Judicial Council *of* California

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INVITATION TO COMMENT

CACI 24-02

Title
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions

Proposed Rules, Forms, Standards, or Statutes
Revise and adopt jury instructions and verdict forms

Proposed by
Advisory Committee on Civil Jury Instructions
Hon. Adrienne M. Grover, Chair

Action Requested
Review and submit comments by September 5, 2024

Proposed Effective Date
November 15, 2024

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Executive Summary and Origin

The Advisory Committee on Civil Jury Instructions seeks public comment on proposed revisions and additions to the *Judicial Council of California Civil Jury Instructions* (*CACI*). Under California Rules of Court, rule 10.58, 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 2025 edition of the official LexisNexis Matthew Bender *CACI* publication.

Attachments and Links

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2. Proposed revised and new instructions and verdict forms, at pages 4–77

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370. Common Count: Money Had and Received

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/*nonbinary pronoun*/it] money. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] received money that was intended to be used for the benefit of [*name of plaintiff*];**

2. **That the money was not used for the benefit of [*name of plaintiff*]; and**

3. **That [*name of defendant*] has not given the money to [*name of plaintiff*].**

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*New June 2005; Revised November 2024**

Directions for Use

The instructions in this series are not intended to cover all available common counts. Users may need to draft their own instructions or modify the CACI instructions to fit the circumstances of their case.

Do not give this instruction for a claim involving "consumer debt" incurred on or after July 1, 2024. (See Code Civ. Proc., § 425.30 [exempting "consumer debt" from "common counts"].)

Sources and Authority

- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim ... . Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. ... The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)

- " 'A cause of action for money had and received is stated if it is alleged [that] the defendant "is indebted to the plaintiff in a certain sum 'for money had and received by the defendant for the use of the plaintiff.' " …' The claim is viable ' "wherever one person has received money which belongs to another, and which in equity and good conscience should be paid over to the latter." ' As juries are instructed in CACI No. 370, the plaintiff must prove that the defendant received money 'intended to

be used for the benefit of [the plaintiff],' that the money was not used for the plaintiff's benefit, and that the defendant has not given the money to the plaintiff." (*Avidor v. Sutter's Place, Inc.* (2013) 212 Cal.App.4th 1439, 1454 [151 Cal.Rptr.3d 804], internal citations omitted.)

- " 'The action for money had and received is based upon an implied promise which the law creates to restore money which the defendant in equity and good conscience should not retain. The law implies the promise from the receipt of the money to prevent unjust enrichment. The measure of the liability is the amount received.' Recovery is denied in such cases unless the defendant himself has actually received the money." (*Rotea v. Izuel* (1939) 14 Cal.2d 605, 611 [95 P.2d 927], internal citations omitted.)

- "[S]ince the basic premise for pleading a common count ... is that the person is thereby 'waiving the tort and suing in assumpsit,' any tort damages are out. Likewise excluded are damages for a breach of an express contract. The relief is something in the nature of a constructive trust and ... 'one cannot be held to be a constructive trustee of something he had not acquired.' One must have acquired some money which in equity and good conscience belongs to the plaintiff or the defendant must be under a contract obligation with nothing remaining to be performed except the payment of a sum certain in money." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14–15 [101 Cal.Rptr. 499], internal citations omitted.)

- " 'This kind of action to recover back money which ought not in justice to be kept is very beneficial, and, therefore, much encouraged. It lies for money paid by mistake, or upon a consideration which happens to fail, or extortion, or oppression, or an undue advantage of the plaintiff's situation contrary to the laws made for the protection of persons under those circumstances.' " (*Minor v. Baldridge* (1898) 123 Cal. 187, 191 [55 P. 783], internal citation omitted.)

- " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." ' A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)

- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

- "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v.*

Boughton (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

- "The cause of action [for money had and received] is available where, as here, the plaintiff has paid money to the defendant pursuant to a contract which is void for illegality." (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623 [33 Cal.Rptr.2d 276], internal citations omitted.)

- " 'It is well established in our practice that an action for money had and received will lie to recover money paid by mistake, under duress, oppression or where an undue advantage was taken of plaintiffs' situation whereby money was exacted to which the defendant had no legal right.' " (*J.C. Peacock, Inc. v. Hasko* (1961) 196 Cal.App.2d 353, 361 [16 Cal.Rptr. 518], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleading, § 561

12 California Forms of Pleading and Practice, Ch. 121, *Common Counts*, §§ 121.24[1], 121.51 (Matthew Bender)

4 California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars*, § 43.25 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.02, 9.15, 9.32

371. Common Count: Goods and Services Rendered

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/*nonbinary pronoun*/it] money for [goods delivered/services rendered]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] requested, by words or conduct, that [*name of plaintiff*] [perform services/deliver goods] for the benefit of [*name of defendant*];**

2. **That [*name of plaintiff*] [performed the services/delivered the goods] as requested;**

3. **That [*name of defendant*] has not paid [*name of plaintiff*] for the [services/goods]; and**

4. **The reasonable value of the [goods/services] that were provided.**

*New June 2005; Revised November 2024**

Directions for Use

Do not give this instruction for a claim involving "consumer debt" incurred on or after July 1, 2024. (See Code Civ. Proc., § 425.30 [exempting "consumer debt" from "common counts"].)

Sources and Authority

- " ' "Quantum meruit refers to the well-established principle that 'the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered.' [Citation.] To recover in quantum meruit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made.' " [Citation.]' 'The underlying idea behind quantum meruit is the law's distaste for unjust enrichment. If one has received a benefit which one may not justly retain, one should "restore the aggrieved party to his [or her] former position by return of the thing or its equivalent in money." [Citation.]' " 'The measure of recovery in *quantum meruit* is the reasonable value of the services rendered *provided* they were of direct benefit to the defendant." [Citations.]' In other words, quantum meruit is equitable payment for services already rendered." (*E. J. Franks Construction, Inc. v. Sahota* (2014) 226 Cal.App.4th 1123, 1127–1128 [172 Cal.Rptr.3d 778], original italics, internal citations omitted.)

- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim ... . Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "To recover on a claim for the reasonable value of services under a quantum meruit theory, a plaintiff must establish both that he or she was acting pursuant to either an express or implied request for services from the defendant and that the services rendered were intended to and did benefit the defendant." (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 794 [9 Cal.Rptr.3d 734], internal citation omitted.)

- "[W]here services have been rendered under a contract which is unenforceable because not in writing, an action generally will lie upon a common count for quantum meruit." (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996 [90 Cal.Rptr.2d 665].)

- "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. ... The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)

- " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract.' " A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)

- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

- "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleading, § 554

12 California Forms of Pleading and Practice, Ch. 121, *Common Counts*, §§ 121.25, 121.55–121.58 (Matthew Bender)

4 California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars*, §§ 43.33, 43.40 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions,* 9.02, 9.15, 9.32

373. Common Count: Account Stated

An account stated is an agreement between the parties, based on prior transactions between them establishing a debtor-creditor relationship, that a particular amount is due and owing from the debtor to the creditor. The agreement may be oral, in writing, or implied from the parties' words and conduct.

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***/it] money on an account stated. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] owed [***name of plaintiff***] money from previous financial transactions;**

2. **That [***name of plaintiff***] and [***name of defendant***], by words or conduct, agreed that the amount that [***name of plaintiff***] claimed to be due from [***name of defendant***] was the correct amount owed;**

3. **That [***name of defendant***], by words or conduct, promised to pay the stated amount to [***name of plaintiff***];**

4. **That [***name of defendant***] has not paid [***name of plaintiff***] [any/all] of the amount owed under this account; and**

5. **The amount of money [***name of defendant***] owes [***name of plaintiff***].**

*New December 2005; Revised November 2019, November 2024**

Directions for Use

Do not give this instruction for a claim involving "consumer debt" incurred on or after July 1, 2024. (See Code Civ. Proc., § 425.30 [exempting "consumer debt" from "common counts"].)

Sources and Authority

- " 'An account stated is an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing. [Citation.] To be an account stated, "it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing." [Citation.]' " (*Leighton v. Forster* (2017) 8 Cal.App.5th 467, 491 [213 Cal.Rptr.3d 899].)

- "The essential elements of an account stated are: (1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or

implied, on the amount due from the debtor to the creditor; (3) a promise by the debtor, express or implied, to pay the amount due." (*Zinn v. Fred R. Bright Co.* (1969) 271 Cal.App.2d 597, 600 [76 Cal.Rptr. 663], internal citations omitted.)

- "The agreement of the parties necessary to establish an account stated need not be express and frequently is implied from the circumstances. In the usual situation, it comes about by the creditor rendering a statement of the account to the debtor. If the debtor fails to object to the statement within a reasonable time, the law implies his agreement that the account is correct as rendered." (*Zinn, supra,* 271 Cal.App.2d at p. 600, internal citations omitted.)

- "An account stated is an agreement, based on the prior transactions between the parties, that the items of the account are true and that the balance struck is due and owing from one party to another. When the account is assented to, ' "it becomes a new contract. An action on it is not founded upon the original items, but upon the balance agreed to by the parties. ..." Inquiry may not be had into those matters at all. It is upon the new contract by and under which the parties have adjusted their differences and reached an agreement.' " (*Gleason v. Klamer* (1980) 103 Cal.App.3d 782, 786–787 [163 Cal.Rptr. 483], internal citations omitted.)

- "To be an account stated, 'it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing.' The agreement necessary to establish an account stated need not be express and is frequently implied from the circumstances. When a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an agreement that the account is correct as rendered. Actions on accounts stated frequently arise from a series of transactions which also constitute an open book account. However, an account stated may be found in a variety of commercial situations. The acknowledgement of a debt consisting of a single item may form the basis of a stated account. The key element in every context is agreement on the final balance due." (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752–753 [241 Cal.Rptr. 883], internal citations omitted.)

- "An account stated need not be submitted by the creditor to the debtor. A statement expressing the debtor's assent and acknowledging the agreed amount of the debt to the creditor equally establishes an account stated." (*Truestone, Inc. v. Simi West Industrial Park II* (1984) 163 Cal.App.3d 715, 726 [209 Cal.Rptr. 757], internal citations omitted.)

- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim . ... Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "The account stated may be attacked only by proof of 'fraud, duress, mistake, or other grounds cognizable in equity for the avoidance of an instrument.' The defendant 'will not be heard to answer

when action is brought upon the account stated that the claim or demand was unjust, or invalid.' " (*Gleason, supra,* 103 Cal.App.3d at p. 787, internal citations omitted.)

- "An account stated need not cover all the dealings or claims between the parties. There may be a partial settlement and account stated as to some of the transactions." (*Gleason, supra,* 103 Cal.App.3d at p. 790, internal citation omitted.)

- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

- "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleading, § 561

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, §§ 1003, 1004

1 California Forms of Pleading and Practice, Ch. 8, *Accounts Stated and Open Accounts*, §§ 8.10, 8.40–8.46 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.02, 9.15, 9.32

374. Common Count: Mistaken Receipt

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/*nonbinary pronoun*/it] money [that was paid/for goods that were received] by mistake. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] [paid [*name of defendant*] money/sent goods to [*name of defendant*]] by mistake;**

2. **That [*name of defendant*] did not have a right to [that money/the goods];**

3. **That [*name of plaintiff*] has asked [*name of defendant*] to return the [money/goods];**

4. **That [*name of defendant*] has not returned the [money/goods] to [*name of plaintiff*]; and**

5. **The amount of money that [*name of defendant*] owes [*name of plaintiff*].**

*New December 2005; Revised November 2024**

Directions For Use

Do not give this instruction for a claim involving "consumer debt" incurred on or after July 1, 2024. (See Code Civ. Proc., § 425.30 [exempting "consumer debt" from "common counts"].)

Sources and Authority

- " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." ' A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)

- "It is well settled that no contract is necessary to support an action for money had and received other than the implied contract which results by operation of law where one person receives the money of another which he has no right, conscientiously, to retain. Under such circumstances the law will imply a promise to return the money. The action is in the nature of an equitable one and is based on the fact that the defendant has money which, in equity and good conscience, he ought to pay to the plaintiffs. Such an action will lie where the money is paid under a void agreement, where it is obtained by fraud or where it was paid by a mistake of fact." (*Stratton v. Hanning* (1956) 139 Cal.App.2d 723, 727 [294 P.2d 66], internal citations omitted.)

- ~~Restatement First of Restitution, section 28, provides:~~

  ~~A person who has paid money to another because of a mistake of fact and who does not obtain what he expected in return is entitled to restitution from the other if the mistake was induced:~~

  ~~(a) by the fraud of the payee, or~~

  ~~(b) by his innocent and material misrepresentation, or~~

  ~~(c) by the fraud or material misrepresentation of a person purporting to act as the payee's agent, or~~

  ~~(d) by the fraud or material misrepresentation of a third person, provided that the payee has notice of the fraud or representation before he has given or promised something of value.~~

- "Money paid upon a mistake of fact may be recovered under the common count of money had and received. The plaintiff, however negligent he may have been, may recover if his conduct has not altered the position of the defendant to his detriment." (*Thresher v. Lopez* (1921) 52 Cal.App. 219, 220 [198 P. 419], internal citations omitted.)

- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim ... . Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. ... The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)

- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

- "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based

on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

Restatement First of Restitution, section 28

4 Witkin, California Procedure (5th ed. 2008) Pleading, § 561

12 California Forms of Pleading and Practice, Ch. 121, *Common Counts*, § 121.25 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.02, 9.15, 9.32

VF-304. Breach of Implied Covenant of Good Faith and Fair Dealing

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] and [*name of defendant*] enter into a contract?
____ 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 plaintiff*] do all, or substantially all, of the significant things that the contract required [him/her/*nonbinary pronoun*/it] to do?
____ Yes ____ No]

If your answer to question 2 is yes, [skip question 3 and] answer question 4. If you answered no, [answer question 3 *if excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].]

