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REPORT TO THE JUDICIAL COUNCIL

For business meeting on December 13, 2011

Title
Jury Instructions: Additions, Revisions, and Revocations to Civil Jury Instructions

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Civil Jury Instructions (*CACI*)

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. H. Walter Croskey, Chair

Agenda Item Type
Action Required

Effective Date
December 13, 2011

Date of Report
November 7, 2011

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of the proposed additions, revisions, and revocations to the *Judicial Council of California Civil Jury Instructions (CACI)*. These changes will keep *CACI* current with statutory and case authority.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective December 13, 2011, approve for publication under rule 2.1050 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the new and revised instructions will be published in the 2012 edition of the *Judicial Council of California Civil Jury Instructions (CACI)*.

A table of contents and the proposed additions and revisions to the civil jury instructions are attached at pages 46-228.

Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.58 of the California Rules of Court, which established the advisory committee's charge.[1] At its July 2003 meeting, the council voted to approve the *CACI* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CACI.* This is the 19th release of *CACI*.

The council approved *CACI* release 18 at its June 2011 meeting.

Rationale for Recommendation

The committee recommends proposed additions, revisions, and revocations to the following 49 instructions and verdict forms: 100, 333, 408, 417, 427, 451, 453, VF-403, 518, 1009C, 1205, VF-1203, 2021, VF-2006, 2508, 2526, 2804, VF-2803, 3009, 3017, VF-3006, 3200, 3201, 3205, 3240, 3241, 3242, 3243, 3244, VF-3200, VF-3202, 3712, VF-4200, VF-4201, VF-4202, 4302, 4303, 4304, 4305, 4306, 4307, 4308, 4309, 4328, 4532, 4550, 4551, 5007, and 5020. Of these, 39 are revised and 9 are newly drafted. One (CACI No. 1009C) is proposed to be revoked.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 48 additional instructions under a delegation of authority from the council to RUPRO.[2]

The instructions were revised or added based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law. Below is a summary of the more significant actions proposed to the council.

Electronic communications and research—contempt of court

2011 legislation (Assembly Bill 141)[3] amended Code of Civil Procedure section 1209(a) to define contempt of court as including "[w]illful disobedience by a juror of a court admonishment

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[1] Rule 10.58(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's civil jury instructions."

[2] At its October 20, 2006, meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes and corrections and minor substantive changes to jury instructions unlikely to create controversy. The council also gave RUPRO the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which RUPRO has done.

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use. RUPRO has already given final approval to 48 instructions that have only these changes. Further, under its delegation of authority from RUPRO, the advisory committee has made other nonsubstantive grammatical, typographical, and technical corrections.

[3] Stats. 2011, ch. 181.

related to the prohibition on any form of communication or research about the case, including all forms of electronic or wireless communication or research."[4] CACI No. 100, *Preliminary Admonitions,* has been revised to advise jurors that any violation of the prohibitions on communications and research, including prohibitions on electronic communications and research, may result in the juror being held in contempt of court.

Contractual (express) assumption of risk

A new case, *Rosencrans v. Dover Images, Ltd.*,[5] discusses the interplay between the doctrines of express and implied assumption of risk, noting that if the contract by which the plaintiff allegedly assumed the risk is found to be unenforceable (for example because of gross negligence), implied assumption of risk may still need to be considered. The committee proposes revisions to both the text of and the Directions for Use to CACI No.451, *Affirmative Defense—Contractual Assumption of Risk,* to address this possibility.

Owner liability for injury to employee of independent contractor—nondelegable duty

In *Seabright Ins. Co. v. US Airways, Inc.*,[6] the California Supreme Court held that by hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract.[7] Therefore, the owner cannot be liable for an injury to an employee of the contractor under a theory of nondelegable duty. This holding undermines the legal basis for CACI No. 1009C, *Liability to Employees of Independent Contractors for Unsafe Conditions—Nondelegable Duty*. The committee recommends revoking CACI No. 1009C.

Product liability—strict liability—failure to warn

The proposed revision that has elicited the greatest response from the public comments is to CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*. The issue concerns what risks the manufacturer should have known of based on scientific knowledge at the time of manufacture, or what is commonly referred to as the "state of the art."

CACI No. 1205 currently requires that the plaintiff prove "[t]hat the [*product*] had potential [risks/side effects/allergic reactions] that were [known] [or] [**knowable by the use of scientific knowledge available**] at the time of [manufacture/distribution/sale]." (emphasis added.) The Directions for Use say (emphasis added):

> A fuller definition of "scientific knowledge" may be appropriate in certain cases. Such a definition would advise that the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was "**knowable in light of the generally recognized and**

[4] Code Civ. Proc., § 1209(a)(6).

[5] (2011) 192 Cal.App.4th 1072, 1081.

[6] (2011) 52 Cal.4th 590.

[7] *Id.* at p. 594.

> **prevailing best scientific and medical knowledge available**." (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162, 920 P.2d 1347].)

No guidance is provided as to the "certain cases" in which the alternative language would "be appropriate," and no assistance has been found in the case law.

The committee received a comment from an attorney who stated that the alternative language was actually the proper test in all cases and should be elevated to the instruction itself. The committee initially agreed and proposed making this change. The proposed revision was circulated for public comment.

The Consumer Attorneys of California (CAOC) sent a comment strongly opposing this change and requesting restoration of the current language. The committee received 32 additional letters either repeating or endorsing CAOC's opposition.

Both the current language and the proposed new language come from the 1991 California Supreme Court case of *Anderson v. Owens-Corning Fiberglas Corp.*[8] The narrow holding of *Anderson* is that state-of-the-art evidence is admissible in a strict-liability failure-to-warn case.[9] The parameters of what constitutes state-of-the-art evidence were stated in various ways, including both the current language and the proposed new language.[10] The court did not refine "state of the art" into a single definition or test to be applied in all cases as it was not necessary to decide the case.

After *Anderson,* numerous courts, including the California Supreme Court at least one more time, included the "generally recognized and prevailing best scientific and medical knowledge available" language in published opinions.[11] However, in all of the California cases, the language was recited only in general background discussion of the strict-liability failure-to-warn law. None of the California opinions actually applies this language to its facts to shed further light on the meaning of the various component terms, "generally recognized," "prevailing," and "best."

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[8] (1991) 53 Cal.3d 987, 1002–1003.

[9] *Id.* at pp. 990–991.

