosure” Defined. Government Code section 8547.2(e).
- Governmental Claims Act Not Applicable. Government Code section 905.2(h).
- “The [Whistleblower Protection Act] prohibits improper governmental activities, which include interference with or retaliation for reporting such activities.” (*Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 939 [163 Cal.Rptr.3d 530].)
- “[Government Code] Section 8547.8 requires a state employee who is a victim of conduct prohibited by the [Whistleblower Protection] Act to file a written complaint with the Personnel

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Board within 12 months of the events at issue and instructs, ‘any action for damages shall not be available to the injured party ...’ unless he or she has filed such a complaint. The Legislature could hardly have used stronger language to indicate its intent that compliance with the administrative procedure of sections 8547.8 and 19683 is to be regarded as a mandatory prerequisite to a suit for damages under the Act than to say a civil action is ‘not ... available’ to persons who have not complied with the procedure.” (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1112–1113 [150 Cal.Rptr.3d 405, internal citations omitted.]

Secondary Sources

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2443. Affirmative Defense—Same Decision (Gov. Code, § 8547.8(e))

If [name of plaintiff] proves that [his/her] disclosure was a contributing factor to [his/her] discharge, [name of defendant] is not liable if [name of defendant] proves by clear and convincing evidence that [he/she/it] would have discharged [name of plaintiff] for legitimate, independent reasons even if [name of plaintiff] had not made protected disclosures [or refused an illegal order].

New December 2014

Directions for Use

Give this instruction in a so-called same-decision or mixed-motive case under the California Whistleblower Protection Act. (See Gov. Code, § 8547 et seq.; CACI No. 2442, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Gov. Code, § 8547.8(e).)

Include the bracketed language at the end if the court has allowed the case to proceed based on refusing an illegal order. The affirmative defense statute includes refusing an illegal order as protected activity along with making a protected disclosure. The statute that creates the plaintiff's cause of action does not expressly mention refusing an illegal order (Compare Gov. Code, § 8547.8(e) with Gov. Code, § 8547.2(c).) See the Directions for Use to CACI No. 2442.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Same-Decision Affirmative Defense. Government Code section 8547.8(e).

Secondary Sources

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2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] wrongfully discriminated against [him/her] based on [his/her] ~~perceived~~ [history of [a]] [select term to describe basis of limitations, e.g., physical condition]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] was [an employer/[other covered entity]];
2. That [name of plaintiff] [was an employee of [name of defendant]/applied to [name of defendant] for a job/[describe other covered relationship to defendant]];
3. ~~That [name of defendant] knew that [name of plaintiff] had/treated [name of plaintiff] as if he/she had] a history of having [a] [e.g., physical condition] [that limited [insert major life activity]]];~~~~or~~

~~That [name of defendant] knew that [name of plaintiff] had/treated [name of plaintiff] as if he/she had] a history of having [a] [e.g., physical condition] [that limited [insert major life activity]]];~~

4. That [name of plaintiff] was able to perform the essential job duties [with reasonable accommodation for [his/her] [e.g., physical condition]];
5. [That [name of defendant] [discharged/refused to hire/[other adverse employment action]] [name of plaintiff];]

[or]

[That [name of defendant] subjected [name of plaintiff] to an adverse employment action;]

[or]

[That [name of plaintiff] was constructively discharged;]

6. ~~That [name of plaintiff]’s [history of [a]] [e.g., physical condition] was a substantial motivating reason for [name of defendant]’s [decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]/conduct];~~~~or~~

~~That [name of defendant]’s belief that [name of plaintiff] had [a history of [a]] [e.g., physical condition] was a substantial motivating reason for [name of defendant]’s [decision to [discharge/refuse to hire/[other adverse employment action]] [name of plaintiff]/conduct];~~

7. That [name of plaintiff] was harmed; and
8. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.

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New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013; December 2014

Directions for Use

Select a term to use throughout to describe the source of the plaintiff’s limitations. It may be a statutory term such as “physical disability,” “mental disability,” or “medical condition.” (See Gov. Code, § 12940(a).) Or it may be a general term such as “condition,” “disease,” or “disorder.” Or it may be a specific health condition such as “diabetes.”

In the introductory paragraph and in elements 3 and 6, select the bracketed language on “history” of disability include “perceived” or “history of” if the claim of discrimination is based on a perceived disability or a history of disability rather than a current actual disability.

~~For~~ If element 1 is contested, give CACI No. 2514, *Existence of Employment Relationship Disputed*, the court may need to instruct the jury on the ~~statutory~~ definition of “employer” under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

~~Under element 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select “knew that [name of plaintiff] had.” For a perceived disability, select “treated [name of plaintiff] as if [he/she] had.”~~ Modify elements 3 and 6 if plaintiff was not actually disabled or had a history of disability, but alleges discrimination because he or she was perceived to be disabled. (See Gov. Code, § 12926(o); see also See Gov. Code, § 12926(j)(4), ~~(4m)~~(4) [mental and physical disability include being regarded or treated as disabled by the employer].) If the plaintiff alleges discrimination on the basis of his or her association with someone who was or was perceived to be disabled, give CACI No. 2547, *Disability-Based Associational Discrimination—Essential Factual Elements*. (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655–660 [163 Cal.Rptr.3d 392] [claim for “disability based associational discrimination” adequately pled].)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit “that limited [*insert major life activity*]” in element 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

Regarding element 4, it is now settled that the ability to perform the essential duties of the job is an element of the plaintiff’s burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P.3d 118].)

Read the first option for element 5 if there is no dispute as to whether the employer’s acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, “*Adverse Employment Action*” Explained, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, “*Constructive Discharge*” Explained. Select “conduct” in element 6 if either the second or third option is included for element 5.

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Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, “*Substantial Motivating Reason*” Explained.)