[3. Was [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/*nonbinary pronoun*/it] to do?
____ 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 all the conditions that were required for [*name of defendant*]'s performance occur?
____ Yes ____ No

If your answer to question 4 is yes, [skip question 5 and] answer question 6. If you answered no, [answer question 5 *if waiver or excuse is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].]

[5. Were the required conditions that did not occur [excused/waived]?
____ 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*] [*specify conduct that plaintiff claims prevented plaintiff from receiving the benefits under the contract*]?
____ 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.

~~6~~7. Did [*name of defendant*]~~ unfairly interfere with [*name of plaintiff*]'s right to receive the benefits of the contract~~ fail to act fairly and in good faith?
____ Yes ____ No

If your answer to question ~~6~~7 is yes, then answer question ~~7~~8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~7~~8. Was [*name of plaintiff*] harmed by [*name of defendant*]'s~~ interference~~ failure to act fairly and in good faith?
____ Yes ____ No

If your answer to question ~~7~~8 is yes, then answer question ~~8~~9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~8~~9. What are [*name of plaintiff*]'s damages?

[a. Past [economic] loss [including [*insert descriptions of claimed damages*]]:
$ _____]

[b. Future [economic] loss [including [*insert descriptions of claimed damages*]]:
$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New June 2014; Revised June 2015, May 2024, November 2024

Directions for Use

This verdict form is based on CACI No. 325, *Breach of Implied Covenant of Good Faith and Fair*

Dealing—Essential Factual Elements.

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

Optional questions 2 and 3 address acts that the plaintiff must have performed before the defendant's duty to perform is triggered. Include question 2 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) Include question 3 if the plaintiff claims that he or she was excused from having to perform an otherwise required obligation.

Optional questions 4 and 5 address conditions precedent to the defendant's performance. Include question 4 if the occurrence of conditions for performance is at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 5 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*~~; see also Restatement Second of Contracts, section 225, Comment b~~.) Waiver must be proved by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515].) Note that questions 4 and 5 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question ~~8~~9.

If specificity is not required, users do not have to itemize the damages listed in question ~~8~~9. 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*. If counts for both breach of express contractual terms and breach of the implied covenant are alleged, this verdict form may be combined with CACI No. VF-300, *Breach of Contract*. Use VF-3920 to direct the jury to separately address the damages awarded on each count and to avoid the jury's awarding the same damages on both counts. (See *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387].)

1009A. Liability to Employees of Independent Contractors for Unsafe Concealed Conditions

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[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed by an unsafe concealed condition while employed by [*name of plaintiff's employer*] and working on [*name of defendant*]'s property. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [owned/leased/occupied/controlled] the property;**

2. **That [*name of defendant*] knew, or reasonably should have known, of a preexisting unsafe concealed condition on the property;**

3. **That [*name of plaintiff's employer*] neither knew nor could be reasonably expected to know of the unsafe concealed condition through a reasonable inspection of the worksite;**

4. ~~**That the condition was not part of the work that [*name of plaintiff's employer*] was hired to perform;**~~

~~5.~~ **That [*name of defendant*] failed to warn [*name of plaintiff's employer*] of the condition;**

~~6~~5. **That [*name of plaintiff*] was harmed; and**

~~7~~6. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

An unsafe condition is concealed if either it is not visible or its dangerous nature is not apparent to a reasonable person.

Derived from former CACI No. 1009 April 2007; Revised April 2009, December 2011, May 2024, November 2024*

Directions for Use

This instruction is for use if a concealed dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on the hirer's retained control over the contractor's performance of work, see CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control*. For an instruction for injuries based on the property owner providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

Element~~s~~ 3 ~~and 4~~ expresses the independent contractor's limited duty to inspect the premises for potential safety hazards. (*Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 53–54 [282 Cal.Rptr.3d 658, 493 P.3d 212]; *Acosta v. MAS Realty, LLC* (2023) 96 Cal.App.5th 635, 659 [314 Cal.Rptr.3d 507] ["[A] contractor has a

duty to inspect the worksite to identify safety hazards before beginning work"].) The duty to inspect the worksite includes the means to access the worksite. (*Acosta, supra,* 96 Cal.App.5th at p. 662.) When an employee alleges injury due to an unsafe concealed condition encountered while accessing the worksite, the court may wish to modify element 3 accordingly.

~~For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on the hirer's retained control over the contractor's performance of work, see CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control*. For an instruction for injuries based on the property owner providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment.*~~

~~See also the Vicarious Responsibility Series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.~~

Sources and Authority

- "[T]he hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if: (1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 675 [36 Cal.Rptr.3d 495, 123 P.3d 931].)

- "[T]here is no reason to distinguish conceptually between premises liability based on a hazardous substance that is concealed because it is invisible to the contractor and known only to the landowner and premises liability based on a hazardous substance that is visible but is known to be hazardous only to the landowner. If the hazard is not reasonably apparent, and is known only to the landowner, it is a concealed hazard, whether or not the substance creating the hazard is visible." (*Kinsman, supra*, 37 Cal.4th at p. 678.)

- "A landowner's duty generally includes a duty to inspect for concealed hazards. But the responsibility for job safety delegated to independent contractors may and generally does include explicitly or implicitly a limited duty to inspect the premises as well. Therefore, … the landowner would not be liable when the contractor has failed to engage in inspections of the premises implicitly or explicitly delegated to it. Thus, for example, an employee of a roofing contractor sent to repair a defective roof would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such defects could reasonably be implied to be within the scope of the contractor's employment. On the other hand, if the same employee fell from a ladder because the wall on which the ladder was propped collapsed, assuming that this defect was not related to the roof under repair, the employee may be able to sustain a suit against the hirer. Put in other terms, the contractor was not being paid to inspect the premises generally, and therefore the duty of general inspection could not be said to have been delegated to it. Under those circumstances, the landowner's failure to reasonably inspect the premises, when a hidden hazard leads directly to the employee's injury, may well result in liability." (*Kinsman, supra,* 37 Cal.4th at pp. 677–678, internal citations omitted.)

- "[A]n independent contractor does not have a duty to inspect all of the landowner's property or to identify hazards wholly outside his area of expertise. But a landowner who hires an independent contractor 'presumptively delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees,' and thus the independent contractor has a duty to determine whether its employees can safely perform the work they have been hired to do. That includes a duty to inspect not only the worksite itself, but the 'means to access the worksite.' " (*Acosta, supra,* 96 Cal.App.5th at pp. 661–662, internal citations omitted.)

- "Horizon, as the independent contractor hired by defendants, had a duty to ensure a safe workplace for its employees and is deemed to have been aware of any hazards that a reasonable inspection of the workplace would have revealed. Whether the independent contractor actually inspected, or whether an employee of the independent contractor actually communicated an unsafe condition to the contractor, is irrelevant—what matters is whether the hazard would have been revealed by a reasonable inspection." (*Acosta, supra,* 96 Cal.App.5th at p. 663.)

- "We emphasize that our holding applies only to hazards on the premises of which the independent contractor is aware or should reasonably detect. Although we recognized in *Kinsman* that the delegation of responsibility for workplace safety to independent contractors may include a limited duty to inspect the premises, it would not be reasonable to expect [an independent contractor] to identify every conceivable dangerous condition on the roof given that he is not a licensed roofer and was not hired to repair the roof." (*Gonzalez, supra,* 12 Cal.5th at p. 54, internal citations omitted.)

- "[T]he initial formulation of the *Kinsman* test asks whether the independent contractor could reasonably have discovered the latent hazardous condition; the gloss on the test for obvious hazards asks whether knowledge of the hazard is inadequate to prevent injury. Both of these tests are defeated where, as here, there is undisputed evidence that the hazard could reasonably have been discovered (by inspecting the ladder) and, once discovered, avoided (by getting another ladder)." (*Johnson v. Raytheon Co.* (2019) 33 Cal.App.5th 617, 632 [245 Cal.Rptr.3d 282].)

- "The court also told the jury that [defendant] was liable if its negligent use or maintenance of the property was a substantial factor in harming [plaintiff] (see CACI Nos. 1000, 1001, 1003 & 1011). These instructions were erroneous because they did not say that these principles would only apply to [defendant] if the hazard was concealed." (*Alaniz v. Sun Pacific Shippers, L.P.* (2020) 48 Cal.App.5th 332, 338–339 [261 Cal.Rptr.3d 702].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1259 et seq.

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-A, *Liability For Defective Conditions On Premises*, ¶¶ 6:4, 6:9.12 (The Rutter Group)

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, §§ 15.04[4], 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.20 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability,* §§ 421.11–421.12 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability,* § 178.20 et seq. (Matthew Bender)

1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by an unsafe condition while employed by [***name of contractor***] and working on [***specify nature of work that defendant hired the contractor to perform***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] retained some control over [***name of contractor***]'s manner of performance of [***specify nature of contracted work***];**

2. **That [***name of defendant***] actually exercised [his/her/***nonbinary pronoun***/its] retained control over that work by [***specify alleged negligence of defendant***];**

3. **That [***name of plaintiff***] was harmed; and**

4. **That [***name of defendant***]'s negligent exercise of [his/her/***nonbinary pronoun***/its] retained control affirmatively contributed to [***name of plaintiff***]'s harm.**

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*Derived from former CACI No. 1009 April 2007; Revised April 2009, December 2010, December 2011, May 2017, May 2022, November 2024**

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant retained control over the manner of performance of some part of the work entrusted to the contractor. (*Sandoval v. Qualcomm Inc.* (2021) 12 Cal.5th 256, 273 [283 Cal.Rptr.3d 19, 494 P.3d 487].) Both retaining control and actually exercising control over some aspect of the work is required because hirers who fully and effectively delegate work to a contractor owe no tort duty to that contractor's workers. (See *id.*) If there is a question of fact regarding whether the defendant entrusted the work to the contractor, the instruction should be modified. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on unsafe conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on the property owner's providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

~~See also the Vicarious Responsibility Series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.~~

The hirer's exercise of retained control must have "affirmatively contributed" to the plaintiff's injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 [115 Cal.Rptr.2d 853, 38 P.3d 1081]; see *Sandoval, supra,* 12 Cal.5th at p. 277.) However, the affirmative contribution need not be active conduct but may be a failure to act. (*Hooker, supra,* 27 Cal.4th at p. 212, fn. 3; see *Sandoval, supra,* 12 Cal.5th at p. 277.) "Affirmative contribution" means that there must be causation between the

hirer's exercising retained control and the plaintiff's injury. Modification may be required if the defendant's failure to act is alleged pursuant to *Hooker*.

Sources and Authority

- "A hirer 'retains control' where it retains a sufficient degree of authority over the manner of performance of the work entrusted to the contractor. … So 'retained control' refers specifically to a hirer's authority over work entrusted to the contractor, i.e., work the contractor has agreed to perform. For simplicity we will often call this the 'contracted work'—irrespective of whether it's set out in a written contract or arises from an informal agreement. A hirer's authority over noncontract work—although potentially giving rise to other tort duties—thus does not give rise to a retained control duty unless it has the effect of creating authority over the contracted work." (*Sandoval, supra,* 12 Cal.5th at pp. 274–275.)

- "We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker, supra,* 27 Cal.4th at p. 202, original italics.)

- "Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette*, *Toland* and *Camargo* because the liability of the hirer in such a case is not ' "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." ' To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term." (*Hooker, supra,* 27 Cal.4th at pp. 211–212, original italics, internal citations and footnote omitted.)

- "Contract workers must prove that the hirer *both* retained control *and* actually exercised that retained control in such a way as to affirmatively contribute to the injury." (*Sandoval, supra,* 12 Cal.5th at p. 276, original italics.)

- "Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker, supra,* 27 Cal.4th at p. 212, fn. 3.)

- " 'Affirmative contribution' means that the hirer's exercise of retained control contributes to the injury in a way that isn't merely derivative of the contractor's contribution to the injury. Where the contractor's conduct is the immediate cause of injury, the affirmative contribution requirement can be satisfied only if the hirer in some respect induced—not just failed to prevent—the contractor's injury-causing conduct." (*Sandoval, supra,* 12 Cal.5th at p. 277, internal citation omitted.)

- "If a hirer entrusts work to an independent contractor, but retains control over safety conditions at

a jobsite and then negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control." (*Tverberg v. Fillner Constr., Inc.* (2012) 202 Cal.App.4th 1439, 1446 [136 Cal.Rptr.3d 521].)

- "[A]ffirmative contribution is a different sort of inquiry than substantial factor causation. For instance, a fact finder might reasonably conclude that a hirer's negligent hiring of the contractor was a substantial factor in bringing about a contract worker's injury, and yet negligent hiring is not affirmative contribution because the hirer's liability is essentially derivative of the contractor's conduct. Conversely, affirmative contribution does not itself require that the hirer's contribution to the injury be substantial." (*Sandoval, supra,* 12 Cal.5th at p. 278, internal citations omitted.)

- "A hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution." (*Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 [208 Cal.Rptr.3d 699].)

- "On facts [showing a contractor's awareness of a hazard], then, it is the contractor's responsibility, not the hirer's responsibility, to take the necessary precautions to protect its employees from a known workplace hazard. And should the contractor fail to take the necessary precautions, … its employees cannot fault the hirer for the contractor's own failure." (*McCullar v. SMC Contracting, Inc.* (2022) 83 Cal.App.5th 1005, 1017 [298 Cal.Rptr.3d 785].)