[10] The court in *Anderson* expressed "knowability" in several ways, including (1) the proposed new language: "knowable in light of the generally recognized and prevailing best scientific and medical knowledge available" (p. 1002); (2) the current language: "knowable by the application of scientific knowledge available at the time of manufacture" (p.1004); (3) "reasonably scientifically knowable" (p. 999); (4) "knowledge, actual or constructive" (p. 1000); (5) "knowledge or knowability" (p. 1000); (6) "dangers that were known to the scientific community"(p. 1003); and (7) "based on the information scientifically available" (p. 1003).

[11] See *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112; *Saller v. Crown Cork & Seal Company* (2010) 187 Cal.App.4th 1220, 1239; *Pannu v. Land Rover N. Am., Inc.* (2011) 191 Cal.App.4th 1298, 1316; *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717, fn. 8; *Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101; *Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 793; *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1396, fn. 5; *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1004; *Rosa v. City of Seaside* (N.D. Cal. 2009) 675 F.Supp.2d 1006, 1012.

The committee concluded, therefore, that case law does not compel the exact words of the proposed language that was circulated for comment.

The point that CAOC made in its comment that most resonated with the committee was that the language circulated for comment was conjunctive, and thus the plaintiff would have to prove not only that the knowledge was "generally recognized," but also that it is "prevailing" and the "best." The committee agreed that the three components are not clearly defined and that a jury might well have difficulty applying the terms to the facts. The committee also was concerned that this standard would constitute a greater burden than necessary to prove the state of the art at the relevant time. But the committee also thought that the current language, "knowable by the use of scientific knowledge available," was an insufficient burden under the law. The fact that knowledge is "available" does not mean that it is so accepted that the manufacturer should be on notice to warn of the risks.

Therefore, the committee searched for alternative language, consistent with the law, that would express state of the art in terms more understandable to a jury, but that would still place a greater burden on the plaintiff than simply to show that the knowledge was available. The committee now proposes: "**knowable in light of the [scientific/medical] knowledge that was generally accepted in the scientific community at the time of [manufacture/distribution/sale].**" The Directions for Use now set forth why this phrase captures the *Anderson* language appropriately:

> "A risk may be "generally recognized" as a view (knowledge) advanced by one body of scientific thought and experiment, but it may not be the "prevailing" or "best" scientific view; that is, it may be a minority view. The committee believes that when a risk is (1) generally recognized (2) as prevailing in the relevant scientific community, and (3) represents the best scholarship available, it is sufficient to say that the risk is knowable in light of "the generally accepted" scientific knowledge."

This language combines "generally recognized," "prevailing," and "best" into a single standard; each term need not be proved to the jury separately. Evidence of what is "generally recognized," "prevailing," and "best" is relevant in proving what is "generally accepted in the scientific community."

Fair Employment and Housing Act (FEHA)—continuing violation

At the request of a judge who tries many FEHA cases, the committee proposes revising CACI No. 2508, *Failure to File Timely Administrative Complaint—Plaintiff Alleges Continuing Violation,* to add a new paragraph that sets out the parameters of the parties' dispute about the span of time over which a violation was continuing. As long as the violation continues, the limitation period within which the employee must file a complaint with the Department of Fair Employment and Housing does not begin to run. The paragraph tells the jury the date outside of the limitation period by which the employer alleges the violation no longer continued and the date within the limitation period through which the employee alleges that the violation was continuing.

Song-Beverly Consumer Warranty Act—incidental and consequential damages

In the Song-Beverly Consumer Warranty Act series (Song-Beverly),[12] five instructions address the damages recoverable under the act.[13] In this release, the committee proposes expanding the discussion in the Directions for Use to all five instructions to provide more information regarding the interrelationship between Song-Beverly and the California Commercial Code (which is based on the Uniform Commercial Code) regarding the recovery of damages.

As circulated for comment, the committee proposed adding the following to the Directions for Use to CACI Nos. 3242 and 3243 (emphasis added):

> The availability of [incidental and consequential] damages under Song-Beverly would appear to be limited. Consequential damages are allowed under Commercial Code section 2715, if the plaintiff has elected to accept the goods. (Civ. Code, § 1794(b)(2).) **If the buyer has rightfully rejected or justifiably revoked acceptance, incidental/consequential damages are allowed under Commercial Code 2711, 2712, and 2713, but only for the seller's nondelivery or repudiation of the contract or in connection with cover (obtaining replacement goods from another seller).** (Civ. Code, § 1794(b)(1).)

The Consumer Attorneys of California (CAOC) disagrees with the sentence in bold. In a public comment, CAOC stated that the committee's additions are legally incorrect with regard to incidental (CACI No. 3242) and consequential (CACI No. 3243) damages. Its position is that there are no limitations on the buyer's right to reject the product and still recover both incidental and consequential damages. In support, it cites three national treatises on commercial law and the Uniform Commercial Code.[14]

The committee accepts that the treatises cited by CAOC state the correct rule under the Commercial Code generally. The treatises, however, do not address Song-Beverly or cite any Song-Beverly cases. Therefore, they do not establish that the general rule applies under Song-Beverly.

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[12] CACI No. 3200 et seq.

[13] See CACI Nos. 3240, *Reimbursement Damages—Consumer Goods;* 3241, *Restitution From Manufacturer—New Motor Vehicle;* 3242, *Incidental Damages;* 3243, *Consequential Damages;* and 3244, *Civil Penalty—Willful Violation*.

[14] The treatises cited by CAOC are: Carter, et al., *Consumer Warranty Law: Lemon Law, Magnuson-Moss, UCC, Manufactured Home, and Other Warranty Statutes* (National Consumer Law Center, 4th ed.; c2010), §10.5.1 ["[S]ections 2-712(2), 2-713(1), and 2-714(3) of the Uniform Commercial Code (UCC) allow the buyer to recover any incidental or consequential damages suffered as a result of the seller's breach. This recovery is allowed regardless of whether the buyer canceled the contract or kept the goods.]; Clark & Smith, *The Law of Product Warranties*, §7.25 ["The case law has unanimously supported the right of the aggrieved buyer to return the defective goods to the seller without losing any claim for incidental and consequential damages,"]; White & Summers, Uniform Commercial Code (Thomson West, 5th ed.) § 6-5 [buyer who rightfully rejects nonconforming goods should be able to recover, as incidental damages, costs of inspecting the goods as well as storage and transportation expenses].

Under Song-Beverly:[15]

> The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:
>
> (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
> (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

The committee reads this statute as limiting damages under Song-Beverly to those provided in Civil Code section 1793.2(d) and Commercial Code sections 2711 through 2715. If incidental and consequential damages are recoverable, the authority must be found within one of these statutes.