If the existence of a qualifying disability is disputed, additional instructions defining “physical disability,” “mental disability,” and “medical condition” may be required. (See Gov. Code, § 12926(i), (j), (m).)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Inability to Perform Essential Job Duties. Government Code section 12940(a)(1).
- “Medical Condition” Defined. Government Code section 12926(i).
- “Mental Disability” Defined. Government Code section 12926(j).
- “Physical Disability” Defined. Government Code section 12926(m).
- Perception of Disability and Association With Disabled Person Protected. Government Code section 12926(o).
- “Substantial” Limitation Not Required. Government Code section 12926.1(c).
- “[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case, a plaintiff must show ‘ “ “actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion” ’ ” ...’ The prima facie burden is light; the evidence necessary to sustain the burden is minimal. As noted above, while the elements of a plaintiff’s prima facie case can vary considerably, generally an employee need only offer sufficient circumstantial evidence to give rise to a reasonable *inference* of discrimination.” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310 [115 Cal.Rptr.3d 453], original italics, internal citations omitted.)
- “If the employee meets this [prima facie] burden, it is then incumbent on the employer to show that it had a legitimate, nondiscriminatory reason for its employment decision. When this showing is made, the burden shifts back to the employee to produce substantial evidence that employer’s given reason was either ‘untrue or pretextual,’ or that the employer acted with discriminatory animus, in order to raise an inference of discrimination.” (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729,

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744 [151 Cal.Rptr.3d 292], internal citations omitted.)

- “Summary adjudication of the section 12940(a) claim ... turns on ... whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the ‘qualified individual with a disability’ requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]’s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion.” (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)
- “At most, [plaintiff] alleges only that he anticipated becoming disabled for some time after the organ donation. This is insufficient. [Plaintiff] cannot pursue a cause of action for discrimination under FEHA on the basis of his ‘actual’ physical disability in the absence of factual allegations that he was in fact, physically disabled.” (*Rope, supra*, 220 Cal.App.4th at p. 659.)
- “[Defendant] asserts the statute’s ‘regarded as’ protection is limited to persons who are denied or who lose jobs based on an employer’s reliance on the ‘myths, fears or stereotypes’ frequently associated with disabilities. ... However, the statutory language does not expressly restrict FEHA’s protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer’s failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute’s plain language leads to the conclusion that the ‘regarded as’ definition casts a broader net and protects *any* individual ‘regarded’ or ‘treated’ by an employer ‘as having, or having had, any physical condition that makes achievement of a major life activity difficult’ or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer’s ‘mistaken’ perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA’s protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement.” (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)
- “[T]he purpose of the ‘regarded-as’ prong is to protect individuals rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability.” (*Diffey v. Riverside County Sheriff’s Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)
- “We say on this record that [defendant] took action against [plaintiff] based on concerns or fear about his possible future disability. The relevant FEHA definition of an individual regarded as disabled

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applies only to those who suffer certain specified physical disabilities or those who have a condition with ‘no present disabling effect’ but which ‘may become a physical disability’ According to the pleadings, [defendant] fired [plaintiff] to avoid accommodating him because of his association with his physically disabled sister. That is not a basis for liability under the ‘regarded as’ disabled standard.” (*Rope, supra, v. Auto-Chlor System of Washington, Inc. (2013)* 220 Cal.App.4th at p.635, 659 [~~163 Cal.Rptr.3d 392~~], internal citations omitted.)

- “ Three types of situation are, we believe, within the intended scope of the rarely litigated ... association section. We’ll call them “expense,” “disability by association,” and “distraction.” They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) (“expense”) his spouse has a disability that is costly to the employer because the spouse is covered by the company’s health plan; (2a) (“disability by association”) the employee’s homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee’s blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) (“distraction”) the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer’s satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.’ ” (*Rope, supra*, 220 Cal.App.4th at p. 657.)
- “ [A]n employer who discriminates against an employee because of the latter’s association with a disabled person is liable even if the motivation is purely monetary. But if the disability plays no role in the employer’s decision ... then there is no disability discrimination.’ ” (*Rope, supra*, 220 Cal.App.4th at p.658.)
- “ ‘An adverse employment decision cannot be made “because of” a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee’s disability when the adverse employment decision was made. ... While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. “Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations” ... ’ ” (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.2d 338].)
- “[W]e interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence.” (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 166 [125 Cal.Rptr.3d 1], internal citations omitted.)
- “Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, ... proof that discrimination was a *substantial* factor in an employment decision

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triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris, supra*, 56 Cal.4th at p. 232, original italics.)

- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a “but for” cause.” (*Harris, supra*, 56 Cal.4th at p. 229.)
- “Being unable to work during pregnancy is a disability for the purposes of section 12940.” (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1340 [153 Cal.Rptr.3d 367].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 936, 937

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2160–9:2241 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78–2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.14, 115.23, 115.34, 115.77[3][a] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:46 (Thomson Reuters)

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2547. Disability-Based Associational Discrimination—Essential Factual Elements

[Name of plaintiff] **claims that** *[name of defendant]* **wrongfully discriminated against** *[him/her]* **based on** *[his/her]* **association with a disabled person. To establish this claim,** *[name of plaintiff]* **must prove all of the following:**

1. **That** *[name of defendant]* **was** *[an employer/[other covered entity]]*;
2. **That** *[name of plaintiff]* **[was an employee of** *[name of defendant]* **/applied to** *[name of defendant]* **for a job/[describe other covered relationship to defendant]]**;
3. **That** *[name of plaintiff]* **was** *[specify basis of association or relationship, e.g., the brother of [name of disabled person]]*, **who had** **[a]** *[e.g., physical condition]*;
4. **[That** *[name of disabled person]* **'s** *[e.g., physical condition]* **was costly to** *[name of defendant]* **because** *[specify reason, e.g., [name of disabled person] was covered under [plaintiff]'s employer-provided health care plan];]*

[or]

[That *[name of defendant]* **feared** *[name of plaintiff]* **'s association with** *[name of disabled person]* **because** *[specify, e.g., [name of disabled person] has a disability with a genetic component and [name of plaintiff] is likely to develop the disability as well];]*

[or]

[That *[name of plaintiff]* **was somewhat inattentive at work because** *[name of disabled person]* **'s** *[e.g., physical condition]* **requires** *[name of plaintiff]* **'s attention, but not so inattentive that to perform to** *[name of defendant]* **'s satisfaction** *[name of plaintiff]* **would need an accommodation;]**

5. **[That** *[name of defendant]* **[discharged/refused to hire/[other adverse employment action]]** *[name of plaintiff];]*