- "When the employer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative contribution occurs. When the hirer does not fully delegate the task of providing a safe working environment but in some manner actively participates in how the job is done, the hirer may be held liable to the employee if its participation affirmatively contributed to the employee's injury. [¶] By contrast, passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer or the contractor had agreed to implement these measures. Thus, the failure to exercise retained control does not constitute an affirmative contribution to an injury. Such affirmative contribution must be based on a negligent exercise of control. In order for a worker to recover on a retained control theory, the hirer must engage in some active participation." (*Tverberg, supra,* 202 Cal.App.4th at p. 1446, internal citations omitted.)

- "Although plaintiffs concede that [contractor] had exclusive control over how the window washing would be done, they urge that [owner] nonetheless is liable because it affirmatively contributed to decedent's injuries 'not [by] active conduct *but … in the form of an omission to act*.' Although it is undeniable that [owner]'s failure to equip its building with roof anchors contributed to decedent's death, *McKown* [*v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219] does not support plaintiffs' suggestion that a passive omission of this type is actionable. … Subsequent Supreme Court decisions … have repeatedly rejected the suggestion that the passive provision of an unsafe workplace is actionable. … Accordingly, the failure to provide safety equipment does not constitute an 'affirmative contribution' to an injury within the meaning of *McKown*." (*Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1093 [229 Cal.Rptr.3d 594],

original italics.)

- "[U]nder Government Code section 815.4, a public entity can be held liable under the retained control doctrine, provided a private person would be liable under the same circumstances. This means that the public entity must *negligently* exercise its retained control so as to affirmatively contribute to the injuries of the employee of the independent contractor." (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 985 [79 Cal.Rptr.3d 777], original italics.)

- "The *Privette* line of decisions establishes a presumption that an independent contractor's hirer 'delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees.'… [T]he *Privette* presumption affects the burden of producing evidence." (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 642 [221 Cal.Rptr.3d 119], internal citations omitted.)

Secondary Sources

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-A, *Liability For Defective Conditions On Premises*, ¶ 6:1 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.23 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability,* §§ 421.11, 421.12 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability,* § 178.20 et seq. (Matthew Bender)

1009D. Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed by an unsafe condition while employed by [*name of plaintiff's employer*] and working on [*name of defendant*]'s property. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [owned/leased/occupied/controlled] the property;**

2. **That [*name of defendant*] negligently provided unsafe equipment that contributed to [*name of plaintiff*]'s injuries;**

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.**

*Derived from CACI No. 1009B April 2009; Revised December 2011, November 2024**

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant provided defective equipment. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on unsafe concealed conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on the hirer's retained control over the contractor's performance of work, see CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control*.

~~See also the Vicarious Responsibility Series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.~~

Sources and Authority

- "[W]hen a hirer of an independent contractor, by negligently furnishing unsafe equipment to the contractor, affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer's own negligence." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 937 [22 Cal.Rptr.3d 530, 102 P.3d 915].)

- " '[W]here the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party's own negligence that renders it liable, not that of the contractor.' " (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225 [115 Cal.Rptr.2d 868, 38 P.3d 1094], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1259

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.23 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.15 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.24 (Matthew Bender)

1126. Failure to Warn of a Dangerous Roadway Condition Resulting From an Approved Design—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] is responsible for [his/her/***nonbinary pronoun***] harm caused [***name of defendant***]'s failure to warn of [***insert description of dangerous condition resulting from an approved design***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] had notice that its approved design created a dangerous condition;**

2. **That [***name of defendant***] failed to warn of the dangerous condition;**

3. **That the dangerous condition would not have been reasonably apparent to or anticipated by a person exercising due care;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That the absence of a warning was a substantial factor in causing [***name of plaintiff***]'s harm.**

New November 2024

Directions for Use

Give this instruction if the plaintiff claims that the public entity defendant failed to warn of a dangerous roadway condition resulting from an approved design, even if the approved design would otherwise be covered by design immunity.

Give CACI No. 1102, *Definition of "Dangerous Condition,"* and CACI No. 1103, *Notice*, to define a dangerous condition and actual and constructive notice in connection with this instruction.

Sources and Authority

- Liability of Public Entity for Dangerous Condition of Property. Government Code section 835.
- Actual Notice. Government Code section 835.2(a).
- Constructive Notice. Government Code section 835.2(b).
- Definitions. Government Code section 830.
- "[W]e conclude that where the state is immune from liability for injuries caused by a dangerous condition of its property because the dangerous condition was created as a result of a plan or design

which conferred immunity under section 830.6, the state may nevertheless be liable for failure to warn of this dangerous condition where the failure to warn is negligent and is an independent, separate, concurring cause of the accident." (*Cameron v. State of California* (1972) 7 Cal.3d 318, 329 [102 Cal.Rptr. 305, 497 P.2d 777].)

- "[W]hile *Cameron* [*v. State of California*] generally permits claims for failure to warn of a dangerous traffic condition that is subject to design immunity, a plaintiff pursuing such a claim must nonetheless prove various elements that are not present when pursuing a claim alleging a public entity *created* that dangerous condition: (1) the public entity had actual or constructive notice that the approved design resulted in a dangerous condition; (2) the dangerous condition qualified as a concealed trap, i.e., 'would not [have been] reasonably apparent to, and would not have been anticipated by, a person exercising due care'; and (3) the absence of a warning was a substantial factor in bringing about the injury." (*Tansavatdi v. City of Rancho Palos Verdes* (2023) 14 Cal.5th 639, 661–662 [307 Cal.Rptr.3d 346, 527 P.3d 873], original italics.)

- "In sum, we find nothing illogical about interpreting sections 830.6 and 835 in a manner that compels government entities to provide a warning when they know (or should know) that an approved roadway design presents concealed dangers to the public." (*Tansavatdi, supra,* 14 Cal.5th at p. 668.)

Secondary Sources

1246. Affirmative Defense—Design Defect—Government Contractor

[*Name of defendant*] may not be held liable for design defects in the [*product*] if it proves all of the following:

1. **That [*name of defendant*] contracted with the United States government to provide the [*product*] for military use;**

2. **That the United States approved reasonably precise specifications for the [*product*];**

3. **That the [*product*] conformed to those specifications; and**

4. **[That [*name of defendant*] warned the United States about the dangers in the use of the [*product*] that were known to [*name of defendant*] but not to the United States.]**

   [or]

4. **[That the United States did not need to be warned because it was already aware of the dangers in the use of the [*product*].]**

New June 2010; Revised December 2010, November 2024

Directions for Use

This instruction is for use if the defendant's product whose design is challenged was provided to the United States government for military use. The essence of the defense is that the plaintiff should not be able to impose on a government contractor a duty under state law that is contrary to the duty imposed by the government contract. (~~See~~ *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 508–509 [108 S.Ct. 2510, 101 L.Ed.2d 442].)

It has been stated that the defense is not limited to military contracts (see *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 710 [99 Cal.Rptr.3d 418]), though no California court has expressly so held. (See *Kase v. Metalclad Insulation Corp.* (2016) 6 Cal.App.5th 623, 637 [212 Cal.Rptr.3d 198] [citing cases from courts outside of California that have observed the defense may not be limited to military contracts].)

Depending on the facts of the case, choose one of the bracketed choices in element 4.

Different standards and elements apply in a failure-to-warn case. For an instruction for use in such a case, see CACI No. 1247, *Affirmative Defense—Failure to Warn—Government Contractor.*

Sources and Authority

- "The [United States] Supreme Court noted that in areas of ' "uniquely federal interests" ' state law may be preempted or displaced by federal law, and that civil liability arising from the

performance of federal procurement contracts is such an area. The court further determined that preemption or displacement of state law occurs in an area of uniquely federal interests only where a ' "significant conflict" ' exists between an identifiable federal policy or interest and the operation of state law. The court concluded that 'state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.' " (*Oxford, supra,* 177 Cal.App.4th at p. 708, quoting *Boyle, supra,* 487 U.S. at pp. 500, 504, 507, 512.)

- "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated—i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision." (*Boyle, supra,* 487 U.S. at pp. 512–513.)

- "[T]he fact that a company supplies goods to the military does not, in and of itself, immunize it from liability for the injuries caused by those goods. Where the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply." (*In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 811.)

- "[W]here a purchase does not involve 'reasonably precise specifications' bearing on the challenged design feature, the government necessarily has not made a considered evaluation of and affirmative judgment call about the design." (*Kase, supra, ~~v. Metalclad Insulation Corp. (2016)~~* 6 Cal.App.5th ~~623,~~ at p. 628 ~~[212 Cal.Rptr.3d 198]~~.)

- "In our view, if a product is produced according to military specifications and used by the military because of particular qualities which serve a military purpose, and is incidentally sold commercially as well, that product may nonetheless still qualify as military equipment under the military contractor defense." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319 [273 Cal.Rptr. 214]; see also *Kase, supra,* 6 Cal.App.5th at p. 637 ["We continue to agree with *Jackson* and *Oxford* that a product's commercial availability does not necessarily foreclose the government contractor defense."].)

- "While courts such as the court in *Hawaii* have sought to confine the government contractor defense to products that are made exclusively for the military, we agree with the court in *Jackson* that this limitation is unduly confining. Though the court in *Boyle* discussed the parameters of the contractor defense in terms of 'military equipment,' use of that term appears to have followed from the facts of that case. Other courts considering this issue have concluded the defense is not limited to military contracts. … [*Boyle's*] application focuses instead on whether the issue or area

is one involving 'uniquely federal interests' and, if so, whether the application of state law presents a 'significant conflict' with federal policy." (*Oxford, supra,* 177 Cal.App.4th at p. 710; the split on this issue in the federal and other state courts is noted in *Carley v. Wheeled Coach* (3d Cir. 1993) 991 F.2d 1117, 1119, fn. 1.)

- "[T]he Supreme Court in *Boyle* did not expressly limit its holding to products liability causes of action. Thus, the government contractor defense is applicable to related negligence claims." (*Oxford, supra,* 177 Cal.App.4th at p. 711.)

- "[I]n order to satisfy the first condition—government 'approval' … the government's involvement must transcend rubber stamping." (*Oxford, supra,* 177 Cal.App.4th at p. 712.)

- "[A]pproval must result from a 'continuous exchange' and 'back and forth dialogue' between the contractor and the government. When the government engages in a thorough review of the allegedly defective design and takes an active role in testing and implementing that design, *Boyle's* first element is met." (*Getz v. Boeing Co.* (9th Cir. 2011) 654 F.3d 852, 861, internal citation omitted.)

- "[T]he operative test for conformity with reasonably precise specifications turns on whether 'the alleged defect … exist[ed] independently of the design itself.' 'To say that a product failed to conform to specifications is just another way of saying that it was defectively manufactured.' Therefore, absent some evidence of a latent manufacturing defect, a military contractor can establish conformity with reasonably precise specifications by showing '[e]xtensive government involvement in the design, review, development and testing of a product' and by demonstrating 'extensive acceptance and use of the product following production.' " (*Getz, supra,* 654 F.3d at p. 864, internal citations omitted.)

- "[T]he cases recognize that a contractor 'can demonstrate a fully informed government decision by showing either that they conveyed the relevant known and "substantial enough" dangers … or that the government did not need the warnings because it already possessed that information.' " (*Kase, supra,* 6 Cal.App.5th at p. 643, internal citations omitted.)

- "Although the source of the government contractor defense is the United States' sovereign immunity, we have explicitly stated that 'the government contractor defense does not confer sovereign immunity on contractors.' " (*Rodriguez v. Lockheed Martin Corp.* (9th Cir. 2010) 627 F.3d 1259, 1265.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1704

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1270, 2:1316, 2:1631 (The Rutter Group)

1 California Products Liability Actions, Ch. 8, *Defenses*, § 8.05 (Matthew Bender)

2 Levy et al., California Torts, Ch. 21, *Aviation Tort Law*, § 21.02[6] (Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 16, *Airplanes and Airports*, § 16.10[5] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.104[23] (Matthew Bender)

1247. Affirmative Defense—Failure to Warn—Government Contractor

[*Name of defendant*] may not be held liable for failure to warn about the dangers in the use of the [*product*] if it proves all of the following:

1. **That [*name of defendant*] contracted with the United States government to provide the [*product*] for military use;**

2. **That the United States imposed reasonably precise specifications ~~on [*name of defendant*]~~ regarding the provision of warnings for the [*product*];**

3. **That the [*product*] conformed to those specifications regarding warnings; and**

4. **[That [*name of defendant*] warned the United States about the dangers in the use of the [*product*] that were known to [*name of defendant*] but not to the United States.]**

   [or]

   4. [That the United States did not need to be warned because it was already aware of the dangers in the use of the [*product*].]

New December 2010; Revised November 2024

Directions for Use

This instruction is for use if the defendant's product about which a failure to warn is alleged (see CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*, and CACI No. 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements*) was provided to the United States government for military use. The essence of the defense is that the plaintiff should not be able to impose on a government contractor a duty under state law that is contrary to the duty imposed by the government contract. (~~See~~ *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 508–509 [108 S.Ct. 2510, 101 L.Ed.2d 442].)

It has been stated that the defense is not limited to military contracts (see *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 710 [99 Cal.Rptr.3d 418]), though no California court has expressly so held. (See *Kase v. Metalclad Insulation Corp.* (2016) 6 Cal.App.5th 623, 637 [212 Cal.Rptr.3d 198] [citing cases from courts outside of California that have observed the defense may not be limited to military contracts].)

Depending on the facts of the case, choose one of the bracketed choices in element 4.