Civil Code section 1793.2(d)(2) provides for incidental damages in connection with the replacement of or reimbursement for a new motor vehicle. This section does not provide for consequential damages or for incidental damages for consumer goods other than motor vehicles. Therefore, any further right to recover incidental or consequential damages must be found in Commercial Code sections 2711 through 2715. Section 2715 provides for incidental and consequential damages, but the omission of section 2715 from section 1794(b)(1) would indicate that incidental and consequential damages are not recoverable on rejection or revocation except as permitted under sections 2711, 2712, or 2713.

Commercial Code section 2711(1) allows for damages if the buyer elects to cover (purchase replacement goods) and for damages for the seller's nondelivery, and incorporates sections 2712 and 2713. Section 2712 allows for incidental and consequential damages under section 2715 for cover, and section 2713 allows for them with regard to the seller's nondelivery or repudiation. The proposed revisions to the Directions for Use note these two situations in which recovery is allowed even though the buyer rejects. But the committee finds no clear path through the statutes leading to the conclusion that incidental and consequential damages are always recoverable if the buyer rejects. Hence, the committee concluded that the unlimited recovery otherwise allowed under the UCC is not applicable under Song-Beverly.

Nevertheless, the committee is not fully comfortable with this conclusion. There would seem to be no policy reason why damages should be more restricted under Song-Beverly than under

[15] Civ. Code, §1794(b).

otherwise applicable commercial law.[16] Several members believe that Commercial Code section 2711 may be construed broadly to avoid this result, but this view has not garnered majority support. In recognition of some possible uncertainty, the committee proposes changing the new language in the Directions for Use slightly to cast the matter as not fully settled. Instead of saying that the right "would appear to" be limited, the revised text now says that the right "may" be limited. Also, in the sentence, "If the buyer has rightfully rejected or justifiably revoked acceptance, incidental/consequential damages are allowed under Commercial Code 2711, 2712, and 2713, but only for the seller's nondelivery or repudiation of the contract or in connection with cover," the words "but only" have been removed. This change introduces the possibility that the recovery may be broader under section 2711 than the two express rights provided by sections 2712 and 2713.

Directions to omit uncontested elements

Some instructions included a sentence in the Directions for Use indicating that uncontested elements may be omitted. The committee believes that this option may not always be a wise course. Excluding uncontested elements may, in some cases, give the jury the impression that the plaintiff's burden to establish the cause of action is quite minimal.

In the last release, this sentence was removed from the Directions for Use for all the instructions that included it. In this release, the committee has revised the "Guide for Using Judicial Council of California Civil Jury Instructions" in the publication's front matter to discuss several options for addressing uncontested elements.[17] As now stated, omitting an element that is obvious and not crucial to the jury's understanding may be appropriate. The fact that the plaintiff is an elder or a dependent adult in an elder abuse case may be obvious, and omitting that element will not raise any issues with the jury. In other cases, omitting stipulated elements may confuse the jury. In these cases, the guide now suggests including the element, but noting that the parties have agreed that the element has been established.

New Instructions

CACI No. 427, *Furnishing Alcoholic Beverages to Minors,* is a proposed new instruction on social host liability for furnishing alcohol to a minor based on a recently revised statute.[18]

CACI No. 3205, *Failure to Begin Repairs Within Reasonable Time or to Complete Repairs Within 30 Days—Essential Factual Elements*,[19] is a proposed new instruction under the Song-Beverly Consumer Warranty Act that was requested by an attorney who specializes in the area.

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[16] See Civ. Code, §1790.3 ["where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of this chapter, the provisions of this chapter shall prevail."].

[17] Because the previous release was a supplement only, the guide was not included.

[18] See Civ. Code, § 1714(d), added by Stats. 2010, ch. 154 and amended by Stats 2011, ch. 410.

[19] See Civ. Code, §1792.3(b).

A judge requested that verdict forms be added to the Breach of Fiduciary Duty series. The committee proposes adding VF-4200, *Actual Intent to Defraud Creditor—Affirmative Defense—Good Faith;* VF-4201, *Constructive Fraudulent Transfer;* and VF-4202, *Constructive Fraudulent Transfer—Insolvency,* in response to this request.

A new unlawful detainer statute provides an affirmative defense to eviction if the tenant has been a victim of domestic violence, sexual assault, or stalking.[20] Proposed new CACI No. 4328, *Affirmative Defense—Tenant Was Victim of Domestic Violence, Sexual Assault, or Stalking,* addresses this new defense.

Proposed new instructions have been added to the Construction Law series to address statutes of limitation for patent[21] and latent[22] construction defects. See CACI No. 4550, *Affirmative Defense—Statute of Limitations—Patent Construction Defect,* and CACI No. 4551, *Affirmative Defense—Statute of Limitations—Latent Construction Defect*.

Finally, a proposed new instruction has been added to the Concluding Instructions series to more fully explain to the jury how to consider demonstrative evidence. See CACI No. 5020, *Demonstrative Evidence*.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from July 25 to September 2, 2011. Comments were received from 48 different commentators. The committee evaluated all comments and revised some of the instructions as a result. A chart with summaries of all comments received and the committee's responses is attached at pages 11-45.

Of the comments received, more than half addressed the proposed changes to CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements,* discussed above.

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CACI* on a regular basis and submit its recommendations to the council for approval. The proposed new, revised, and revoked instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the

[20] See Code Civ. Proc., § 1161.3, added by Stats. 2010, ch. 626.

[21] See. Code Civ. Proc., § 337.1.

[22] See Code Civ. Proc., § 337.15.

Administrative Office of the Courts (AOC). Other licensing agreements with other publishers provide additional royalties.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the AOC will register the copyright in this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC provides a broad public license for their noncommercial use and reproduction.