[or]

[That *[name of defendant]* **subjected** *[name of plaintiff]* **to an adverse employment action;]**

[or]

[That *[name of plaintiff]* **was constructively discharged;]**

6. **That** *[name of plaintiff]* **'s association with** *[name of disabled person]* **was a substantial motivating reason for** *[name of defendant]* **'s** **[decision to** *[discharge/refuse to hire/[other adverse employment action]]* **[name of plaintiff]/conduct;]**

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7. **That** [*name of plaintiff*] **was harmed; and**
8. **That** [*name of defendant*]'s **conduct was a substantial factor in causing** [*name of plaintiff*]'s **harm.**
-

New December 2014

Directions for Use

Give this instruction if plaintiff claims that he or she was subjected to an adverse employment action because of his or her association with a disabled person. Discrimination based on an employee's association with a person who is (or is perceived to be) disabled is an unlawful employment practice under the FEHA. (See Gov. Code, § 12926(o).)

Select a term to use throughout to describe the source of the disabled person's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

If the employer-employee relationship is contested, give CACI No. 2514, *Existence of Employment Relationship Disputed*, to instruct the jury on the definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Three versions of disability-based associational discrimination have been recognized, called "expense," "disability by association," and "distraction." (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655–660 [163 Cal.Rptr.3d 392] [claim for "disability based associational discrimination" adequately pled].) Element 4 sets forth options for the three versions.

Read the first option for element 5 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, "*Adverse Employment Action*" Explained, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, "*Constructive Discharge*" Explained. Select "conduct" in element 6 if either the second or third option is included for element 5.

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, "*Substantial Motivating Reason*" Explained.)

If the existence of the associate's disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(i), (j), (m).)

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Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- “Medical Condition” Defined. Government Code section 12926(i).
- “Mental Disability” Defined. Government Code section 12926(j).
- “Physical Disability” Defined. Government Code section 12926(m).
- Association With Disabled Person Protected. Government Code section 12926(o).
- “ ‘Three types of situation are, we believe, within the intended scope of the rarely litigated ... association section. We'll call them “expense,” “disability by association,” and “distraction.” They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) (“expense”) his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) (“disability by association”) the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) (“distraction”) the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.’ ” (*Rope, supra*, 220 Cal.App.4th at p. 657.)
- “ ‘[A]n employer who discriminates against an employee because of the latter's association with a disabled person is liable even if the motivation is purely monetary. But if the disability plays no role in the employer's decision ... then there is no disability discrimination.’ ” (*Rope, supra*, 220 Cal.App.4th at p.658.)
- “Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, ... proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris, supra*, 56 Cal.4th at p. 232, original italics.)
- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a “but for” cause.” (*Harris, supra*, 56 Cal.4th at p. 229.)

Secondary Sources

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2730. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

[Name of plaintiff] claims that [name of defendant] [discharged/[other adverse employment action]] [him/her] in retaliation for [his/her] [disclosure of information of/refusal to participate in] an unlawful act. In order to establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] was [acting on behalf of] [name of plaintiff]’s employer;**
- 2. [That [name of defendant] believed that [name of plaintiff] [had disclosed/might disclose] to a [government agency/law enforcement agency/person with authority over [name of plaintiff]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [specify information disclosed];]**

[or]

[That [name of plaintiff] [provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;

[or]

[That [name of plaintiff] refused to [specify activity in which plaintiff refused to participate];]

- 3. [That [name of plaintiff] had reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

[or]

[That [name of plaintiff] had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]

[or]

[That [specify activity] would result in [a violation of a [state/federal statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]

- 4. That [name of defendant] [discharged/[other adverse employment action]] [name of plaintiff];**
- 5. That [name of plaintiff]’s [disclosure of information/refusal to [specify]] was a contributing factor in [name of defendant]’s decision to [discharge/[other adverse employment action]] [name of plaintiff];**
- 6. That [name of plaintiff] was harmed; and**
- 7. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s**

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harm.

[The disclosure of policies that an employee believes to be unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [name of plaintiff] must have reasonably believed that [name of defendant]’s policies violated federal, state, or local statutes, rules, or regulations.]

[It is not [name of plaintiff]’s motivation for [his/her] disclosure, but only the content of that disclosure, that determines whether the disclosure is protected.]

[A disclosure is protected even though disclosing the information may be part of [name of plaintiff]’s job duties.]

[A report of publicly known facts is not a protected disclosure.]

New December 2012; Revised June 2013, December 2013, Revoked June 2014; Restored and Revised December 2014

Directions for Use

The whistle-blower protection statute of the Labor Code prohibits retaliation against an employee who discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c).) Select the first option for elements 2 and 3 for disclosure of information; select the second options for providing information to or testifying before a public body conducting an investigation, hearing or inquiry. Select the third options for refusal to participate in an unlawful activity. In the first option for element 2, choose “might disclose” if the allegation is that the employer believed that the employee might disclose the information in the future. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648–649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].) Also select any of the optional paragraphs explaining what disclosures are and are not protected as appropriate to the facts of the case.

“Adverse employment action” is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113]; see CACI No. 2505, *Retaliation—Essential Factual Elements*.) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, “*Adverse Employment Action*” Explained, and CACI No. 2510, “*Constructive Discharge*” Explained, for instructions that may be adapted for use with this instruction.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. 2731, *Affirmative Defense—Same Decision*.)

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Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.
- Affirmative Defense: Same Decision. Labor Code section 1102.6.
- “The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two.” (*Patten, supra*, 134 Cal.App.4th at p. 1384, internal citations omitted.)
- “In 1984, our Legislature provided ‘whistle-blower’ protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature’s interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state’s whistle-blower statute includes administrative regulations as a policy source for reporting an employer’s wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies.” (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)
- “As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute ‘disclosing information’ or a ‘protected disclosure’ under the California statutes.” (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 847 [136 Cal.Rptr.3d 259].)
- “The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct.” (*Mize-Kurzman, supra*, 202 Cal.App.4th at pp. 852–853.)
- “[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered.” (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 852, original

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italics.)