Different standards and elements apply in a design defect case. For an instruction for use in such a case, see CACI No. 1246, *Affirmative Defense—Design Defect—Government Contractor*.

Sources and Authority

- "The appellate court in *Tate* [*Tate v. Boeing Helicopters* (6th Cir. 1995) 55 F.3d 1150, 1157] offered an alternative test for applying the government contractor defense in the context of failure to warn claims: 'When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not.' " (*Oxford, supra,* 177 Cal.App.4th at p. 712.)

- "As in design defect cases, in order to satisfy the first condition—government 'approval'—in failure to warn cases, the government's involvement must transcend rubber stamping. And where the government goes beyond approval and actually determines for itself the warnings to be provided, the contractor has surely satisfied the first condition because the government exercised its discretion. The second condition in failure to warn cases, as in design defect cases, assures that the defense protects the government's, not the contractor's, exercise of discretion. Finally, the third condition encourages frank communication to the government of the equipment's dangers and increases the likelihood that the government will make a well-informed judgment." (*Oxford, supra,* 177 Cal.App.4th at p. 712, quoting *Tate, supra,* 55 F.3d at p. 1157.)

- "Under California law, a manufacturer has a duty to warn of a danger when the manufacturer has knowledge of the danger or has reason to know of it and has no reason to know that those who use the product will realize its dangerous condition. Whereas the government contractor's defense may be used to trump a design defect claim by proving that the government, not the contractor, is responsible for the defective design, that defense is inapplicable to a failure to warn claim in the absence of evidence that in making its decision whether to provide a warning … , [defendant] was 'acting in compliance with "reasonably precise specifications" imposed on [it] by the United States.' " (*Butler v. Ingalls Shipbuilding* (9th Cir. 1996) 89 F.3d 582, 586, internal citations omitted.)

- "In a failure-to-warn action, where no conflict exists between requirements imposed under a federal contract and a state law duty to warn, regardless of any conflict which may exist between the contract and state law design requirements, *Boyle* commands that we defer to the operation of state law." (*Butler, supra,* 89 F.3d at p. 586.)

- "Defendants' evidence did not establish as a matter of law the necessary significant conflict between federal contracting requirements and state law. Although defendants' evidence did show that certain warnings were required by the military specifications, that evidence did not establish that the specifications placed any limitation on additional information from the manufacturers to users of their products. Instead, the evidence suggested no such limitation existed." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1317 [273 Cal.Rptr. 214].)

- "The [United States] Supreme Court noted that in areas of ' "uniquely federal interests" ' state law may be preempted or displaced by federal law, and that civil liability arising from the performance of federal procurement contracts is such an area. The court further determined that

preemption or displacement of state law occurs in an area of uniquely federal interests only where a ' "significant conflict" ' exists between an identifiable federal policy or interest and the operation of state law." (*Oxford, supra,* 177 Cal.App.4th at p. 708, quoting *Boyle, supra,* 487 U.S. at pp. 500, 504, 507, 512.)

- "[T]he Supreme Court in *Boyle* did not expressly limit its holding to products liability causes of action. Thus, the government contractor defense is applicable to related negligence claims." (*Oxford, supra,* 177 Cal.App.4th at p. 711.)

- "[T]he fact that a company supplies goods to the military does not, in and of itself, immunize it from liability for the injuries caused by those goods. Where the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply." (*In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 811.)

- "In our view, if a product is produced according to military specifications and used by the military because of particular qualities which serve a military purpose, and is incidentally sold commercially as well, that product may nonetheless still qualify as military equipment under the military contractor defense." (*Jackson, supra,* 223 Cal.App.3d at p. 1319.)

- "While courts such as the court in *Hawaii* have sought to confine the government contractor defense to products that are made exclusively for the military, we agree with the court in *Jackson* that this limitation is unduly confining. Though the court in *Boyle* discussed the parameters of the contractor defense in terms of 'military equipment,' use of that term appears to have followed from the facts of that case. Other courts considering this issue have concluded the defense is not limited to military contracts. … [*Boyle's*] application focuses instead on whether the issue or area is one involving 'uniquely federal interests' and, if so, whether the application of state law presents a 'significant conflict' with federal policy." (*Oxford, supra,* 177 Cal.App.4th at p. 710~~; the split on this issue in the federal and other state courts is noted in *Carley v. Wheeled Coach* (3d Cir. 1993) 991 F.2d 1117, 1119, fn. 1~~.)

- "[T]he cases recognize that a contractor 'can demonstrate a fully informed government decision by showing either that they conveyed the relevant known and "substantial enough" dangers … or that the government did not need the warnings because it already possessed that information.' " (*Kase, supra,* 6 Cal.App.5th at p. 643, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1704

1 California Products Liability Actions, Ch. 8, *Defenses*, § 8.05 (Matthew Bender)

2 Levy et al., California Torts, Ch. 21, *Aviation Tort Law*, § 21.02[6] (Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 16, *Airplanes and Airports*, § 16.10[5] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.104[23] (Matthew Bender)

1803. Appropriation of Name or Likeness—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] violated [his/her/*nonbinary pronoun*] right to [privacy/publicity/privacy and publicity]. 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;**

2. **That [*name of plaintiff*] did not consent to this use;**

3. **That [*name of defendant*] gained a commercial benefit [or some other advantage] by using [*name of plaintiff*]'s name, likeness, or identity;**

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.**

New September 2003; Revised December 2014, November 2017, May 2020, November 2024

Directions for Use

If the plaintiff is asserting more than one privacy right or a right of publicity, give an introductory instruction stating that a person's right to privacy or right of publicity 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. (~~See~~ *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409 [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 with a challenge to the artist's 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,* 94 Cal.App.4th at p. 414 ["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 misappropriation claim is 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. [Citations.]" [Citation.]' " (*Maxwell v. Dolezal* (2014) 231 Cal.App.4th 93, 97 [179 Cal.Rptr.3d 807].)

- " '[T]he right of publicity has come to be recognized as distinct from the right of privacy'. 'What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name, voice, signature, photograph, or likeness.' 'What the right of publicity holder possesses is … a right to prevent others from misappropriating the economic value generated … through the merchandising of the 'name, voice, signature, photograph, or likeness' of the [holder].' " (*Timed Out, LLC v. Youabian, Inc.* (2014) 229 Cal.App.4th 1001, 1006 [177 Cal.Rptr.3d 773], internal citations omitted.)

- "California recognizes the right to profit from the commercial value of one's identity as an aspect of the right of publicity." (*Gionfriddo, supra,* 94 Cal.App.4th at p. 409.)

- "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].)

- "[B]oth the statutory and common law versions of a right of publicity claim require that the defendant actually use the plaintiff's likeness … ." (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 210 [222 Cal.Rptr.3d 250].)

- "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.)

- "Consent to the use of a name or likeness is determined by traditional principles of contract interpretation." (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 8 [206 Cal.Rptr.3d 884].)

- "[T]he appearance of an 'endorsement' is not the *sine qua non* of a claim for commercial appropriation." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 419 [198 Cal.Rptr. 342].)

- "[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 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, adopted in 1971.' " (*Eastwood, supra,* 149 Cal.App.3d at pp. 416–417.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 784–786

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)

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

1804A. Use of Name or Likeness (Civ. Code, § 3344)

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

1. **That [***name of defendant***] knowingly used [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] [on merchandise/ [or] to advertise or sell [***describe what is being advertised or sold***]];**

2. **That the use did not occur in connection with a news, public affairs, or sports broadcast or account, or with a political campaign;**

3. **That [***name of defendant***] did not have [***name of plaintiff***]'s consent;**

4. **That [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] was directly connected to [***name of defendant***]'s commercial purpose;**

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.**

Derived from former CACI No. 1804 April 2008; Revised April 2009, November 2024

Directions for Use

If the plaintiff is asserting more than one privacy right or a right of publicity, give an introductory instruction stating that a person's right to privacy or right of publicity can be violated in more than one way and listing the legal theories under which the plaintiff is suing. One's name and likeness are protected under both the common law and under Civil Code section 3344. As the statutory remedy is cumulative (Civ. Code, § 3344(g)), both this instruction and CACI No. 1803, *Appropriation of Name or Likeness*, which sets forth the common-law cause of action, will normally be given.

Different standards apply if the use is in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. (See Civ. Code, § 3344(d); *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 421–426 [198 Cal.Rptr. 342].) The plaintiff bears the burden of proving the nonapplicability of these exceptions. (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416–417 [114 Cal.Rptr.2d 307].) Element 2 may be omitted if there is no question of fact with regard to this issue. See CACI No. 1804B, *Use of Name or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*, for an instruction to use if one of the exceptions of Civil Code section 3344(d) applies.

If plaintiff alleges that the use was not covered by Civil Code section 3344(d) (e.g., not a "news" account) but that even if it were covered it is not protected under the standards of *Eastwood*, then both this instruction and CACI No. 1804B should be given in the alternative. In that case, it should be made clear to the jury that if the plaintiff fails to prove the inapplicability of Civil Code section 3344(d) as set forth in element 2, the claim is still viable if the plaintiff proves all the elements of CACI No. 1804B.

Note that a plaintiff is entitled to the sum of $750 under Civil Code section 3344(a) even if actual damages are not proven. (See *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1008 [72 Cal.Rptr.3d 194] [claim for 14,060 misappropriations of plaintiff's name under section 3344(a) constitutes single cause of action for which statutory damages are $750].)

Sources and Authority

- Liability for Use of Name or Likeness. Civil Code section 3344.

- "Civil Code section 3344 provides a statutory cause of action for commercial misappropriation that complements, rather than codifies, the common law misappropriation cause of action." (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 13 [206 Cal.Rptr.3d 884].)

- "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB Enters v. Matthews* (2000)78 Cal.App.4th 362, 367 [92 Cal.Rptr.2d 713].)

- "There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a section 3344 claim. To prove the common law cause of action, the plaintiff must establish: ' "(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." [Citation.]' To prove the statutory remedy, a plaintiff must present evidence of 'all the elements of the common law cause of action' and must also prove 'a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.' " (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544 [135 Cal.Rptr.3d 200], internal citations omitted.)

- "The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law." (*Eastwood, supra,* 149 Cal.App.3d at p. 417, fn. 6, internal citation omitted.)

- "[B]oth the statutory and common law versions of a right of publicity claim require that the defendant actually use the plaintiff's likeness … ." (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 210 [222 Cal.Rptr.3d 250].)

- "Plaintiffs assert that Civil Code section 3344's 'commercial use' requirement does not need to 'involve some form of advertising or endorsement.' This is simply incorrect, as Civil Code section 3344, subdivision (a) explicitly provides for possible liability on '[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner … for purposes of

advertising … without such person's prior consent.' The statute requires some 'use' by the advertiser aimed at obtaining a commercial advantage for the advertiser." (*Cross, supra,* 14 Cal.App.5th at p. 210.)

- "[T]he single-publication rule as codified in [Civil Code] section 3425.3 applies, in general, to a cause of action for unauthorized commercial use of likeness." (*Christoff v. Nestle USA, Inc.* (2009) 47 Cal.4th 468, 476 [97 Cal.Rptr.3d 798, 213 P.3d 132].)

- "Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant's answer based upon a general denial and need not be raised by affirmative defense. ... Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d)." (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 416–417, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 789–791

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Invasion Of Privacy*, ¶¶ 5:1116–5:1118 (The Rutter Group)

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*, §§ 184.22–184.24 (Matthew Bender)

California Civil Practice: Torts § 20:17 (Thomson Reuters)

1804B. Use of Name or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign (Civ. Code, § 3344(d))

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

1. **That [***name of defendant***] knowingly used [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] [on merchandise/ [or] to advertise or sell [***describe what is being advertised or sold***]];**

2. **That the use occurred in connection with a [[news/public affairs/sports] broadcast or account/political campaign];**

3. **That the use contained false information;**

4. **[***Use for public figure***: That [***name of defendant***] knew the [broadcast or account/campaign material] was false or that [he/she/***nonbinary pronoun***/it] acted with reckless disregard of its falsity;]**

   [*or***]**

   [*Use for private individual***: That [***name of defendant***] was negligent in determining the truth of the [broadcast or account/campaign material];]**

5. **That [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] was directly connected to [***name of defendant***]'s commercial purpose;**

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.**

Derived from former CACI No. 1804 April 2008; Revised April 2009

Directions for Use

Give this instruction if the plaintiff's name or likeness has been used in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. In this situation, consent is not required. (Civ. Code, § 3344(d).) However, in *Eastwood v. Superior Court,* the court held that the constitutional standards under defamation law apply under section 3344(d) and that the statute as it applies to news does not provide protection for a knowing or reckless falsehood. (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 421–426 [198 Cal.Rptr. 342].) Under defamation law, this standard

applies only to public figures, and private individuals may sue for negligent publication of defamatory falsehoods. (*Id.* at p. 424.) Presumably, the same distinction between public figures and private individuals would apply under Civil Code section 3344(d). Element 4 provides for the standards established and suggested by *Eastwood*.

Give CACI No. 1804A, *Use of Name or Likeness,* if there is no issue whether one of the exceptions of Civil Code section 3344(d) applies. If plaintiff alleges that the use was not covered by subdivision (d) (e.g., not a "news" account) but that even if it were covered it is not protected under the standards of *Eastwood*, then both this instruction and CACI No. 1804A should be given in the alternative. In that case, it should be made clear to the jury that if the plaintiff fails to prove the inapplicability of Civil Code section 3344(d) as set forth element 2 of CACI No. 1804A, the claim is still viable if the plaintiff proves all the elements of this instruction.