Attachments

1. Chart of comments, at pages 11-45
2. Full text of new and revised *CACI* instructions, at pages 46-228

CACI 11-01
New and Revised CACI Instructions
All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Committee Response
100, *Preliminary Admonitions*	Association of Defense Counsel of Northern California and Nevada, by Andrew R. Weiss, President	Support proposed change to CACI 100. The Association strongly supports adding the suggested language warning jurors about possible contempt penalties for Internet research. This is already a problem, and it is likely to get worse. Jurors are drawn from everyday people, and everyday people use the Internet to look up all manner of things, so whatever the courts can do to let jurors know that court proceedings are different so they should resist the temptation is a good thing. The Association suggests that it might be advisable to add an additional sentence to the effect of "It is not fair to the parties to this case to have your decision affected by anything other than what happens in this court." No one really wants to see jurors prosecuted for this. Everyone wants to see jurors not do it.	The general content of the proposed additional sentence is included in CACI No. 116, *Why Electronic Communications and Research Are Prohibited*, which was approved by the Judicial Council, effective June 24, 2011.
	Hon. Barbara A. Kronlund, Judge of the San Joaquin County Superior Court	Since contempt proceedings frequently result in reversals and discipline because judges have trouble getting it right, I propose adding to the warning in CACI 100 at least the possibility of CCP 177.5 sanctions, which are much easier to impose; so that it would instead read in part: … "you may be held in contempt of court *or face other sanctions for violating a lawful court order*. That means that you may have to serve time in jail or face other punishment*, including monetary sanctions,* for that violation."	The committee agrees and has added a reference to other sanctions besides contempt.

CACI 11-01
New and Revised CACI Instructions
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Instruction	Commentator	Summary of Comment	Committee Response
	Orange County Bar Association, by John C. Hueston, President	Brackets mean that the new language is optional. The language should be mandatory; the brackets should be omitted.	Not all judges are comfortable with threatening jurors with contempt before the trial begins. The committee believes that the language should be optional in deference to that view.
	Steve Pascover, Manager, San Bernardino County Superior Court Research Department	The additional instruction giving jurors notice that they may be held in contempt is clear and firm.	No response required.
	3M Company, by Andrew J. Detherage of Barnes & Thornburg, Indianapolis Indiana	3M agrees with the proposed revision to CACI No. 100, Preliminary Admonitions. The proposed revision provides an important deterrent to prevent jurors from engaging in prohibited communications, particularly social media communication, and from performing research during the course of a trial. Improper juror research and communication is a serious and growing problem that can significantly distort and undermine a jury trial. Indeed, reports of mistrials resulting from this juror misconduct have been on the rise. In response, the general trend among state and federal courts throughout the country has been to implement specific admonitions in an effort to control this problem. Likewise, many trial lawyers have called for even stronger and more detailed admonitions to help curb juror misconduct. *See, e.g.*, American College of Trial Lawyers Proposed Model Jury Instructions Cautioning Against Use of the Internet and Social Networking, September 2010. The proposed revision advances the purpose of deterring juror misconduct by	No response required.

CACI 11-01
New and Revised CACI Instructions
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Instruction	Commentator	Summary of Comment	Committee Response
		clearly stating that violations may result in a juror being held in contempt of court and explaining in plain language the practical implications of being held in contempt.	
333, *Affirmative Defense—Economic Duress*	Orange County Bar Association, by John C. Hueston, President	To better reflect the actual language of element 2 and the tone of case discussion in this regard (see *CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644), the first sentence of the second paragraph of the Directions for Use should be modified to read as follows: "Element 2 requires that the defendant have had no "reasonable alternative" other than to consent."	The committee agrees with the comment and has made this change.
	The State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair.	The committee believes that *Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1156–1157, provides no solid authority for the proposition that economic duress to avoid a settlement agreement requires that the creditor be placed in danger of imminent bankruptcy or financial ruin. Those were the facts in that case, and the court held that those facts were sufficient to establish that there was no reasonable alternative, but the court did not hold or suggest that imminent bankruptcy or financial ruin was necessary to establish that there was no reasonable alternative. The other opinions cited in the second paragraph of the Directions for Use also provide no solid authority on this point. The committee suggests deleting the entire second paragraph of the Directions for Use.	The commentator's reading of *Rich & Whillock* is correct. But the paragraph discusses one possible meaning of "no reasonable alternative," which appears in element 2. The discussion is about what the law might be, not what the law is. As such, the committee believes that the paragraph is useful and should be retained.

CACI 11-01
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Instruction	Commentator	Summary of Comment	Committee Response
		The first sentence of the third paragraph of the Directions for Use says to "insert the conduct that constitutes the wrongful act or threat," while the instruction itself says to "insert relevant rule." The committee believes that the instruction is more accurate and that no further explanation is needed in the Directions for Use, so we suggest deleting the first sentence of the third paragraph of the Directions for Use. If further explanation is desired, we suggest modifying this sentence as follows: In the next-to-last paragraph, *state the rule that makes the alleged conduct wrongful*.	The committee believes that the sentence is useful, but agrees with the commentator's alternative suggestion to revise the wording of the sentence and has made this change.
		The second sentence of the third paragraph of the Directions for Use states, "The conduct must be something more than the breach or threatened breach of the contract itself." The committee believes that the reference to "the contract itself" is mistaken. The "contract" in the instruction is the contract that the plaintiff seeks to enforce and that the defendant claims was entered into under duress. The defendant would not claim that the breach or threatened breach of that contract forced the defendant to enter into that same contract. Instead, the contract referenced in *River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1425 ("It is not duress . . . to take a different view of contract rights, even though mistaken, from that of the other contracting party, and it is not duress to refuse, in good faith, to proceed with	The committee disagrees that the reference to "the contract itself" is mistaken. In *River Bank America,* there was a single contract at issue. Before the contract was finalized, the plaintiff bank changed its position to exact harsher terms. The defendants asserted economic duress as an affirmative defense to contract formation on the harsher terms. The court said that threatening to abandon the negotiations was not economic duress because all the bank did was assert a position on contract formation. The committee believes that some mention of this issue in the Directions for Use is appropriate.

CACI 11-01
New and Revised CACI Instructions
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Instruction	Commentator	Summary of Comment	Committee Response
		a contract, even though such refusal might later be found to be wrong.") must be some preexisting contract different from the contract that the plaintiff is seeking to enforce. Moreover, the breach or threatened breach of a contract can constitute duress, as in *Rich & Whillock, Inc., supra,* 157 Cal.App.3d 1154, where the general contractor in bad faith refused to pay the contract price. The language from *River Bank America* quoted above is also in the Sources and Authority and is self-explanatory, so the committee believes that an explanation in the Directions for Use is unnecessary.	
		The committee believes that the statement in the third sentence of the third paragraph of the Directions for Use, that there is no economic duress if the person has "an adequate legal remedy," is not helpful and is potentially misleading without further explanation. We believe that "an adequate legal remedy" in this context simply refers to the existence of a "reasonable alternative," the language used in the instruction. But "an adequate legal remedy" can have other meanings in other contexts. For example, the subcontractor in *Rich & Whillock, supra,* arguably had an adequate legal remedy by way of a legal action to recover the full payment that indisputably was due, unless that remedy was inadequate because the subcontractor would	The committee does not believe that this sentence is misleading. *Rich & Whillock,* is a settlement enforcement case. Whether there was no adequate legal remedy because of possible financial ruin is what the jury must determine.