- “[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, ... , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results.” (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)
- “Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer.” (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)
- “We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law.” (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 858.)
- “Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. ‘To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected ‘whistleblowers’ arising from the routine workings and communications of the job site. ... ’ ” (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment § 349

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Employment Torts And Related Claims: Other Statutory Claims*, ¶ 5:894 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 250.12, 249.15 (Matthew Bender)

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10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42 et seq. (Matthew Bender)

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2732. Retaliatory Unfair Immigration-Related Practice—Essential Factual Elements (Lab. Code, § 1019)

[Name of plaintiff] **claims that** *[name of defendant]* *[specify unfair immigration-related practice, e.g., threatened to report [him/her] to immigration authorities]* **in retaliation for** *[his/her]* *[specify right, e.g., making a claim for minimum wage and overtime pay]*. **In order to establish this claim,** *[name of plaintiff]* **must prove all of the following:**

1. That *[name of plaintiff]*

[in good faith, filed a complaint, or informed someone, about an alleged violation by *[name of defendant]* **of a legal obligation[;/.]]**

[or]

[sought information regarding whether or not *[name of defendant]* **is in compliance with** *[his/her/its]* **legal obligations[;/.]]**

[or]

[informed someone of that person’s potential rights and remedies for *[name of defendant]* **’s alleged violation of a legal obligation and assisted** *[him/her]* **in asserting those rights[;/.]]**

[or]

[[specify other plaintiff conduct alleged to have caused retaliation].]

2. That *[name of defendant]*

[requested more or different documents than those that are required by federal immigration law, or refused to honor documents that on their face reasonably appeared to be genuine[;/.]]

[or]

[used the federal E-Verify system to check the employment authorization status of *[name of plaintiff]* **at a time or in a manner not required or authorized by federal immigration law[;/.]]**

[or]

[filed or threatened to file a false police report[;/.]]

[or]

[contacted or threatened to contact immigration authorities.]

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3. That *[name of defendant]*'s conduct was for the purpose of, or with the intent of, retaliating against *[name of plaintiff]* for exercising *[his/her]* rights;
4. That *[name of plaintiff]* was harmed; and
5. That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.

[If you find that *[name of defendant]* acted as described in element 2 fewer than 90 days after *[name of plaintiff]* acted as described in element 1, you may but are not required to conclude, without further evidence, that *[name of defendant]* acted with a retaliatory purpose and intent.]

New December 2014

Directions for Use

One who is the victim of an “unfair immigration-related practice” as defined, or his or her representative, may bring a civil action for equitable relief and any damages or penalties. (Lab. Code, § 1019(d)(1).) While most commonly this claim would be brought by an employee against an employer, the statute prohibits unfair immigration-related practices by “an employer or any other person” against “an employee or other person.” (Lab. Code, § 1019(a).) Therefore, the statute does not require an employment relationship between the parties.

While the statute specifies three particular employee activities that are protected, they are not exclusive. (See Lab. Code, § 1019(a) [“includes, but is not limited to”].) Therefore, any conduct can be set forth in element 1 that is alleged to have caused the retaliation.

The “legal obligation” in the options for element 1 refers to a violation of the Labor Code or local ordinance applicable to employees. (Lab. Code, § 1019(a).) If a particular violation is alleged, the specific law at issue may be substituted for “legal obligation.” For example, the first option might read: “in good faith, filed a complaint, or informed someone, about an alleged violation by *[name of defendant]* of the minimum wage law.”

The statute specifies four unfair immigration-related practices. This list would seem to be exclusive. (See Lab. Code, § 1019(b)(1) [“includes, but is not limited to” omitted].) Therefore, no “other” option is included for element 2.

Engaging in an unfair immigration-related practice against a person within 90 days of the person's exercise of protected rights raises a rebuttable presumption that the defendant did so in retaliation for the plaintiff's exercise of those rights. (Lab. Code, § 1019(c).) The statute does not specify whether the presumption is one affecting only the burden of producing evidence (see Evid. Code, §§ 603, 604) or one affecting the burden of proof. (See Evid. Code, § 605.) If the statute implements a public policy against the use of immigration-related coercion to deter workers from exercising their rights under the Labor

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Code, its presumption would affect the burden of proof. (See Evid. Code, § 605.) The last optional paragraph of the instruction may then be given if applicable on its facts. If, however, the presumption affects only the burden of producing evidence, it ceases to exist when the defendant produces evidence rebutting the presumption, such as a reason for the action other than retaliation. (Evid. Code, § 604.) In that case, the last paragraph would not be given.~~Give the last optional paragraph if the defendant's act occurred within 90 days of the plaintiff's act.~~

Sources and Authority

- Retaliatory Use of Immigration-Related Practices. Labor Code section 1019.
- Unlawful Employment of Aliens. 8 United States Code section 1324a.

Secondary Sources

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3040. Violation of Prisoner’s Federal Civil Rights—Eighth Amendment—~~General Conditions of Confinement Claim~~Substantial Risk of Serious Harm (42 U.S.C. § 1983)

[Name of plaintiff] claims that [name of defendant] subjected [him/her] to prison conditions that violated [his/her] constitutional rights. To establish this claim, [name of plaintiff] must prove all of the following:

1. That ~~while imprisoned,~~ [name of plaintiff] was ~~imprisoned under conditions that~~ [describe violation that created risk, e.g., ~~deprived [him/her] of out-of-cell exercise~~placed in a cell block with rival gang members];
2. That [name of defendant]’s conduct created a substantial risk of serious harm to [name of plaintiff]’s health or safety;
3. That [name of defendant] knew ~~or it was obvious~~ that [his/her/its] conduct created a substantial risk of serious harm to [name of plaintiff]’s health or safety;
4. That there was no reasonable justification for the conduct;
5. That [name of defendant] was acting or purporting to act in the performance of [his/her] official duties;
6. That [name of plaintiff] was harmed; and
7. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.

Whether the risk was obvious is a factor that you may consider in determining whether [name of defendant] knew of the risk.

New September 2003; Revised December 2010, June 2011; Renumbered from CACI No. 3011 December 2012, December 2014

Directions for Use

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811].) “Deliberate indifference” involves a two part inquiry. First, the inmate must show that the prison officials were aware of a “substantial risk of serious harm” to the inmate’s health or safety. Second, the inmate must show that the prison officials had no “reasonable” justification for the deprivation, in spite of that risk. (*Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150.) Elements 3 and 4 express the deliberate-indifference components.