If the plaintiff is asserting more than one privacy right or a right of publicity, give an introductory instruction stating that a person's right to privacy or right of publicity can be violated in more than one way and listing the legal theories under which the plaintiff is suing. One's name and likeness are protected under both the common law and under Civil Code section 3344. As the statutory remedy is cumulative (Civ. Code, § 3344(g)), both this instruction and CACI No. 1803, *Appropriation of Name or Likeness*, which sets forth the common-law cause of action, will normally be given.

Note that a plaintiff is entitled to the sum of $750 under Civil Code section 3344(a) even if actual damages are not proven. (See *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1008 [72 Cal.Rptr.3d 194] [claim for 14,060 misappropriations of plaintiff's name under section 3344(a) constitutes single cause of action for which statutory damages are $750].)

Even though consent is not required, it may be an affirmative defense. CACI No. 1721, *Affirmative Defense—Consent* (to defamation), may be used in this situation.

Sources and Authority

- Liability for Use of Name or Likeness. Civil Code section 3344.

- ~~Civil Code section 3344 is~~ "In 1971, California enacted [Civil Code] section 3344, a commercial appropriation statute which complements the common law tort of appropriation." (*KNB Enters. v. Matthews* (2000) 78 Cal.App.4th 362, 366–367 [92 Cal.Rptr.2d 713].)

- "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB Enters., supra,* 78 Cal.App.4th at p. 367.)

- "There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a section 3344 claim. To prove the common law cause of action, the plaintiff must establish: ' "(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." [Citation.]' To prove the statutory remedy, a plaintiff must present evidence of 'all the elements of the common law cause of action' and must also prove 'a knowing use by the defendant as well as a direct connection between the alleged use and the commercial

purpose.' " (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544 [135 Cal.Rptr.3d 200], internal citations omitted.)

- "The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law." (*Eastwood, supra,* 149 Cal.App.3d at p. 417, fn. 6, internal citation omitted.)

- "The spacious interest in an unfettered press is not without limitation. This privilege is subject to the qualification that it shall not be so exercised as to abuse the rights of individuals. Hence, in defamation cases, the concern is with defamatory lies masquerading as truth. Similarly, in privacy cases, the concern is with nondefamatory lies masquerading as truth. Accordingly, we do not believe that the Legislature intended to provide an exemption from liability for a knowing or reckless falsehood under the canopy of 'news.' We therefore hold that Civil Code section 3344, subdivision (d), as it pertains to news, does not provide an exemption for a knowing or reckless falsehood." (*Eastwood, supra,* 149 Cal.App.3d at p. 426, internal citations omitted.)

- The burden of proof as to knowing or reckless falsehood under Civil Code section 3344(d) is on the plaintiff. (See *Eastwood, supra,* 149 Cal.App.3d at p. 426.)

- "[T]he single-publication rule as codified in [Civil Code] section 3425.3 applies, in general, to a cause of action for unauthorized commercial use of likeness." (*Christoff v. Nestle USA, Inc.* (2009) 47 Cal.4th 468, 476 [97 Cal.Rptr.3d 798, 213 P.3d 132].)

- "Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant's answer based upon a general denial and need not be raised by affirmative defense. ... Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d)." (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416–417 [114 Cal.Rptr.2d 307], internal citation omitted.)

- "We presume that the Legislature intended that the category of public affairs would include things that would not necessarily be considered news. Otherwise, the appearance of one of those terms in the subsection would be superfluous, a reading we are not entitled to give to the statute. We also presume that the term 'public affairs' was intended to mean something less important than news. Public affairs must be related to real-life occurrences." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 546 [18 Cal.Rptr.2d 790], internal citations omitted.)

- "[N]o cause of action will lie for the 'publication 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 citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 789–791

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-:L, *Invasion Of Privacy*, ¶¶ 5:1116–5:1118 (The Rutter Group)

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*, § 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.35 (Matthew Bender)

California Civil Practice: Torts § 20:17 (Thomson Reuters)

1805. Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (*Comedy III*)

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] has not violated [***name of plaintiff***]'s right of [privacy/publicity/privacy and publicity] because the [***insert type of work, e.g., "picture"***] is protected by the First Amendment's guarantee of freedom of speech and expression. To succeed, [***name of defendant***] must prove either of the following:**

1. **That the [***insert type of work, e.g., "picture"***] adds ~~something new~~ significant creative elements to [***name of plaintiff/celebrity/other person***]'s ~~likeness~~[name/voice/signature/photograph/likeness], giving it a new expression, meaning, or message; or**

2. **That the value of the [***insert type of work, e.g., "picture"***] does not result primarily from [***name of plaintiff/celebrity/other person***]'s ~~fame~~ [name/voice/signature/photograph/likeness].**

New September 2003; Revised October 2008, November 2024

Directions for Use

This instruction sets forth the affirmative defense under the First Amendment to unauthorized use of a person's name or likeness, which may involve privacy rights or the right of publicity. In the introductory sentence, select only the right or rights that apply in the case based on the legal theory under which plaintiff is suing. (See CACI No. 1803, *Appropriation of Name or Likeness—Essential Factual Elements*.)

~~This instruction assumes that the plaintiff is the celebrity whose likeness is the subject of the trial. This instruction will need to be modified if the plaintiff is not the actual celebrity.~~ Use the celebrity's or other person's name rather than the plaintiff's name in elements 1 and 2 if the plaintiff is not the person whose likeness is the subject of the trial.

Sources and Authority

- "The right of publicity is often invoked in the context of commercial speech when the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing a product. Because the First Amendment does not protect false and misleading commercial speech, and because even nonmisleading commercial speech is generally subject to somewhat lesser First Amendment protection, the right of publicity may often trump the right of advertisers to make use of celebrity figures." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 396 [106 Cal.Rptr.2d 126, 133, 21 P.3d 797, 802], internal citations omitted.)

- "[O]ur precedents have held that speech which either appropriates the economic value of a performance or persona or seeks to capitalize off a celebrity's image in commercial advertisements is unprotected by the First Amendment against a California right-of-publicity claim." (*Sarver v.*

Chartier (9th Cir. 2016) 813 F.3d 891, 905.)

- "In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as 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., supra, ~~v. Gary Saderup, Inc.~~ (2001)* 25 Cal.4th ~~387,~~ at p. 407 ~~[106 Cal.Rptr.2d 126, 21 P.3d 797]~~.)

- "We have explained that '[o]nly if [a defendant] is entitled to the [transformative] defense *as a matter of law* can it prevail on its motion to strike,' because the California Supreme Court 'envisioned the application of the defense as a question of fact.' As a result, [defendant] 'is only entitled to the defense as a matter of law if no trier of fact could reasonably conclude that the [game] [i]s not transformative.' " (*Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)* (9th Cir. 2013) 724 F.3d 1268, 1274, original italics.)

- "[C]ourts can often resolve the question as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person or persons portrayed. Because of these circumstances, an action presenting this issue is often properly resolved on summary judgment or, if the complaint includes the work in question, even demurrer." (*Winter v. DC Comics* (2003) 30 Cal.4th 881, 891–892 [134 Cal.Rptr.2d 634, 69 P.3d 473], internal citation omitted.)

- "[T]he First Amendment … safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays." (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 860 [230 Cal.Rptr.3d 625].)

- "Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 400.)

- "Furthermore, in determining whether a work is sufficiently transformative, courts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity—from the creativity, skill, and reputation of the artist—it may be presumed that sufficient transformative elements are present to warrant First Amendment protection. If the question is answered in the affirmative, however, it does not necessarily follow that the work is without First Amendment protection—it may still be a transformative work." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 407.)

- "As the Supreme Court has stated, the central purpose of the inquiry into this fair use factor 'is to see ... whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is

"transformative." ' " (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 404, internal citations omitted.)

- "We emphasize that the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 406.)

- "[Defendant] contends the plaintiffs' claims are barred by the transformative use defense formulated by the California Supreme Court in *Comedy III* … . 'The defense is "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." ' " (*Davis v. Elec. Arts, Inc.* (9th Cir. 2015) 775 F.3d 1172, 1177, internal citation omitted)

- "Simply stated, the transformative test looks at 'whether the celebrity likeness is one of the "raw materials" from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness.' This transformative test is the court's primary inquiry when resolving a conflict between the right of publicity and the First Amendment." (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 686 [166 Cal.Rptr.3d 359], internal citations omitted.)

- "*Comedy III's* 'transformative' test makes sense when applied to products and merchandise—'tangible personal property,' in the Supreme Court's words. Lower courts have struggled mightily, however, to figure out how to apply it to expressive works such as films, plays, and television programs." (*De Havilland, supra,* 21 Cal.App.5th at p. 863, internal citation omitted.)

- "The First Amendment defense does not apply only to visual expressions, however. 'The protections may extend to all forms of expression, including written and spoken words (fact or fiction), music, films, paintings, and entertainment, whether or not sold for a profit.' " (*Ross, supra,* 222 Cal.App.4th at p. 687.)

- "The distinction between parody and other forms of literary expression is irrelevant to the *Comedy III* transformative test. It does not matter what precise literary category the work falls into. What matters is whether the work is transformative, not whether it is parody or satire or caricature or serious social commentary or any other specific form of expression." (*Winter, supra,* 30 Cal.4th at p. 891.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 788

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 4(VII)-C, *Harm to Reputation and Privacy Interests*, ¶ 4:1385 et seq. (The Rutter Group)

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

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.38 (Matthew Bender)

3708. Peculiar-Risk Doctrine

[*Name of plaintiff*] claims that even if [*name of independent contractor*] was not an employee, [*name of defendant*] is responsible for [*name of independent contractor*]'s conduct because the work involved a special risk of harm.

A special risk of harm is a recognizable danger that arises out of the nature of the work or the place where it is done and requires specific safety measures appropriate to the danger. A special risk of harm may also arise out of a planned but unsafe method of doing the work. A special risk of harm does not include a risk that is unusual, abnormal, or not related to the normal or expected risks associated with the work.

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

1. **That the work was likely to involve a special risk of harm to others;**

2. **That [*name of defendant*] knew or should have known that the work was likely to involve this risk;**

3. **That [*name of independent contractor*] failed to use reasonable care to take specific safety measures appropriate to the danger to avoid this risk; and**

4. **That [*name of independent contractor*]'s failure was a cause of harm to [*name of plaintiff*].**

[In deciding whether [*name of defendant*] should have known the risk, you should consider [his/her/*nonbinary pronoun*/its] knowledge and experience in the field of work to be done.]

*New September 2003; Revised November 2024**

Directions for Use

This instruction may be used in cases in which the plaintiff seeks to hold the hirer of an independent contractor vicariously liable because the work for which the contractor was hired involves a special risk arising out of the nature of the work or its location.

However, do not give this instruction if an independent contractor (or its employee) seeks to hold the hirer or general contractor vicariously liable for injuries arising from the work performed by the independent contractor for the hirer. (*Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 52 [282 Cal.Rptr.3d 658, 493 P.3d 212].) Give instead, if applicable, CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control.*

Sources and Authority

- "The doctrine of peculiar risk is an exception to the common law rule that a hirer was not liable for

the torts of an independent contractor. Under this doctrine, 'a person who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's negligent performance of the work causes injuries to others. By imposing such liability without fault on the person who hires the independent contractor, the doctrine seeks to ensure that injuries caused by inherently dangerous work will be compensated, that the person for whose benefit the contracted work is done bears responsibility for any risks of injury to others, and that adequate safeguards are taken to prevent such injuries.' This doctrine of peculiar risk thus represents a limitation on the common law rule and a corresponding expansion of hirer vicarious liability." (*Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638, 646−647 [182 Cal.Rptr.3d 803], internal citation omitted.)

- "A critical inquiry in determining the applicability of the doctrine of peculiar risk is whether the work for which the contractor was hired involves a risk that is 'peculiar to the work to be done,' arising either from the nature or the location of the work and ' "against which a reasonable person would recognize the necessity of taking special precautions." ' " (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 695 [21 Cal.Rptr.2d 72, 854 P.2d 721], internal citations omitted.)

- "The courts created this exception in the late 19th century to ensure that innocent third parties injured by inherently dangerous work performed by an independent contractor for the benefit of the hiring person could sue not only the contractor, but also the hiring person, so that in the event of the contractor's insolvency, the injured person would still have a source of recovery." (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 258 [74 Cal.Rptr.2d 878, 955 P.2d 504].)

- "The analysis of the applicability of the peculiar risk doctrine to a particular fact situation can be broken down into two elements: (1) whether the work is likely to create a peculiar risk of harm unless special precautions are taken; and (2) whether the employer should have recognized that the work was likely to create such a risk." (*Jimenez v. Pacific Western Construction Co.* (1986) 185 Cal.App.3d 102, 110 [229 Cal.Rptr. 575] [proper in this case for trial court to find peculiar risk as a matter of law].)

- "Whether the particular work which the independent contractor has been hired to perform is likely to create a peculiar risk of harm to others unless special precautions are taken is ordinarily a question of fact." (*Castro v. State of California* (1981) 114 Cal.App.3d 503, 511 [170 Cal.Rptr. 734], internal citations omitted~~; but see *Jimenez, supra,* 185 Cal.App.3d at pp. 109–111 [proper in this case for trial court to find peculiar risk as a matter of law]~~.)

- "[T]he hiring person's liability is cast in the form of the hiring person's breach of a duty to see to it that special precautions are taken to prevent injuries to others; in that sense, the liability is 'direct.' Yet, peculiar risk liability is not a traditional theory of direct liability for the risks created by one's own conduct: Liability … is in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor, because it is the hired contractor who has caused the injury by failing to use reasonable care in performing the work. … 'The conclusion that peculiar risk is a form of vicarious liability is unaffected by the characterization of the doctrine as "direct" liability in situations when the person hiring an independent contractor 'fails to provide in the contract that the contractor shall take [special] precautions.' " (*Toland, supra,* 18 Cal.4th at p. 265.)