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		have been ruined financially meanwhile. If the lack of a reasonable alternative is what makes the legal remedy inadequate and gives rise to duress, the reference to "an adequate legal remedy" does not help to explain the use of this instruction. Accordingly, we suggest deleting this sentence and deleting the entire third paragraph of the Directions for Use.	
		The committee suggests deleting the second sentence of the quotation from *River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1425, in the first new bullet point in the Sources and Authority because we believe that this language is unhelpful without further explanation, as stated above.	The language is a direct quotation from the case. The purpose of the Sources and Authority is to direct the user to sources on point, not to definitively resolve legal issues.
408, *Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Activity*	The State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair.	Agree	No response required.
451, *Affirmative Defense—Contractual Assumption of Risk*	The State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair.	The committee believes that the instruction should state that a release (i.e., a contractual assumption of risk) is invalid not only if the defendant was grossly negligent but also if the defendant intentionally harmed the plaintiff. Civil Code section 1668 invalidates any contract exempting a person from liability for "willful injury." We suggest adding "or intentionally harmed [*name of plaintiff*]" at the end of the first paragraph of the instruction and adding "or acted intentionally to harm [*name of plaintiff*]" after the words "grossly negligent" in the first line of the third	The committee agrees with the comment and has added intentional harm to the instruction.

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		paragraph of the instruction. We also suggest adding "or [*name of defendant*] intentionally harmed the plaintiff" at the end of the first sentence of the third paragraph of the Directions for Use and adding Civil Code section 1668 to the Sources and Authority.	
		The second sentence of the third paragraph of the Directions for Use is confusing. We believe that the point is that primary assumption of risk may apply if an inherently dangerous sport or activity is involved, not that the doctrine may apply if the defendant was grossly negligent and an inherently dangerous sport or activity is involved. We suggest that this sentence be clarified or deleted.	The sentence must be read in the context of the preceding sentence, which addresses the potential invalidity of the written release based on gross negligence or willful injury. The court in ***Rosencrans v. Dover Images, Ltd.*** (2011) 192 Cal.App.4th 1072, 1081 stated that even if the written release is invalid, the doctrine of primary assumption of risk must still be considered.
453, *Injury Incurred in Course of Rescue*	Association of Defense Counsel of Northern California and Nevada, by Andrew R. Weiss, President	This revision would allow a plaintiff who acted rashly or recklessly to recover. That is contrary to existing law.	The revision only allocates the burden of proof as to the rescuer's reasonableness to the defendant. See ***Solgaard v. Guy F. Atkinson Co.*** (1971) 6 Cal.3d 361, 368, cited in the Directions for Use.
	The State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair.	Agree	No response required.
518, *Medical Malpractice—Res ipsa loquitur*	Consumer Attorneys of California, by Nancy Peverini, Legislative Director and Anna Buck, Research Law Clerk	CAOC believes that the proposed changes are confusing and are most likely to be misunderstood by a jury as an endorsement of the defendant's case. The last paragraph is given when the defendant presents evidence that would support a finding that the	The committee has revised this sentence to state that the defendant "contends" that he/she/it was not negligent.

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		defendant was not negligent or that any negligence on the defendant's part was not a proximate cause of the accident. "Would" in this sense is synonymous with "could". See Directions for Use. However, as phrased, the revision sounds like an instructional finding by the court that the evidence presented by the defense has established conclusively a lack of negligence. We suggest that in order to avoid any misunderstanding that would result in a miscarriage of justice that this sentence be restated as "the defense contends that the evidence would support a finding that [he/she/it] was not negligent or that [his/her/its] negligence, if any, did not cause [name of plaintiff's] harm."	
	Steve Pascover, Manager, San Bernardino County Superior Court Research Department	The new paragraph does not seem to follow with the purpose described in the notes. Possibly there is some language missing from the second sentence of the purpose statement.	Nothing is missing. The commentator has not provided enough explanation to identify the concern.
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We stated by our comments in the last release that CACI No. 417 is appropriate only if the defendant presents evidence to rebut the presumption that the defendant's negligence caused the plaintiff's harm. The same is true of CACI No. 518. Both instructions state that if the jury finds that the three conditions are established, the jury may, but is not required to, find that the defendant was negligent or that the defendant's negligence was a substantial	The commentator is correct; that if no rebuttal evidence is presented and the three res ipsa loquitur factors are found, the plaintiff must prevail. But the committee believes that the possibility that the defense will stand solely on the plaintiff's failure to prove the elements of res ipsa loquitur and not present rebuttal evidence is so unlikely that it is not necessary to include that option in the instruction. Mention of the point in the Directions for Use is sufficient.

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		factor in causing the plaintiff's harm. This is correct only if the defendant presented rebuttal evidence. (Evid. Code, § 646(c)(1).) Absent rebuttal evidence, the jury should be instructed that if it finds that the three conditions are established, it must find that the defendant's negligence was a proximate cause of the occurrence. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th at p. 826; Evid. Code, § 604; Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 646, pp. 200-201.) The Directions for Use for both instructions should clearly state that the instructions are proper only if the court finds that the defendant presented rebuttal evidence sufficient to support a finding that the defendant was not negligent or that the defendant's negligence was not a proximate cause of the occurrence.	
		The second and third sentences of the final paragraph of both instructions are mandated by Evidence Code section 646(c)(2) if the defendant presented rebuttal evidence (which is the only situation in which these instructions should be given). This language is mandatory, not optional, and should not be bracketed. The first sentence of those paragraphs, stating that the defendant presented evidence that would support a finding that the defendant was not negligent or that the defendant's negligence was not a proximate cause, does not belong in these instructions because the court decides whether	The committee agrees and has removed the brackets from the last paragraph. The Directions for Use clarify that the last two paragraphs of the instruction assume that the defense has presented evidence. These revisions have been made.