The “official duties” referred to in element 5 must be duties created pursuant to any state, county, or

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municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 5.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.
- “It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.” (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)
- “Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, ‘sufficiently serious.’ For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that ‘only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.’ To violate the Cruel and Unusual Punishments Clause, a prison official must have a ‘sufficiently culpable state of mind.’ In prison-conditions cases that state of mind is one of ‘deliberate indifference’ to inmate health or safety” (*Farmer, supra*, 511 U.S. at p. 834, internal citations omitted.)
- “A deprivation is sufficiently serious when the prison official’s act or omission results ‘in the denial of the minimal civilized measure of life’s necessities.’ ” (*Lemire v. Cal. Dep’t of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1074.)
- “The objective question of whether a prison officer’s actions have exposed an inmate to a substantial risk of serious harm is a question of fact, and as such must be decided by a jury if there is any room for doubt.” (*Lemire, supra*, 726 F.3d at pp. 1075–1076.)
- “Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” (*Farmer, supra*, 511 U.S. at p. 842, internal citation omitted.)
- “When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly.” (*Farmer, supra*, 511 U.S. at p. 843 fn. 8.)
- “The second step, showing ‘deliberate indifference,’ involves a two part inquiry. First, the inmate must show that the prison officials were aware of a ‘substantial risk of serious harm’ to an inmate’s health or safety. This part of our inquiry may be satisfied if the inmate shows that the risk posed by the deprivation is obvious. Second, the inmate must show that the prison officials had no ‘reasonable’ justification for the deprivation, in spite of that risk.” (*Thomas, supra*, 611 F.3d at p. 1150, footnotes and internal citations omitted.)
- “We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an

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inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” (*Farmer, supra*, 511 U.S. at p. 837.)

- “[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is ‘part of the penalty that criminal offenders pay for their offenses against society,’ ‘only those deprivations denying “the minimal civilized measure of life’s necessities” are sufficiently grave to form the basis of an Eighth Amendment violation.’ ” (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)
- “Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety.” (*Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 731, internal citations omitted.)
- “The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes.” (*Greening v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)
- “The Supreme Court has interpreted the phrase ‘under “color” of law’ to mean ‘under “pretense” of law.’ A police officer’s actions are under pretense of law only if they are ‘in some way “related to the performance of his official duties.”’ By contrast, an officer who is ‘“pursuing his own goals and is not in any way subject to control by [his public employer],” ’ does not act under color of law, unless he ‘purports or pretends’ to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not ‘purport[] or pretend[]’ to be officers, do not act under color of law.” (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed.) Constitutional Law § 826

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶¶ 11.02–11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners’ Rights*, § 114.28 (Matthew Bender)

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3041. Violation of Prisoner’s Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

[Name of plaintiff] claims that *[name of defendant]* provided *[him/her]* with inadequate medical care in violation of *[his/her]* constitutional rights. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* had a serious medical need;
2. That *[name of defendant]* acted with deliberate indifference to this need;
3. That *[name of defendant]* was acting or purporting to act in the performance of *[his/her]* official duties;
4. That *[name of plaintiff]* was harmed; and
5. That *[name of defendant]*’s deliberate indifference was a substantial factor in causing *[name of plaintiff]*’s harm.

A serious medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and pointless infliction of pain.

To establish “deliberate indifference,” *[name of plaintiff]* must prove (1) that *[name of defendant]* knew *[name of plaintiff]* faced a substantial risk of serious harm and (2) that *[he/she]* disregarded that risk by failing to take reasonable measures to correct it. Negligence is not enough to establish deliberate indifference.

[In determining whether *[name of defendant]* was deliberately indifferent, you should consider the personnel, financial, and other resources available to *[him/her]* or those that *[he/she]* could reasonably have obtained. *[Name of defendant]* is not responsible for services that *[he/she]* could not provide or cause to be provided because the necessary personnel, financial, and other resources were not available or could not be reasonably obtained.]

New September 2003; Revised December 2010; Renumbered from CACI No. 3012 December 2012; Revised June 2014, December 2014

Directions for Use

The “official duties” referred to in element 3 must be duties created ~~pursuant to any~~ by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

The Ninth Circuit has held that in considering whether an individual prison medical provider was deliberately indifferent, the jury should be instructed to consider the economic resources made available to the prison health care system. (See *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, 1084 [*en banc*].)

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Give the last optional paragraph if the defendant has presented evidence of lack of economic resources.

Sources and Authority

- Deprivation of Civil Rights: Title 42 United States Code section 1983.
- “[D]eliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner’s serious illness or injury states a cause of action under section 1983.” (*Estelle v. Gamble* (1976) 429 U.S. 97, 104-105 [97 S.Ct. 285, 50 L.Ed.2d 251], internal citation and footnotes omitted.)
- “Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, ‘sufficiently serious.’ For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that ‘only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.’ To violate the Cruel and Unusual Punishments Clause, a prison official must have a ‘sufficiently culpable state of mind.’ In prison-conditions cases that state of mind is one of ‘deliberate indifference’ to inmate health or safety” (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)
- “ ‘To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment, first the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, a plaintiff must show the defendant’s response to the need was deliberately indifferent.’ The ‘deliberate indifference’ prong requires ‘(a) a purposeful act or failure to respond to a prisoner’s pain or possible medical need, and (b) harm caused by the indifference.’ ‘Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown in the way in which prison [officials] provide medical care.’ ‘[T]he indifference to [a prisoner’s] medical needs must be substantial. Mere “indifference,” “negligence,” or “medical malpractice” will not support this [claim].’ Even gross negligence is insufficient to establish deliberate indifference to serious medical needs.” (*Lemire v. Cal. Dep’t of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1081–1082, internal citations omitted.)
- “We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” (*Farmer, supra*, 511 U.S. at p. 837.)
- “The subjective standard of deliberate indifference requires ‘more than ordinary lack of due care for the prisoner’s interests or safety.’ The state of mind for deliberate indifference is subjective recklessness. But the standard is ‘less stringent in cases involving a prisoner’s medical needs . . .