- "A peculiar risk may arise out of a contemplated and unsafe method of work adopted by the independent contractor." (*Mackey v. Campbell Construction Co*. (1980) 101 Cal.App.3d 774, 785-786 [162 Cal.Rptr. 64].)

- "The term 'peculiar risk' means neither a risk that is abnormal to the type of work done, nor a risk that is abnormally great; it simply means 'a special, recognizable danger arising out of the work itself.' For that reason, as this court has pointed out, the term 'special risk' is probably a more accurate description than 'peculiar risk,' which is the terminology used in the Restatement." (*Privette, supra*, 5 Cal.4th at p. 695, internal citations omitted.)

- "Even when work performed by an independent contractor poses a special or peculiar risk of harm, ... the person who hired the contractor will not be liable for injury to others if the injury results from the contractor's 'collateral' or 'casual' negligence." (*Privette, supra,* 5 Cal.4th at p. 696.)

- " 'Casual' or 'collateral' negligence has sometimes been described as negligence in the operative detail of the work, as distinguished from the general plan or method to be followed. Although this distinction can frequently be made, since negligence in the operative details will often not be within the contemplation of the employer when the contract is made, the distinction is not essentially one between operative detail and general method. 'It is rather one of negligence which is unusual or abnormal, or foreign to the normal or contemplated risks of doing the work, as distinguished from negligence which creates only the normal or contemplated risk.' " (*Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 510 [156 Cal.Rptr. 41, 595 P.2d 619], overruled on other grounds in *Privette, supra*, 5 Cal.4th at p. 702, fn. 4.)

- "[T]he question is whether appellant's alleged injuries resulted from negligence which was unusual or abnormal, creating a new risk not inherent in the work itself or in the ordinary or prescribed way of doing it, and not reasonably foreseeable by respondent; or whether the injuries were caused by normal negligence which precipitated a contemplated special risk of harm which was itself 'peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable man would recognize the necessity of taking special precautions.' This question, like the broader issue of whether there was a peculiar risk inherent in the work being performed, is a question of fact to be resolved by the trier of fact." (*Caudel v. East Bay Municipal Utility Dist.* (1985) 165 Cal.App.3d 1, 9 [211 Cal.Rptr. 222].)

- "[T]he dispositive issue for purposes of applying the peculiar risk doctrine to the present case is whether there was a direct relationship between the accident and the 'particular work performed' by [contractor]. In other words, if the 'character' of the work contributed to the accident, the peculiar risk doctrine applies. If the accident resulted from 'ordinary' use of the vehicle, the peculiar risk doctrine does not apply, notwithstanding the vehicle's size and weight." (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 309 [111 Cal.Rptr.3d 787], internal citation omitted.)

- "Nevertheless, we determined that the doctrine of peculiar risk does not apply when an independent contractor 'seeks to hold the general contractor vicariously liable for injuries arising from risks inherent in the nature *or the location* of the hired work over which the independent contractor has, through the chain of delegation, been granted control.' " (*Gonzalez, supra, ~~v. Mathis (2021)~~* 12 Cal.5th ~~29,~~ at p. 52 ~~[282 Cal.Rptr.3d 658, 493 P.3d 212]~~, original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1394–1396

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.05[3][b] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.10[2][b] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.22, 248.32[3] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.41 et seq. (Matthew Bender)

California Civil Practice: Torts § 3:22 (Thomson Reuters)

3713. Nondelegable Duty

[*Name of defendant***] has a duty that cannot be delegated to another person arising from [***insert name, popular name, or number of regulation, statute, or ordinance***/a contract between the parties/***other, e.g., the landlord-tenant relationship***]. Under this duty, [***insert requirements of regulation, statute, or ordinance or otherwise describe duty***].**

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by the conduct of [***name of ~~independent contractor~~third party***] and that [***name of defendant***] is responsible for this harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] hired [***name of ~~independent contractor~~third party***] to [***describe job involving nondelegable duty, e.g., repair the roof***];**

2. **That [***name of ~~independent contractor~~third party***] [***specify wrongful conduct in breach of duty, e.g., did not comply with this law***];**

3. **That [***name of plaintiff***] was harmed; and**

4. **That [***name of ~~independent contractor~~third party***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New October 2004; Revised June 2010, November 2024

Directions for Use

Use this instruction with regard to the liability of the hirer for the torts of a ~~n independent contractor~~ third party if a nondelegable duty is imposed on the hirer by statute, regulation, ordinance, contract, or common law. (See *Barry v. Raskov* (1991) 232 Cal.App.3d 447, 455 [283 Cal.Rptr. 463].)

Sources and Authority

- "As a general rule, a hirer of an independent contractor is not liable for physical harm caused to others by the act or omission of the independent contractor. There are multiple exceptions to the rule, however, one being the doctrine of nondelegable duties. … ' "A nondelegable duty is a definite affirmative duty the law imposes on one by reason of his or her relationship with others. One cannot escape this duty by entrusting it to an independent contractor." A nondelegable duty may arise when a statute or regulation requires specific safeguards or precautions to ensure others' safety. [Citation.] … ' " (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 400 [99 Cal.Rptr.3d 5], internal citations omitted.)

- "Nondelegable duties 'derive from statutes [,] contracts, and common law precedents.' They 'do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the

employer has himself been at fault. They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor. The liability imposed is closely analogous to that of a master for the negligence of his servant. [¶] The statement commonly made in such cases is that the employer is under a duty which he is not free to delegate to the contractor. Such a "non-delegable duty" requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted.' " (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 316 [111 Cal.Rptr.3d 787], internal citations omitted.)

- " 'When the manufacturer delegates some aspect of manufacture, such as final assembly or inspection, to a subsequent seller, the manufacturer may be subject to liability under rules of vicarious liability for a defect that was introduced into the product after it left the hands of the manufacturer.' This rule has the laudable effect of encouraging a manufacturer or distributor like [defendant] to act to safeguard proper assembly by its various dealers, including attempting to ensure that negligent conduct in one location does not repeat elsewhere. It further ensures that a plaintiff does not have the burden of discovering and proving *which* entity in the production chain is responsible for negligent assembly: [defendant] for insufficient instructions or safeguards that would ensure proper assembly, or a dealer for failing to execute [defendant's] commands properly." (*Defries v. Yamaha Motor Corp.* (2022) 84 Cal.App.5th 846, 861 [300 Cal.Rptr.3d 670], internal citation omitted.)

- "The rationale of the nondelegable duty rule is 'to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm[.]' The 'recognition of nondelegable duties tends to insure that there will be a financially responsible defendant available to compensate for the negligent harms caused by that defendant's activity[.]' Thus, the nondelegable duty rule advances the same purposes as other forms of vicarious liability." (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 727 [28 Cal.Rptr.2d 672], internal citations and footnote omitted.)

- "Simply stated, ' "[t]he duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition[.]" ' " (*Srithong, supra,* 23 Cal.App.4th at p. 726.)

- "Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure the safety of others." (*Felmlee v. Falcon Cable Co.* (1995) 36 Cal.App.4th 1032, 1039 [43 Cal.Rptr.2d 158].)

- "Unlike strict liability, a nondelegable duty operates, not as a substitute for liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or an independent contractor." (*Maloney v. Rath* (1968) 69 Cal. 2d 442, 446 [71 Cal.Rptr. 897, 445 P.2d 513].)

- " '[A] nondelegable duty operates, not as a substitute for liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person

whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or independent contractor.' A California public agency is subject to the imposition of the duty in the same manner as any private individual." ~~A California public agency is subject to the imposition of a nondelegable duty in the same manner as any private individual.~~ (~~Gov. Code, § 815.4;~~ *Jordy v. County of Humboldt* (1992) 11 Cal.App.4th 735, 742 [14 Cal.Rptr.2d 553], citing Gov. Code, § 815.4, internal citations omitted.)

- "It is undisputable that '[t]he question of duty is ... a legal question to be determined by the court.' " (*Summers v. A.L. Gilbert Co*. (1999) 69 Cal.App.4th 1155, 1184 [82 Cal.Rptr.2d 162] internal citation omitted.)

- "When a court finds that a defendant has a nondelegable duty as a matter of law, the instruction given by the court should specifically inform the jurors of that fact and not leave them to speculate on the subject." (~~*Id.*~~ *Summers, supra,* 69 Cal.App.4th at p. 1187, fn. 5.)

- " 'Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons can not escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor. ... It is immaterial whether the duty thus regarded as "nondelegable" be imposed by statute, charter or by common law.' " (*Snyder v. Southern California Edison Co*. (1955) 44 Cal.2d 793, 800 [285 P.2d 912], internal citation omitted.)

- "[T]o establish a defense to liability for damages caused by a brake failure, the owner and operator must establish not only that " 'he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law' " but also that the failure was not owing to the negligence of any agent, whether employee or independent contractor, employed by him to inspect or repair the brakes." (*Clark v. Dziabas* (1968) 69 Cal.2d 449, 451 [71 Cal.Rptr. 901, 445 P.2d 517], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1401 et seq.

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.05[3][d] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.10[2][d] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.22[2][c] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.42 (Matthew Bender)

4328. Affirmative Defense—Victim of Abuse or Violence (Code Civ. Proc., § 1161.3)

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***] because [***name of plaintiff***] filed this lawsuit based on [an] act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]] against [[***name of defendant***]/ [or] a member of [***name of defendant***]'s immediate family/ [or] a member of [***name of defendant***]'s household]. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [[***name of defendant***]/ [or] a member of [***name of defendant***]'s immediate family/ [or] a member of [***name of defendant***]'s household] was a victim of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]];**

2. **That the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]] [was/were] documented in a [court order/law enforcement report/statement of a qualified third party acting in a professional capacity/[***specify other evidence or documentation***]];**

3. **That the person who committed the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]] is not a tenant of the same living unit as [[***name of defendant***]/ [or] a member of [***name of defendant***]'s immediate family/ [or] a member of [***name of defendant***]'s household]; and**

4. **That [***name of plaintiff***] filed this lawsuit because of the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]].**

Even if [*name of defendant***] proves all of the above, [***name of plaintiff***] may still evict [***name of defendant***] if [***name of plaintiff***] proves all of the following:**

1. **That the person who committed the abuse or violence threatened, by words or by actions, the physical safety of other [tenants/ [or] guests/ [or] invitees/ [,/or] licensees];**

2. **That [***name of plaintiff***] gave [***name of defendant***] a three-day notice requiring [him/her/***nonbinary pronoun***] not to voluntarily permit or consent to the presence on the property of the person who committed the abuse or violence; and**

3. **That, after the three-day notice expired, [***name of defendant***] voluntarily permitted or consented to the presence on the property of the person who committed the abuse or violence.**

[If the person who committed the abuse or violence is also a defendant in this case, I will decide if a partial eviction of only that person is appropriate after you, the jury, decide certain facts.]

New December 2011; Revised June 2013, June 2014, January 2019, May 2020, May 2024, November 2024

Directions for Use

This instruction is a tenant's affirmative defense alleging that the tenant is being evicted because the tenant, the tenant's immediate family member, or a tenant's household member was the victim of abuse or violence, including domestic violence, sexual assault, stalking, human trafficking, elder or dependent adult abuse, and other crimes. (See Code Civ. Proc., § 1161.3.) If the tenant establishes the elements of the defense, the landlord may attempt to establish a statutory exception that would allow the eviction. The last part of the instruction sets forth the exception.

"Abuse and violence" is defined by statute to include several acts. (Code Civ. Proc., § 1161.3(a); see Code Civ. Proc., § 1219 [sexual assault]; Civ. Code, §§ 1708.7 [stalking], 1946.7(a)(6) [a crime that caused bodily injury or death], (a)(7) [a crime that included the exhibition, drawing, brandishing, or use of a firearm or other deadly weapon or instrument], (a)(8) [a crime that included the use of force against the victim or a threat of force against the victim]; Fam. Code, § 6211 [domestic violence]; Pen. Code, §§ 236.1 [human trafficking], Section 646.9 [stalking]; Welf. & Inst. Code, § 15610.07 [abuse of elder or dependent adult].) Consider giving an additional special instruction defining the specific abuse or violence alleged to make the meaning clear to the jury.

Evidence of abuse or violence must be documented in a court order, law enforcement report, qualified third-party statement, or any other form of documentation or evidence that reasonably verifies that the abuse or violence occurred (element 2). (Code Civ. Proc., § 1161.3(a)(2)(A)–(D).) Consider giving an additional special instruction defining the type of documentation if it is necessary to make the meaning clear to the jury. A "qualified third party" is a health practitioner, domestic violence counselor, a sexual assault counselor, a human trafficking caseworker, or a victim of violent crime advocate. (Code Civ. Proc., § 1161.3(a)(6).) If the parties dispute whether a third party is qualified, consider giving an additional special instruction on the definition of "qualified third party."

The tenant has a complete defense to the unlawful detainer cause of action if the tenant proves that the perpetrator is not a tenant of the same "dwelling unit" as the tenant, the tenant's immediate family member, or household member unless the statutory exception is established. (Code Civ. Proc., § 1161.3(d)(1); see Code Civ. Proc., § 1161.3(b)(2)(B).) "Dwelling unit" is expressed in element 3 as "living unit." If the person who committed the abuse or violence is a tenant in residence of the same residential dwelling unit, then the statute provides for a partial eviction process under Code of Civil Procedure section 1174.27.