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		there is sufficient rebuttal evidence, and to instruct the jury on this would only add to the confusion and would be of no benefit. We therefore suggest removing the brackets on the final paragraph of the instructions and deleting the first sentence of that paragraph.	
		The first sentence of the last paragraph, stating that the defendant presented evidence that would support a finding that the defendant was not negligent or that the defendant's negligence was not a proximate cause, does not belong in these instructions because the court decides whether there is sufficient rebuttal evidence, and to instruct the jury on this would only add to the confusion and would be of no benefit.	The sentence does not ask the jury to decide whether the defense has presented rebuttal evidence. It states that the defense has in fact presented rebuttal evidence and tells the jury how to proceed in light of that evidence.
		The second paragraph of the Directions for Use refers to the second paragraph of the instruction, the point of which is that even if the jury finds that the plaintiff fails to establish the three conditions for res ipsa loquitur, the jury may find based on its consideration of all of the evidence (not only the evidence presented in support of the three conditions) that the defendant was negligent. Such an instruction would be appropriate, for example, if there was evidence of the defendant's negligence apart from the evidence going to the elements of the res ipsa loquitur doctrine." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 646, p. 199, quoted in part in *Howe v.*	The committee agrees and has made this change.

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		Seven Forty Two Co., Inc. (2010) 189 Cal.App.4th 1155, 1163.) Accordingly, the committee suggests modifying the second paragraph of the Directions for Use as follows: "The second paragraph explains that even if the plaintiff fails to establish res ipsa loquitur as a presumption, the jury may still find for the plaintiff if it finds *based on its consideration of all of the evidence* that the defendant was negligent. (See *Howe v. Seven Forty Two Co., Inc.* (2010) 189 Cal.App.4th 1155, 1163–1164.)"	
1205, *Strict Liability—Failure to Warn—Essential Factual Elements*	Association of Defense Counsel of Northern California and Nevada, by Andrew R. Weiss, President	This change is long overdue, for two main reasons. First, it accurately states what has been the law since at least 1991 but has heretofore been kept out of the instruction. As the directions for use quote: "The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was *known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time* of manufacture and distribution .... . [T]he manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial." (*Anderson v. Owens-*	No response required.

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		Corning Fiberglas Corp. (1991) 53 Cal.3d 987, 1002-1003, emphasis added.) There is no good reason why the language the California Supreme Court used cannot be used in the instruction. Second, the proposed change is a fair way to separate junk science from what manufacturers can be fairly charged with knowing. Manufacturers should not be at risk because of some outlier, non-peer-approved study about risk, if "the generally recognized and prevailing best scientific and medical knowledge available" is that there is no risk or danger.	
	Consumer Attorneys of California, by Nancy Peverini, Legislative Director and Anna Buck, Research Law Clerk See the Appendix for a list of additional commentators who have expressed or endorsed these comments from CAOC.	CAOC believes that the proposed changes to CACI 1205, the failure to warn instruction, will result in unnecessary litigation, lengthen trial time, and create useless confusion. The new language comes directly from the California Supreme Court case *Anderson v. Owens Coming Fiberglass Corp.* (1991) 53 Ca1.3d 987, 1002-1003. It adds the additional terms of "generally recognized," "prevailing," "best" and "medical" to the instruction. None of these terms have been defined, thus each would be subject to litigation. Although this language does come from *Anderson,* it is not the holding of the case. The actual holding is: "[A] defendant in a strict products liability	The commentator is correct in that the narrow holding of *Anderson* is that state-of-the-art evidence is admissible in a strict-liability failure-to-warn case, defined as in CACI No. 1205 currently as: that which is "known or knowable by the application of scientific knowledge available at the time." However, the committee believes that this language places an insufficient burden on the plaintiff. Under the law The scientific knowledge must be more than just "available." As noted by commentator 3M Company below, the proposed new language "knowable in light of the generally recognized and prevailing best scientific and medical knowledge available," has been cited in many cases including twice by the

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		action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution." (*Id.* at p. 1004, emphasis added.) The underlined portions of the holding are in the original instruction almost verbatim. The additional words from the opinion will only create unnecessary confusion instead of making a clear and understandable instruction. This instruction was used for many years without problems and does not need to be changed. Actually, the *Anderson* opinion lays out several different formulas besides the holding that describe different ways to define what is the relevant "state of the art." (See *Anderson, supra,* 53 Cal. 3d at pp. 999, 1001, 1002, n. 13.) The language that is quoted in the new proposed instruction is but one of these methods.	California Supreme Court. The committee believes that the proposed new language is fully supported by authority apart from *Anderson*.
		The additional terms of "generally recognized," "prevailing," "best" and "medical" have not been defined, thus each would be subject to litigation. Instead of focusing on whether the risks were known or knowable to a manufacturer, the jury's focus would be additionally strained to	The committee agrees with the commentator that these terms have not been well defined in the case law. While cited many times, they have never actually been applied to the facts of a case by a California court so that guidance can be given to the jury as to their meaning.

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		decide whether the scientific knowledge was the "best" available and what was the "prevailing" knowledge as well as whether the knowledge was "generally recognized."	
		In every case, experts would have to be hired to opine on each of these subjects.	The committee does not see this as a problem because it believes that expert testimony should always be required to establish "state of the art" scientific knowledge.
		In the end, even if the manufacturer was aware of the risks at issue, it could escape liability by contending that its knowledge of the risk wasn't based on the "best" scientific knowledge. We find nothing in California law to support this.	Under element 2 of the instruction, if it can be shown that the defendant was actually aware of the risk, the defendant may not escape liability. "Know" is the first option. So if the manufacturer actually knew of the risk, the parameters of what is "knowable" are irrelevant.
		The new proposed language is conjunctive. Thus, the plaintiff would have to prove each one of these new elements. Not only that the knowledge was the "best" but that it was "generally recognized" and "prevailing." A failure to prove anyone of these three would be fatal under the proposed wording of the change. So, even if a plaintiff proved a risk was knowable under the "generally recognized" scientific knowledge and under the "prevailing" scientific knowledge, the plaintiff could still fail to adequately prove his/her case and lose if the manufacturer/defendant was able to convince the jury that the prevailing scientific knowledge was not the "best" scientific knowledge.	The committee shares the commentator's concern. Despite the frequent iteration of this standard in the cases, there is really no clear indication that three separate tests ("generally recognized," "prevailing," "best") must be met. The committee believes that these three terms can be expressed by the single phrase "generally accepted in the scientific community." This standard requires that the knowledge be more than just "available," but does not present the issue of multiple tests of not-clearly-defined terms that the commentator poses. The committee has made this change and also explained why it thinks that its language is a fair revision of the judicial language in the Directions for