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because “the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns.” ’ ’ ” (*Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, 985, internal citations omitted.)

- “[D]eliberate indifference ‘may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.’ . . . ‘[A] prisoner need not show his harm was substantial.’ ” (*Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122, internal citation omitted.)
- “[A]llegations that a prison official has ignored the instructions of a prisoner’s treating physician are sufficient to state a claim for deliberate indifference.” (*Wakefield v. Thompson* (9th Cir. 1999) 177 F.3d 1160, 1165.)
- “[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.” (*Estelle, supra*, 429 U.S. at p. 106.)
- “It has been recognized ... that inadequate medical treatment may, in some instances, constitute a violation of 42 United States Code section 1983. In *Sturts v. City of Philadelphia*, for example, the plaintiff alleged that defendants acted ‘carelessly, recklessly and negligently’ when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: ‘... where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. ...’ ” (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176-177 [216 Cal.Rptr. 661, 703 P.2d 1], internal citations omitted.)
- “Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are ‘serious.’ ” (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citation omitted.)
- “[T]here is a two-pronged test for evaluating a claim for deliberate indifference to a serious medical need: First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference.” (*Akhtar v. Mesa* (9th Cir. 2012) 698 F.3d 1202, 1213.)
- “A prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate. The challenged instruction properly advised the jury to consider the resources [defendant] had available in determining whether he was deliberately indifferent.” (*Peralta, supra*, 744 F.3d at p. 1084.)

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- “A ‘serious’ medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’ The ‘routine discomfort’ that results from incarceration and which is ‘part of the penalty that criminal offenders pay for their offenses against society’ does not constitute a ‘serious’ medical need.” (*Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546, internal citations and footnote omitted.)
- “The Supreme Court has interpreted the phrase ‘under “color” of law’ to mean ‘under “pretense” of law.’ A police officer’s actions are under pretense of law only if they are ‘in some way “related to the performance of his official duties.”’ By contrast, an officer who is “pursuing his own goals and is not in any way subject to control by [his public employer],” ’ does not act under color of law, unless he ‘purports or pretends’ to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not ‘purport[] or pretend[]’ to be officers, do not act under color of law.” (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

Secondary Sources

3 Witkin, Cal. Criminal Law (4th ed. 2012) Punishment, § 244

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law § 826

Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial, Ch. 2E-10, *Special Jurisdictional Limitations--Eleventh Amendment As Limitation On Actions Against States*, ¶ 2:4923 (The Rutter Group)

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law-Prisons*, ¶ 11.09 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners’ Rights*, § 114.15 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.183 (Matthew Bender)

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3070. Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act—Essential Factual Elements (Civ. Code, §§ 54.3, 55.56)

[Name of defendant] is the owner of [a/an] [e.g., restaurant] named [name of business] that is open to the public. [Name of plaintiff] is a disabled person who [specify disability that creates accessibility problems].

[Name of plaintiff] claims that [he/she] was denied full and equal access to [name of defendant]’s business on a particular occasion because of physical barriers. To establish this claim, [name of plaintiff] must prove both of the following:

- 1. That [name of defendant]’s business had barriers that violated construction-related accessibility standards in that [specify barriers]; and [either]**
- 2. [That [name of plaintiff] personally encountered the violation on a particular occasion.]**

[or]

[That [name of plaintiff] was deterred from accessing [name of defendant]’s business on a particular occasion.]

[A violation that [name of plaintiff] personally encountered may be sufficient to cause a denial of full and equal access if [he/she] experienced difficulty, discomfort, or embarrassment because of the violation.]

[To prove that [name of plaintiff] was deterred from accessing [name of defendant]’s business on a particular occasion, [he/she] must prove both of the following:

- 1. That [name of plaintiff] had actual knowledge of one or more violations that prevented or reasonably dissuaded [him/her] from accessing [name of defendant]’s business, which [name of plaintiff] intended to patronize on a particular occasion.**
- 2. That the violation(s) would have actually denied [name of plaintiff] full and equal access if [he/she] had tried to patronize [name of defendant]’s business on that particular occasion.]**

New December 2014

Directions for Use

The Disabled Persons Act (DPA) provides disabled persons with rights of access to public facilities. (See Civ. Code, §§ 54, 54.1.) Under the DPA, a disabled person who encounters barriers to access at a public accommodation may recover minimum statutory damages for each particular occasion on which he or she was denied access. (Civ. Code, §§ 54.3, 55.56(e).) However, the Construction Related Accessibility

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Standard Act requires that the disabled person either have personally encountered the violation on a particular occasion or have been deterred from accessing the facility on a particular occasion. (See Civ. Code, §§ 55.56.)

Give either or both options for element 2 depending on whether the plaintiff personally encountered the barrier or was deterred from patronizing the business because of awareness of the barrier. The next-to-last paragraph is explanatory of the first option, and the last paragraph is explanatory of the second option.

If actual damages are sought, CACI No. 3026, *Unruh Civil Rights Act—Damages*, may be given.

Sources and Authority

- Disabled Persons Act: Right of Access to Public Facilities. Civil Code sections 54, 54.1.
- Action for Interference With Admittance to or Enjoyment of Public Facilities. Civil Code section 54.3.
- Construction-Related Accessibility Standard Act. Civil Code section 55.56.
- “Part 2.5 of division 1 of the Civil Code, currently consisting of sections 54 to 55.3, is commonly referred to as the “Disabled Persons Act,” although it has no official title. Sections 54 and 54.1 generally guarantee individuals with disabilities equal access to public places, buildings, facilities and services, as well as common carriers, housing and places of public accommodation, while section 54.3 specifies remedies for violations of these guarantees, including a private action for damages.” (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 674 fn. 8 [94 Cal.Rptr.3d 685, 208 P.3d 623].)
- “[L]egislation (applicable to claims filed on or after Jan. 1, 2009) ([Civ. Code,] § 55.57) restricts the availability of statutory damages under sections 52 and 54.3, permitting their recovery only if an accessibility violation actually denied the plaintiff full and equal access, that is, only if ‘the plaintiff personally encountered the violation on a particular occasion, or the plaintiff was deterred from accessing a place of public accommodation on a particular occasion’ (§ 55.56, subd. (b)). It also limits statutory damages to one assessment per occasion of access denial, rather than being based on the number of accessibility standards violated. (*Id.*, subd. (e).)” (*Munson, supra*, 46 Cal.4th at pp. 677–678.)
- “ ‘[S]ection 54.3 imposes the standing requirement that the plaintiff have suffered an actual denial of equal access before any suit for damages can be brought. ... [A] plaintiff cannot recover damages under section 54.3 unless the violation actually denied him or her access to some public facility. [¶] Plaintiff’s attempt to equate a denial of equal access with the presence of a violation of federal or state regulations would nullify the standing requirement of section 54.3, since any disabled person could sue for statutory damages whenever he or she encountered noncompliant facilities, regardless of whether that lack of compliance actually impaired the plaintiff’s access to those facilities. Plaintiff’s argument would thereby eliminate any distinction between a cause of action for equitable relief under section 55 and a cause of action for damages under section 54.3.’ ”