Whether the determinations underlying the partial eviction order are to be made by the court or the jury is unsettled. Code of Civil Procedure section 1174.27(c) provides that *the court* shall determine whether there is documentation evidencing abuse or violence against the tenant, the tenant's immediate family member, or the tenant's household member. The statute also provides that *the court* shall deny the affirmative defense if the court determines there is not documentation evidencing abuse or violence and *the court* shall issue a partial eviction if certain conditions are met, both of which would not be jury functions. If the court determines that there is documentation evidencing abuse or violence against the

tenant, the tenant's immediate family member, or the tenant's household member, and the court does not find the defendant raising the affirmative defense guilty of an unlawful detainer on any other grounds, and upon a showing that any other defendant was the perpetrator of the abuse or violence, then the court shall issue a partial eviction.

Include the final bracketed sentence only in cases involving more than one defendant, one of whom is the alleged perpetrator of the abuse or violence who resides in the same living unit. If the court is making determinations under section 1174.27, it may also be necessary to instruct that the proceeding involves a residential premises or to define "a residential premises" for the jury (Code Civ. Proc., § 1174.27(a)(1)) and to instruct that the defendant raising the defense has not been found guilty of an unlawful detainer on any other grounds. (Code Civ. Proc., § 1174.27(e).) Note that CACI No. VF-4328, *Affirmative Defense—Victim of Abuse or Violence*, includes questions that are not necessary if the victim is not seeking remedies under section 1174.27.

Sources and Authority

- Defense to Termination of Tenancy: Tenant Was Victim of Abuse or Violence. Code of Civil Procedure section 1161.3.
- Unlawful Detainer Remedies for Abuse or Violence Against Tenant. Code of Civil Procedure section 1174.27.

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 714, 752

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 11(I)-C, *Particular Defenses*, ¶¶ 11:230–231 (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 4-D, *Other Issues*, ¶ 4:240 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶ 5:288 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-D, *Answer To Unlawful Detainer Complaint*, ¶ 8:297 et seq., 8:381.10 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.41 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64[15] (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 330, *Landlord and Tenant: Eviction Actions*, § 330.28[8] (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.76 (Matthew Bender)

1 Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.20B

1 Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21[12]

VF-4328. Affirmative Defense—Victim of Abuse or Violence

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] receive documentation or other evidence of abuse or violence against [[***name of defendant***]/ [or] [***name of defendant***]'s immediate family member/ [or] [***name of defendant***]'s household member]?**
   ____ 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. **Does the person who committed the act[s] of abuse or violence reside as a tenant in the same living unit as [***name of defendant***]/ [or] [***name of defendant***]'s immediate family member/ [or] [***name of defendant***]'s household member]?**
   ____ 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. **Name the person who committed the abuse or violence against [***name of defendant***]/ [or] [***name of defendant***]'s immediate family member/ [or] [***name of defendant***]'s household member]:**

   _____

   Answer question 4.

4. **Did [***name of plaintiff***] file this lawsuit to evict [***name of defendant***] because of the act[s] of abuse or violence committed against [him/her/***nonbinary pronoun***]/ [or] [***name of defendant***]'s immediate family member/ [or] [***name of defendant***]'s household member]?**
   ____ 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.

[5. Did the person who committed the abuse or violence also threaten, by words or by actions, the physical safety of other tenants, guests, invitees, or licensees?
____ 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 plaintiff*] give a three-day notice to [*name of defendant*] requiring [him/her/*nonbinary pronoun*] not to voluntarily permit or consent to the presence on the property of the person who committed the abuse or violence?
____ 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. After the three-day notice given by [*name of plaintiff*] expired, did [*name of defendant*] voluntarily permit or consent to the presence on the property of the person who committed the abuse or violence?
____ Yes ____ No

Answer question 8 unless your answer to question 2 above is no. If you answered no to question 2 above, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[8. Does the case involve a residential premises?
____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[9. Has [*name of defendant*] been found guilty of an unlawful detainer on any grounds other than the act[s] of abuse or violence committed against [him/her/*nonbinary pronoun*]?
____ Yes ____ No]

Signed: _____
Presiding Juror

Dated: _____

After this verdict form has/After all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New November 2024

Directions for Use

This verdict form is based on CACI No. 4328, *Affirmative Defense—Victim of Abuse or Violence*, and Code of Civil Procedure section 1174.27.

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.

Include the bracketed language in question 1 if the defendant is relying on other forms of "documentation or evidence reasonably verifying that the abuse or violence occurred" under Code of Civil Procedure section 1161.3(a)(2)(D).

Omit questions 5 through 7 and renumber the questions that follow if it is undisputed that the perpetrator of abuse or violence is a tenant in residence of the same dwelling unit as the tenant, the tenant's immediate family member, or the tenant's household member. If residency of the perpetrator and victim in the same dwelling is disputed, modify the directions after questions 5 through 7 to direct the jury to answer question 8 even if they have answered no to those questions.

Questions 8 and 9 are based on Code of Civil Procedure section 1174.27. (See Code Civ. Proc., § 1174.27(a)(1), (e).) Omit questions 8 and 9 if the case does not potentially involve a partial eviction procedure under section 1174.27 unless question 9 applies for an independent reason.

Question 9 may need to be expanded to ask any factual questions underlying the alternative unlawful detainer theory asserted against the defendant. This verdict form is designed to assist the court in determining whether the affirmative defense has been proved by the defendant raising the affirmative defense and whether there is a basis for issuing a partial eviction of the perpetrator-defendant. If the court does not find the defendant raising the affirmative defense guilty of an unlawful detainer on any other grounds but finds another defendant was the perpetrator of the abuse or violence on which the affirmative defense was based and is guilty of an unlawful detainer, then the court must follow the procedures under Code of Civil Procedure section 1174.27 for issuing a partial eviction of the perpetrator of abuse or violence.

Code of Civil Procedure section 1174.27(c) provides that *the court* is to determine whether there is documentation evidencing abuse or violence against the tenant, the tenant's immediate family member, or the tenant's household member. Whether this determination is to be made by the court or the jury is unsettled. The statute also provides that the court shall deny the affirmative defense if the court determines there is not documentation evidencing abuse or violence and shall issue a partial eviction if certain conditions are met, both of which would not be jury functions.

4401. Misappropriation of Trade Secrets—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] has misappropriated a trade secret. To succeed on this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/was a licensee of] [the following:][***describe each item claimed to be a trade secret that is subject to the misappropriation claim***];**

2. **That [this/these] [select short term to describe, e.g., information] [was/were] [a] trade secret[s] at the time of the misappropriation; and**

3. **That [***name of defendant***] improperly [acquired/used/ [or] disclosed] the trade secret[s]~~;~~.**

~~4. That [[*name of plaintiff*] was harmed/ [or] [*name of defendant*] was unjustly enriched]; and~~

~~5. That [*name of defendant*]'s [acquisition/use/ [or] disclosure] was a substantial factor in causing [[*name of plaintiff*]'s harm/ [or] [*name of defendant*] to be unjustly enriched].~~

New December 2007; Revised December 2010, December 2014, November 2024

Directions for Use

In element 1, specifically describe all items that are alleged to be the trade secrets that were misappropriated. (See *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 43 [171 Cal.Rptr.3d 714].) If more than one item is alleged, include "the following" and present the items as a list. Then in element 2, select a short term to identify the items, such as "information," "customer lists," or "computer code."

In element 1, select the appropriate term, "owned" or "was a licensee of," to indicate the plaintiff's interest in the alleged trade secrets. No reported California state court decision has addressed whether a licensee has a sufficient interest to assert a claim of trade secret misappropriation. These instructions take no position on this issue. The court should make a determination whether the plaintiff has the right as a matter of substantive law to maintain a cause of action for misappropriation of trade secrets if that issue is disputed.

Read also CACI No. 4402, *"Trade Secret" Defined*, to give the jury guidance on element 2.

~~Civil Code section 3426.1(b)(1) defines "misappropriation" as improper "[a]cquisition" of a trade secret, and subsection (b)(2) defines it as improper "[d]isclosure or use" of a trade secret. In some cases, the mere acquisition of a trade secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should be instructed only on matters relevant to damage claims, do not select "acquired" in element 3 or "acquisition" in element 5 unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.~~

To avoid confusion, instruct the jury only on the particular theory of misappropriation applicable under the facts of the case. For example, the jury should not be instructed on misappropriation through "use" if the plaintiff does not assert that the defendant improperly used the trade secrets. Nor should the jury be instructed on a particular type of "use" if that type of "use" is not asserted and supported by the evidence.

Give also CACI No. 4409, ~~*Remedies*~~ *Damages for Misappropriation of Trade Secret*.

Sources and Authority

- Uniform Trade Secrets Act: Definitions. Civil Code section 3426.1.
- Trade Secrets Must Be Identified With Reasonable Particularity. Code of Civil Procedure section 2019.210.
- "A trade secret is misappropriated if a person (1) acquires a trade secret knowing or having reason to know that the trade secret has been acquired by 'improper means,' (2) discloses or uses a trade secret the person has acquired by 'improper means' or in violation of a nondisclosure obligation, (3) discloses or uses a trade secret the person knew or should have known was derived from another who had acquired it by improper means or who had a nondisclosure obligation or (4) discloses or uses a trade secret after learning that it is a trade secret but before a material change of position." (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66 [37 Cal.Rptr.3d 221].)
- "As defined by the plain language of the statute, misappropriation of a trade secret under the California UTSA consists of only two elements: (1) existence of a trade secret, and (2) improper acquisition, use, or disclosure of that trade secret. By its terms, the California UTSA does not require proof of causation or damages as elements of a claim for misappropriation. To the contrary, the California UTSA identifies damages as a remedy that is available once misappropriation has been established." (*Applied Medical Distribution Corp. v. Jarrells* (2024) 100 Cal.App.5th 556, 569–570 [319 Cal.Rptr.3d 205], internal citations omitted.)
- "A cause of action for monetary relief under CUTSA may be said to consist of the following elements: (1) possession by the plaintiff of a trade secret; (2) the defendant's misappropriation of the trade secret, meaning its wrongful acquisition, disclosure, or use; and (3) resulting or threatened injury to the plaintiff. The first of these elements is typically the most important, in the sense that until the content and nature of the claimed secret is ascertained, it will likely be impossible to intelligibly analyze the remaining issues." (*Silvaco Data Systems v. Intel Corp*. (2010) 184 Cal.App.4th 210, 220 [109 Cal.Rptr.3d 27], internal citations omitted, disapproved on other grounds in *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 337 [120 Cal.Rptr.3d 741, 246 P.3d 877].)
- ~~"A cause of action for misappropriation of trade secrets requires a plaintiff to show the plaintiff owned the trade secret; at the time of misappropriation, the information was a trade secret; the defendant improperly acquired, used, or disclosed the trade secret; the plaintiff was harmed; and the defendant's acquisition, use, or disclosure of the trade secret was a substantial factor in causing the plaintiff harm." (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (2018) 28 Cal.App.5th 923, 942 [239 Cal.Rptr.3d 577] [citing CACI].)~~
- "It is critical to any [UTSA] cause of action—and any defense—that the information claimed to have been misappropriated be clearly identified. Accordingly, a California trade secrets plaintiff must, prior to commencing discovery, 'identify the trade secret with reasonable particularity.' " (*Altavion, Inc., supra,* 226 Cal.App.4th at p. 43.)
- "We find the trade secret situation more analogous to employment discrimination cases. In those cases, as we have seen, information of the employer's intent is in the hands of the employer, but

discovery affords the employee the means to present sufficient evidence to raise an inference of discriminatory intent. The burden of proof remains with the plaintiff, but the defendant must then bear the burden of producing evidence once a prima facie case for the plaintiff is made. [¶] We conclude that the trial court correctly refused the proposed instruction that would have shifted the burden of proof." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1674 [3 Cal.Rptr.3d 279], internal citation omitted.)

- "[W]e find no support for [a current-ownership] rule in the text of the CUTSA, cases applying it, or legislative history. Nor do we find any evidence of such a rule in patent or copyright law, which defendants have cited by analogy. Defendants have offered no persuasive argument from policy for our adoption of such a rule." (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 986 [103 Cal.Rptr.3d 426].)

- "[T]he only California authority [defendant] cited for the asserted requirement [that a trade-secrets plaintiff must own the trade secret when the action is filed] was the official California pattern jury instructions—whose 'first element,' [defendant] asserted, 'requires the plaintiff to be either the owner or the licensee of the trade secret. See CACI Nos. 4400, 4401.' [Defendant] did not quote the cited instructions—for good reason. The most that can be said in favor of its reading is that the broader and less specific of the two instructions uses the present tense to refer to the requirement of ownership. That instruction, whose avowed purpose is 'to introduce the jury to the issues involved' in a trade secrets case (Directions for Use for CACI No. 4400), describes the plaintiff as claiming that he 'is' the owner/licensee of the trade secrets underlying the suit. (CACI No. 4400.) The second instruction, which enumerates the actual *elements* of the plaintiff's cause of action, dispels whatever weak whiff of relevance this use of the present tense might have. It requires the plaintiff to prove that he 'own*ed*' or '*was* a licensee of' the trade secrets at issue. (CACI No. 4401, italics added.) Given only these instructions to go on, one would suppose that *past* ownership—i.e., ownership at the time of the alleged misappropriation—is sufficient to establish this element." (*Jasmine Networks, Inc., supra,* 180 Cal.App.4th at p. 997, original italics.)