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			Use.
		The language "and medical knowledge" creates the same problem. By adding this language in the conjunctive, even if a plaintiff proves the risk is knowable by the best, generally recognized and prevailing scientific knowledge, the manufacturer/defendant could still avoid liability by showing a shortcoming in the medical knowledge. Although some of this language is from *Anderson,* CAOC has been unable to find any authority, including the *Anderson* case, that states that both medical and scientific knowledge need be proved. In actuality, by making the definition for all cases a particular one that was suggested in complex drug and pharmaceutical litigation, it will only serve to conflagrate the understanding of "knowledge" in less technologically complicated cases.	The committee has revised the instruction to present "scientific" and "medical" as options so that "medical" can be selected only in a medical-knowledge case.
	Steve Pascover, Manager, San Bernardino County Superior Court Research Department	The concept of "accepted scientific knowledge" is often confusing for jurors and will probably remain so despite the expanded explanation.	As no specific change is requested, no response required.
	3M Company, by Andrew J. Detherage, Indianapolis, Indiana	3M agrees with the proposed modification of CACI No. 1205 with respect to the standard to determine whether potential risks, side effects, and/or allergic reactions related to a failure to warn claim in a products liability action were knowable to a defendant. The current version of CACI No. 1205 only includes the *Anderson* standard in the Directions for Use and states that it "may be appropriate in certain cases." This proposed revision conforms to California	All of the cases cited by the commentator do state the *Anderson* language at issue. But only *Rosa* attempts to define "knowability." The court in *Rosa* does apply "generally recognized," "prevailing," and "best" separately and finds the evidence lacking on all three points. But it is a federal case, and the discussion is brief and perfunctory. In *Carlin,* Justice Kennard's partial dissent notes the very problem at issue. (See *Carlin,*

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		case law. In *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1003, the California Supreme Court held that "[t]he rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution." Subsequently, California federal district courts, California courts of appeals, and subsequent California Supreme Court decisions have repeated this standard. *See Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112; *Saller v. Crown Cork & Seal Company* (2010) 187 Cal.App.4th 1220, 1239; *Pannu v. Land Rover N. Am., Inc.* (2011) 191 Cal.App.4th 1298; 1316; *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 fn. 8; *Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101; *Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 793; *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1396 fn. 5; *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1004; *Rosa v. City of Seaside* (N.D. Cal. 2009) 675 F.Supp. 2d 1006, 1012. The proposed revision is consistent with these California and federal cases. Moreover, this standard is found in the current version of the BAJI Instruction No. 9.00.7 -- Failure to Warn (revised 2008).	*supra,* 13 Cal.4th at p. 1124, opinion of Kennard, J., concurring and dissenting.) But nothing in her opinion reflects a majority view and thus is not helpful in drafting a jury instruction. All of the other cases just cite the language from *Anderson* without any application or analysis. In a couple of cases, the jury was given BAJI 9.00.7, which contains the "generally recognized and prevailing best" language. From this the committee concludes that the *Anderson* language verbatim is not compelled and may be expressed more simply and in plain language.

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		None of these decisions limit its application. Indeed, the *Anderson* standard has become a rule of general application. The *Anderson* standard has been applied in cases related to products such as motor vehicles, stun guns, prescription drugs, and asbestos-containing products, among others. Thus, it is a more accurate statement of law to apply the *Anderson* standard to all cases, and to do so by including the proposed language in the text of CACI No. 1205.	
2021, *Private Nuisance—Essential Factual Elements*	Association of Defense Counsel of Northern California and Nevada, by Andrew R. Weiss, President	This change would expand liability from creating a nuisance condition to "permitting" the nuisance to exist. There is no need for such expansion. The only authority cited for the change is a tree case more than 50 years old. (*Mattos* v.*Mattos* (1958) 162 Cal.App.2d 4l.) No change in the law, no need for a changed instruction.	The committee believes that *Mattos* is still good law. There is liability if a landowner permits a condition to exist on his or her land that constitutes a nuisance, even if the landowner did not create the condition.
	Alexander Reed-Krase, Attorney at Law, Porterville	Agree	No response required.
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response required.
2508, *Failure to File Timely Administrative Complaint—Plaintiff Alleges Continuing Violation*	Association of Defense Counsel of Northern California and Nevada, by Andrew R. Weiss, President	This is a useful clarification, and should make it easier for the jury to focus on the specific proper inquiry.	No response required.
	Marvin E. Krakow, Alexander Krakow &	The definition of "permanent" currently includes "plaintiff has resigned". Although	This comment raises a new matter that is not a part of the current proposed revision and

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	Glick, Santa Monica	this language tracks *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823–824, it creates potential confusion as to when a resignation effectively ends the employment and brings the offensive conduct to an end. For example, an employee might tender a resignation with the hope that the extreme step would generate corrective conduct. In those circumstances, the last day ought to be the last day of employment, not the date of the tender. Less confusing language would be "plaintiff ceased to be employed."	has not been considered by the advisory committee. It will be considered in the next release cycle.
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees that it is appropriate to briefly explain the continuing violation in the instruction. We suggest modifying the instruction for greater clarity. First, we would move the sentence "[*Name of plaintiff*] filed a complaint with the DFEH on [*date*]." from the beginning of the second paragraph to the end of the first paragraph.	The committee does not think that the instruction is improved by moving this sentence.
		Second, we would modify the rest of the second paragraph of the instruction to read as follows: [*Name of plaintiff*] claims that the complaint was timely filed because [*name of defendant*]'s unlawful practice was a continuing course of conduct and some of the conduct occurred within one year before the date on which [name of plaintiff] filed [his/her] complaint with the DFEH. [*Name of plaintiff*]'s complaint was timely filed with respect to all of the alleged unlawful acts if	This proposed language would defeat the purpose of the revision, which is to give the jury the dates that frame the dispute: the defendant's latest possible date by which any possible continuing violation ended and the plaintiff's latest possible date up to which the violation continued.