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” (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1223 [99 Cal.Rptr.3d 746].)

- “Like the Unruh Civil Rights Act, the DPA incorporates the ADA to the extent that ‘A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section.’ (Civ. Code, § 54, subd. (c).” (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825].)

Secondary Sources

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4342. Reduced Rent for Breach of Habitability

If you find that there has there has been a substantial breach of habitability, then you must find the reasonable reduced rental value of the property based on the uninhabitable conditions. To find this value, take the amount of monthly rent required by the [lease/rental agreement/sublease] and reduce it by the [dollar amount/ [or] percent] that you consider to reflect the uninhabitable conditions. Apply this reduction for the period of time, up to present, that the conditions were present.

New December 2014

Directions for Use

Give this instruction if the court decides that the jury should determine the reduced rental value of the premises based on a breach of the warranty of habitability. The court may instruct the jury to find a dollar reduction or a percent reduction, or may leave it up to the jury as to which approach to use. In this later case, include both bracketed options.

Code of Civil Procedure section 1174.2(a) provides that *the court* is to determine the reasonable rental value of the premises in its untenable state to the date of trial. But whether this determination is to be made by the court or the jury is unsettled. Section 1174.2(d) provides that nothing in this section is intended to deny the tenant the right to a trial by jury. Subsection (d) could be interpreted to mean that in a jury trial, wherever the statute says “the court,” it should be read as “the jury.” But the statute also provides that the court may order the landlord to make repairs and correct the conditions of uninhabitability, which would not be a jury function.

Sources and Authority

- Breach of Warranty of Habitability. Code of Civil Procedure section 1174.2.
- “The second method suggested by *Green* [*Green v. Superior Court* (1974) 10 Cal.3d 616] is to first recognize the agreed contract rent as something the two parties have agreed to as proper for the premises as impliedly warranted. Then the court should take testimony and find on the percentage reduction of habitability (or usability) by the tenant by reason of the subsequently ascertained defects. Then reduce the agreed rent by this percentage, multiply the difference by the number of months of occupancy and voila!—the tenant's damages.” (*Cazares v. Ortiz* (1980) 109 Cal.App.3d Supp. 23, 29 [168 Cal.Rptr. 108].)

Secondary Sources

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4510. Breach of Implied Covenant to Perform Work in a Good and Competent Manner— Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] failed to [perform the work for the [project/describe construction project, e.g., kitchen remodeling] competently/ [or] use the proper materials for the [project/ e.g., kitchen remodeling]]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] failed to [perform [his/her/its] work competently/ [or] provide the proper materials] by [describe alleged breach, e.g., failing to apply sufficient coats of paint or failing to complete the project in substantial conformity with the plans and specifications]; and
2. That [name of plaintiff] was harmed by [name of defendant]’s failure.

New December 2010; Revised June 2011, December 2014

Directions for Use

This instruction is for use if an owner claims that the contractor breached the contract by failing to perform the work on the project competently so that the result did not meet what was expected under the contract. This is sometimes referred to as the implied covenant that the work performed will be fit and proper for its intended use. (See *Kuitems v. Covell* (1951) 104 Cal.App.2d 482, 485 [231 P.2d 552].) The implied covenant encompasses the quality of both the work and materials. (See *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 582–583 [12 Cal.Rptr. 257, 360 P.2d 897].)

Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*.

The word “project” may be used if the meaning will be clear to the jury. Alternatively, describe the project in the first paragraph, and then select a shorter term for use thereafter.

This instruction is based on CACI No. 325, *Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements*. It should be given in conjunction with CACI No. 4530, *Owner’s Damages for Breach of Construction Contract—Work Does Not Conform to Contract*, which provides the proper measure of damages recoverable for a breach of the implied covenant to perform work fit for its intended use.

This instruction may be adapted for use with a claim by a homeowner who purchased the property from the developer-owner against the contractor for construction defects. That claim would be based on the proposition that the homeowner is a third-party beneficiary of the builder-developer contract. (See *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, 1422–1423 [168 Cal.Rptr.3d 81].)

Sources and Authority

- “[A]lthough [general contractor] ... had a contractual relationship with the City, it also had a duty of care to perform in a competent manner.” (*Willdan v. Sialic Contractors*)

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Corp. (2007) 158 Cal.App.4th 47, 57 [69 Cal.Rptr.3d 633].)