Secondary Sources

Gaab and Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 10(II)-A ¶ 10:250 (The Rutter Group)

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, § 1.01 (Matthew Bender)

Zamore, Business Torts, Ch. 17, *Trade Secrets*, § 17.05 et seq. (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.51 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Chs. 1, 2, 6, 10, 11, 12

4409. ~~Remedies~~ Damages for Misappropriation of Trade Secret

If [*name of plaintiff*] proves that [*name of defendant*] misappropriated [his/her/*nonbinary pronoun*/its] trade secret[s], then [*name of plaintiff*] is entitled to recover damages if ~~the misappropriation caused [[*name of plaintiff*] to suffer an actual loss/ [or] [*name of defendant*] to be unjustly enriched].~~ [*name of plaintiff*] proves both of the following:

1. **That [*name of plaintiff*] [was harmed]/ [or] [[*name of defendant*] was unjustly enriched]; and**

2. **That [*name of defendant*]'s [acquisition/use/ [or] disclosure] was a substantial factor in causing [[*name of plaintiff*]'s harm/ [or] [*name of defendant*] to be unjustly enriched].**

[[*Name of plaintiff*] may prove that [he/she/*nonbinary pronoun*/it] suffered harm or that [*name of defendant*] was unjustly enriched, or both.]

~~[If [*name of defendant*]'s misappropriation did not cause [[*name of plaintiff*] to suffer an actual loss/ [or] [*name of defendant*] to be unjustly enriched], [*name of plaintiff*] may still be entitled to a reasonable royalty for no longer than the period of time the use could have been prohibited. However, I will calculate the amount of any royalty.]~~

New December 2007; Revised November 2024

Directions for Use

Give this instruction with CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements*, ~~in all cases~~ if the plaintiff is seeking damages. For simplicity, this instruction uses the term "damages" to refer to both actual loss and unjust enrichment, even though, strictly speaking, unjust enrichment may be considered a form of restitution rather than damages. Do not give this instruction if the plaintiff is only seeking injunctive relief or royalties.

Select the nature of the recovery sought; either for the plaintiff's actual loss or for the defendant's unjust enrichment, or both. Include the final bracketed paragraph if the plaintiff is seeking both. If the plaintiff's claim of actual injury or loss is based on lost profits, give CACI No. 3903N, *Lost Profits (Economic Damage)*. If unjust enrichment is alleged, give CACI No. 4410, *Unjust Enrichment*.

If neither actual loss nor unjust enrichment is provable, Civil Code section 3426.3(b) provides for a third, alternate remedy: a reasonable royalty for no longer than the period of time the use could have been prohibited. ~~Both the statute and case law indicate that the question of a reasonable royalty should not be presented to the jury.~~ (See Civ. Code, § 3426.3(b) [*the court* may order the payment of a reasonable royalty]; ~~*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 628 [12 Cal.Rptr.2d 741];~~ *Applied Medical Distribution Corp. v. Jarrells* (2024) 100 Cal.App.5th 556, 572 [based on the jury's misappropriation finding, the court had statutory authority to impose an injunction or assess a reasonable royalty "even though the jury found that the legal remedies submitted to it—damages or unjust enrichment—were not proven"]; see also Civ. Code, § 3426.2(b) [court may issue an injunction that conditions future use of a trade secret on payment of a reasonable royalty].) ~~However, no reported California state court case has directly held that "reasonable royalty" issues should not be presented to the~~

~~jury. (But see *Unilogic, Inc., supra,* 10 Cal.App.4th at p. 627.) Include the optional second paragraph if the court wants to advise the jury that even if it finds that the plaintiff suffered no actual loss and that the defendant was not unjustly enriched, the plaintiff may still be entitled to some recovery.~~

~~For simplicity, this instruction uses the term "damages" to refer to both actual loss and unjust enrichment, even though, strictly speaking, unjust enrichment may be considered a form of restitution rather than damages.~~

Sources and Authority

- Remedies for Misappropriation of Trade Secret. Civil Code section 3426.3.
- "Under subdivision (a), a complainant may recover damages for the actual loss caused by misappropriation, as well as for any unjust enrichment not taken into account in computing actual loss damages. Subdivision (b) provides for an alternative remedy of the payment of royalties from future profits where 'neither damages nor unjust enrichment caused by misappropriation [is] provable.' " (*Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 61 [37 Cal.Rptr.3d 221].)
- ~~"[B]ased on the plain language of the statute, the Court -- not the jury -- determines if and in what amount a royalty should be awarded. See Cal. Civ. Code section 3416.3(b) ('the Court may order payment of a reasonable royalty')." (*FAS Techs. v. Dainippon Screen Mfg.* (N.D. Cal. 2001) 2001 U.S. Dist. LEXIS 15444, **9–10.)~~"In sum, the jury found [defendant] misappropriated [plaintiff's] trade secrets by acquiring, using, or disclosing them by improper means. That constituted a finding by the trier of fact that misappropriation occurred, which in turn permitted the trial court to consider whether to impose an injunction or assess a reasonable royalty. The court had statutory authority to impose those remedies even though the jury found that the legal remedies submitted to it—damages or unjust enrichment—were not proven." (*Applied Medical Distribution Corp., supra,* 100 Cal.App.5th at p. 572, footnote omitted.)
- "To adopt a reasonable royalty as the measure of damages is to adopt and interpret, as well as may be, the fiction that a license was to be granted at the time of beginning the infringement, and then to determine what the license price should have been. In effect, the court assumes the existence *ab initio* of, and declares the *equitable* terms of, a supposititious license, and does this *nunc pro tunc*; it creates and applies retrospectively a compulsory license." (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 68 [171 Cal.Rptr.3d 714], original italics.)
- "Nor was it necessary to submit the liability issue to the jury in order to allow the trial court thereafter to determine a reasonable royalty or to impose an injunction. Just as [cross complainant] presented no evidence of the degree of [cross defendant]'s enrichment, [cross complainant] likewise presented no evidence that would allow the court to determine what royalty, if any, would be reasonable under the circumstances." (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, ~~*supra,* 10 Cal.App.4th at p.~~ 628 [12 Cal.Rptr.2d 741].)
- "It is settled that, in fashioning a pecuniary remedy under the CUTSA for past use of a misappropriated trade secret, the trial court may order a reasonable royalty only where 'neither actual damages to the holder of the trade secret nor unjust enrichment to the user is provable.' 'California law differs on this point from both the [Uniform Act] and Federal patent law, neither of which require[s] actual damages and unjust enrichment to be unprovable before a reasonable royalty may be imposed.' " (*Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1308 [115 Cal.Rptr.3d 168], internal citations omitted.)
- "[W]here a defendant has not realized a profit or other calculable benefit as a result of his or her

misappropriation of a trade secret, unjust enrichment is not provable within the meaning of section 3426.3, subdivision (b), whether the lack of benefit is determined as a matter of law or as a matter of fact. To hold otherwise would place the risk of loss on the wronged plaintiff, thereby discouraging innovation and potentially encouraging corporate thievery where anticipated profits might be minimal but other valuable but nonmeasureable benefits could accrue." (*Ajaxo Inc., supra,* 187 Cal.App.4th at p. 1313 [jury's finding that defendant did not profit from its misappropriation of trade secrets means that unjust enrichment is not "provable" within the meaning of section 3426.3(b)].)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, §§ 92–93

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 10(II)-E ¶ 10:370-10:372 (The Rutter Group)

1 Milgrim on Trade Secrets, Ch. 15, *Trial Considerations*, § 15.02 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.54 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[6], [7] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Ch. 11

4410. Unjust Enrichment

[*Name of defendant***] was unjustly enriched if [his/her/***nonbinary pronoun***/its] misappropriation of [***name of plaintiff***]'s trade secret[s] caused [***name of defendant***] to receive a benefit that [he/she/***nonbinary pronoun***/it] otherwise would not have achieved.**

To decide the amount of any unjust enrichment, first determine the value of [*name of defendant***]'s benefit that would not have been achieved except for [his/her/***nonbinary pronoun***/its] misappropriation. Then subtract from that amount [***name of defendant***]'s reasonable expenses[, including the value of the [***specify categories of expenses in evidence, such as labor, materials, rents, interest on invested capital***]]. [In calculating the amount of any unjust enrichment, do not take into account any amount that you included in determining any amount of damages for [***name of plaintiff***]'s actual loss.]**

*New December 2007; Revised November 2024**

Directions for Use

Give this instruction with CACI No. 4409, ~~*Remedies*~~ *Damages for Misappropriation of Trade Secrets*, if unjust enrichment is alleged and supported by the evidence. If it would be helpful to the jury, specify the categories of expenses to be allowed to the defendant. Include the last sentence if both actual loss and unjust enrichment are alleged.

Sources and Authority

- Remedies for Misappropriation of Trade Secret. Civil Code section 3426.3.
- "In general, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.' (Rest., Restitution, § 1.) 'Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result ... is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered.' [¶] 'In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched.' " (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 627–628 [12 Cal.Rptr.2d 741].)
- "A defendant's unjust enrichment is typically measured by the defendant's profits flowing from the misappropriation. A defendant's profits often represent profits the plaintiff would otherwise have earned. Where the plaintiff's loss does not correlate directly with the misappropriator's benefit, … the problem becomes more complex. There is no standard formula to measure it. A defendant's unjust enrichment might be calculated based upon cost savings or increased productivity resulting from use of the secret. Increased market share is another way to measure the benefit to the defendant. Recovery is not prohibited just because the benefit cannot be precisely measured. But like any other pecuniary remedy, there must be some reasonable basis for the computation." (*Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1305 [115 Cal.Rptr.3d 168], footnote and internal citations omitted.)
- "[W]here a defendant has not realized a profit or other calculable benefit as a result of his or her

misappropriation of a trade secret, unjust enrichment is not provable within the meaning of section 3426.3, subdivision (b), whether the lack of benefit is determined as a matter of law or as a matter of fact." (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 66 [171 Cal.Rptr.3d 714].)

- "Another crucial point is that unjust enrichment, as the phrase is used here, is, in effect, synonymous with restitution. ' " 'The phrase "unjust enrichment" is used in law to characterize the result or effect of a failure to make restitution of or for property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor.' " ' " (*Ajaxo Inc., supra,* 187 Cal.App.4th at p. 1305, internal citations omitted.)

- ~~Restatement of Restitution, section 1, comment a, states: "A person is enriched if he has received a benefit (see Comment b). A person is unjustly enriched if the retention of the benefit would be unjust (see Comment c)."~~

- ~~Restatement of Restitution, section 1, comment b, states: "*What constitutes a benefit*. A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word 'benefit,' therefore, denotes any form of advantage. The advantage for which a person ordinarily must pay is pecuniary advantage; it is not, however, necessarily so limited, as where a physician attends an insensible person who is saved subsequent pain or who receives thereby a greater chance of living."~~

- ~~Restatement of Restitution, section 1, comment c, states: "*Unjust retention of benefit*. Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor. Thus, one who improves his own land ordinarily benefits his neighbors to some extent, and one who makes a gift or voluntarily pays money which he knows he does not owe confers a benefit; in neither case is he entitled to restitution. The Restatement of this Subject states the rules by which it is determined whether or not it is considered to be just to require restitution."~~

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 93

Restatement of Restitution, section 1, comments a, b, and c

1 Milgrim on Trade Secrets, Ch. 13, *Issues Prior to Commencement of Action*, § 13.03[2][a] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.54[4] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[7][b] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) § 11.03

VF-4400. Misappropriation of Trade Secrets

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [the owner/a licensee] of** [*insert general description of alleged trade secret[s] subject to the misappropriation claim*]**?**
   ____ 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 this/Were these] [***select short term to describe, e.g., information***] secret at the time of the alleged misappropriation?**
   ____ 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 [this/these] [***e.g., information***] have actual or potential independent economic value because [it was/they were] secret?**
   ____ 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***] make reasonable efforts under the circumstances to keep the [***e.g., information***] secret?**
   ____ 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.

5. **Did [***name of defendant***] [acquire/use [or] disclose] the trade secret[s] by improper means?**
   ____ 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 improper [acquisition/use/ [or] disclosure] of the [***e.g., information***] a substantial factor in causing [[***name of plaintiff***] harm/ [or] [***name of*

defendant] to be unjustly enriched]?
____ 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 $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

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*New December 2015; Revised December 2016, May 2024, November 2024**

Directions for Use

This verdict form is based on CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements*, CACI No. 4402, *"Trade Secret" Defined*, CACI No. 4403, *Secrecy Requirement*, CACI No. 4404, *Reasonable Efforts to Protect Secrecy*, CACI No. 4409, *Damages for Misappropriation of Trade Secret*, and CACI No. 4412, *"Independent Economic Value" Explained*.

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.

In question 1, briefly describe the material alleged to be a trade secret that is set forth in detail in element1 of CACI No. 4401. Then in question 2, select a short term to describe the material.

Additional questions may be added depending on whether misappropriation is claimed in question 5 by acquisition, disclosure, or use. See CACI No. 4405, *Misappropriation by Acquisition*, CACI No. 4406, *Misappropriation by Disclosure,* and CACI No. 4407, *Misappropriation by Use*, for additional elements that the jury should find in each kind of case.

Omit questions 6 and 7 if the plaintiff is only seeking injunctive relief or royalties. Modify the claimed damages in question 7 as appropriate depending on the circumstances. (See CACI No. 4409, ~~*Remedies*~~ *Damages for Misappropriation of Trade Secret*.) If unjust enrichment is alleged, additional questions on the value of the benefit to the defendant and the defendant's reasonable expenses should be included. (See CACI No. 4410, *Unjust Enrichment*.)

In cases involving more than one trade secret, the jury must answer all of the questions in the verdict form separately for each trade secret at issue.

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*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.