- “The defect complained of and the alleged breach of the warranty relate solely to fabrication and workmanship—the seams opened and the edges raveled. The failure of the carpet to last for the period warranted was occasioned by the defective sewing of the seams and binding of the edges, constituting a breach of the warranty as it related to good workmanship in assembling and installing it, but not as to the quality of the carpet itself.” (*Southern California Enterprises, Inc. v. D. N. & E. Walter & Co.* (1947) 78 Cal.App.2d 750, 753–754 [178 P.2d 785], superceded by statute as stated in *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 132 [87 Cal. Rptr. 3d 5].)
- “[Subcontractor] agreed to perform the waterproofing and drainage work on the retaining walls built by [contractor] and had the duty to perform those tasks in a good and workmanlike manner.” (*Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 749 [50 Cal.Rptr.3d 709].)
- “ ‘Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of the contract.’ The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement.” (*Kuitems, supra*, 104 Cal.App.2d at p. 485.)
- “Obviously, the statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed ‘shall be fit and proper for its said intended use’” (*Kuitems, supra*, 104 Cal.App.2d at p. 485.)
- “[N]o warranty other than that of good workmanship can be implied where the contractor faithfully complies with plans and specifications supplied by the owner” (*Sunbeam Constr. Co. v. Fisci* (1969) 2 Cal.App.3d 181, 186 [82 Cal.Rptr. 446], internal citations omitted.)
- “[T]here is implied in a sales contract for newly constructed real property a warranty of quality and fitness. ... ‘[T]he builder or seller of new construction—not unlike the manufacturer or merchandiser of personalty—makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building.’ ... ‘[W]e conclude builders and sellers of new construction should be held to what is impliedly represented—that the completed structure was designed and constructed in a reasonably workmanlike manner.’ ” (*Burch, supra*, 223 Cal.App.4th at p. 1423, internal citations omitted.)
- “[A] contract to build an entire building is essentially a contract for material and labor, and there is an implied warranty protecting the owner from defective construction. Clearly, it would be anomalous to imply a warranty of quality when construction is

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pursuant to a contract with the owner—but fail to recognize a similar warranty when the sale follows completion of construction.” (*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 378–379 [115 Cal.Rptr. 648, 525 P.2d 88], internal citations omitted.)

- “Several cases dealing with construction contracts and other contracts for labor and material show that ordinarily such contracts give rise to an implied warranty that the product will be fit for its intended use both as to workmanship and materials. These cases support the proposition that although the provisions of the Uniform Sales Act with respect to implied warranty (Civ. Code, §§ 1734–1736) apply only to sales, similar warranties may be implied in other contracts not governed by such statutory provisions when the contracts are of such a nature that the implication is justified. ... [¶] The reference in the stipulation to merchantability, a term generally used in connection with sales, does not preclude reliance on breach of warranty although the contract is one for labor and material. With respect to sales, merchantability requires among other things that the substance sold be reasonably suitable for the ordinary uses it was manufactured to meet. The defect of which [plaintiff] complains is that the tubing was not reasonably suitable for its ordinary use, and his cause of action may properly be considered as one for breach of a warranty of merchantability. There is no justification for refusing to imply a warranty of suitability for ordinary uses merely because an article is furnished in connection with a construction contract rather than one of sale. The evidence, if taken in the light most favorable to [plaintiff], would support a determination that there was an implied warranty of merchantability.” (*Aced, supra*, 55 Cal.2d at p. 583, internal citations omitted.)
- “[P]ublic policy imposes on contractors in various circumstances the duty to finish a project with diligence and to avoid injury to the person or property of third parties.” (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1450 [37 Cal.Rptr.2d 790].)

Secondary Sources

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, § 9.93

2 Stein, Construction Law, Ch. 5B, *Contractor's and Construction Manager's Rights and Duties*, ¶ 5B.01[2][b] (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.42 (Matthew Bender)

29 California Legal Forms, Ch. 89, *Home Improvement and Specialty Contracts*, § 89.14 (Matthew Bender)

11 Miller & Starr, California Real Estate (3d ed. 2008) Ch. 29, *Defective Construction*, § 29:5 (Thomson Reuters ~~West~~)

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Acret, California Construction Law Manual (6th ed. 2005) Ch. 5, *Construction Defects*, § 5:39
| (Thomson Reuters ~~West~~)

| 3 Bruner & O'Connor on Construction Law, Ch. 9, *Warranties*, §§ 9:67–9:70 (Thomson Reuters
~~West~~)

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 5, *Breach of
Contract by Contractor*, § 5.01

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5012. Introduction to Special Verdict Form

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form[s] in the order they appear. After you answer a question, the form tells you what to do next. ~~All 12 of you must deliberate on and answer each question.~~ At least 9 of you must agree on an answer before ~~all of~~ you can move on to the next question. However, the same 9 or more people do not have to agree on each answer.

All 12 of you must deliberate on and answer each question regardless of how you voted on any earlier question. Unless the verdict form tells all 12 jurors to stop and answer no further questions, every juror must deliberate and vote on all of the remaining questions.

When you have finished filling out the form[s], your presiding juror must write the date and sign it at the bottom [of the last page] and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2004, October 2008, December 2009, December 2014

Directions for Use

~~This instruction should be given if a special verdict form is used. If this instruction is read, do not read the sixth paragraph of CACI No. 5009, *Predeliberation Instructions*.~~

Sources and Authority

- ~~General and Special Verdict Forms. Code of Civil Procedure section 624. provides: “The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.”~~
- ~~Special Verdicts; Requirements for Award of Punitive Damages. Code of Civil Procedure section 625. provides: “In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. In all cases in which the issue of punitive damages is presented to the jury the court shall direct the jury to find a special verdict in writing separating punitive damages from compensatory damages. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court~~

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~~must give judgment accordingly.”~~

- “A special verdict presents to the jury each ultimate fact in the case, so that ‘nothing shall remain to the Court but to draw from them conclusions of law.’ This procedure presents certain problems: ‘The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. [T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings’ ” With a special verdict, we do not imply findings on all issues in favor of the prevailing party, as with a general verdict. The verdict’s correctness must be analyzed as a matter of law.” (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 [73 Cal.Rptr.2d 596], internal citations omitted.)
- “When a jury is composed of 12 persons, it is sufficient if *any* nine jurors arrive at each special verdict, regardless of the jurors’ votes on other special verdict questions.” (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 255 [92 Cal.Rptr.3d 862, 206 P.3d 403], original italics.)
- “Appellate courts differ concerning the use of special verdicts. In one case the court said, ‘we should utilize opportunities to force counsel into requesting special verdicts.’ In contrast, a more recent decision included the negative view: ‘Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.’ Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result.” (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736], internal citations omitted.)
- “[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil ‘cause of action’ to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved.” (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243, footnote omitted].)
- “In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, ... we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved.” (*Stoner, supra*, 46 Cal.App.4th at p. 1002.)
- “[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury’s further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of ‘the right to a jury of 12 persons deliberating on all issues.’ Permitting any nine

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jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue.” (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827, 685 P.2d 1178], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 342–346

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.21 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 318, *Judgments*, § 318.49 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.11 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.11 et seq.