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		those acts constitute a continuing course of conduct.	
		In light of the newly defined term "DFEH," "department" in the first enumerated element of the instruction should be changed to "DFEH."	The committee agrees and has made this change.
2526, *Affirmative Defense—Avoidable Consequences Doctrine (Sexual Harassment by a Supervisor)*	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response required.
2804, *Removal or Noninstallation of Power Press Guards—Essential Factual Elements*	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response required.
3009, *Local Government Liability—Failure to Train—Essential Factual Elements*	Association of Defense Counsel of Northern California and Nevada, by Andrew R. Weiss, President	This change accurately states the law and would focus the jury. As the new use note states: "Deliberate indifference requires proof of a pattern of violations in all but a few very rare situations in which the unconstitutional consequences of failing to train are patently obvious. (See *Connick v. Thompson* (2011) - U.S. --, -[131 S. Ct. 1350, 1361, 179 L.Ed.2d 417].) Delete the bracketed language in element 2 unless the facts present the possibility of liability based on patently obvious violations." Absent this instruction, the jury may speculate about what the governmental entity knew, untethered to the only legally justifiable means of determining that matter.	No response required.
	Tony M. Sain, Manning &	The proposed revisions highlight what	There is a new excerpt from *Connick* in the

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	Kass, Ellrod, Ramirez, Trester, Los Angeles	amounts to a piece of dictum in the *Canton* decision that was emphasized by the *Connick* case. Without clear guidelines in the instructions as to what circumstances can constitute the "patently obvious" deliberate indifference to constitutional rights by lack of training, the instruction may have the effect of turning the "very rare situations" in which such a case is litigated into the new normal. The Council should instead consider drawing more of the language from *Connick* into the notes for this instruction so as to clarify the issue - as the Supreme Court made it quite clear that it would be the "rare" case in which "the unconstitutional consequences of failing to train could be so patently obvious that a city would be liable under 1983 without proof of a preexisting pattern of violations."	Sources and Authority that expresses the commentator's point. The committee does not believe that there is any need to add it to the Directions for Use.
		The Council should consider adding a caveat of some kind to limit attempts to prove single incidents as-proof-of-failure-to-train. For example, in element 2, the language in brackets could be changed from: "[, or it should have been obvious to it,]" to [or, because the complete absence of training in the constitutional limits should have been patently obvious to it,]	The committee believes that the instruction includes sufficient caveats.
		The Council could add that, in single-incident claims for which the bracketed language was used, a caveat line (in bold) would also be read along the following lines: "[The fact that the [*name of local*	The committee prefers does not believe that the proposed addition would be helpful.

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		governmental entity] could have provided a better training program for its [*officers/employees*] is not sufficient to establish liability for a failure to train.]"	
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The proposed revision inserts "because of a pattern of similar violations" so that it modifies "knew" but does not modify "it should have been obvious to it." The committee believes that this is incorrect because a pattern of similar violations ordinarily is necessary for either "knew" or "obvious."	The committee disagrees. Under *Connick*, the only way to avoid the need to prove a pattern is in the extremely rare situation in which the violation from a failure to train is patently obvious.
		The revised instruction brackets "or it should have been obvious to it," making this optional language, but we believe that "obvious" should always be instructed as an alternative to "knew" and that this language in the instruction should not be optional.	The brackets are needed to ensure that the court does not include the language in any case other than that rare one in which "patently obvious" can be asserted under *Connick*.
		The committee suggests modifying the second element of the instruction as follows: That [<u>because of a pattern of similar violations,</u>] [*name of local governmental entity*] knew ~~because of a pattern of similar violations~~[, or it should have been obvious to it,~~]~~ that the inadequate training program was likely to result in a deprivation of the right [*specify right violated*]; The Directions for Use should then be revised to state that the bracketed language "[because	The committee prefers its proposed language.

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		of a pattern of similar violations]" should be deleted only if the court finds that the evidence would support a finding of deliberate indifference absent a pattern of similar violations.	
3017, *Supervisor Liability for Acts of Subordinates*	Association of Defense Counsel of Northern California and Nevada, by Andrew R. Weiss, President	The proposed change properly sets the bar for claims that a supervisor should be personally liable for civil rights violations by subordinate employees. Most importantly, it requires knowledge of the risk of harm, which is a reasonable requirement when liability is to be imposed vicariously and not as the result of any harm done by the supervisor to the plaintiff directly.	No response required.
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response required.
3205, *Failure to Begin Repairs Within Reasonable Time or to Complete Repairs Within 30 Days—Essential Factual Elements*	Martin W. Anderson, Attorney at Law, Santa Ana Gregory T. Babbitt, Rosner, Barry & Babbitt, San Diego Steven A. Simons, Attorney at Law, Granada Hills David J. Farrell, Barnes & Farrell, Mission Viejo	Element 3 is an incorrect statement of the law, because nothing in Civil Code § 1793.2(b) requires that the defect in question "substantially impair the use, value, or safety" of the consumer good/vehicle. The substantial-impairment standard is from Civil Code section 1793.22(e). That section makes clear that the standard only applies to claims for violation of subdivision (d) of section 1793.2. It reads, in relevant part: "(e) **For the purposes of subdivision (d) of Section 1793.2** and this section, the following terms have the following meanings:	The committee agrees and has removed this language from element 3.

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Instruction	Commentator	Summary of Comment	Committee Response
	Louis A. Liberty, Attorney at Law, Redwood City	(1) "Nonconformity" means a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee. (Civ. Code, § 1793.22(3), emphasis added) As the bold portion quoted above makes clear, the "substantial impairment" standard applies only to claim for violation of Civil Code section 1793.2(d). It does not apply to claim for violation of any other provision of Song-Beverly, including the violation of Civil Code § 1793.2(b).	
	All of the above commentators except David J. Farrell	The final clause in element 4 "complete repairs within 30 days," also does not accurately reflect the law. It suggests that a manufacturer can comply with subdivision (b) merely by stopping the repair process and returning the product to the consumer, even if the vehicle is not actually fixed. However, Civil Code section 1793.2(b) requires more. It provides that: "[T]he goods shall be serviced or repaired <u>so as to conform to the applicable warranties</u> within 30 days." (Civ. Code, § 1793.2(b), underline added.) Thus, element 4 should be changed to read: "That [*name of defendant*] or its authorized repair facility failed to [begin repairs within a reasonable time/ [or] <u>repair the [*consumer good/motor vehicle*]</u> within 30 days].	The committee has added the language suggested by the commentators.
3242, *Incidental*	Consumer Attorneys of	The revisions to the lemon law jury	*Kwan* does not support this view. *Kwan*

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Instruction	Commentator	Summary of Comment	Committee Response
Damages, and 3243, *Consequential Damages*.	California, by Nancy Peverini, Legislative Director and Anna Buck, Research Law Clerk	instructions are acceptable except for the Directions for Use to CACI 3242 (*Incidental Damages*) and CACI 3243 (*Consequential Damages*). The Directions for Use are wrong in stating that incidental damages are only available when the buyer has accepted the goods (meaning keeping the goods and seeking damages). In *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 187-188, the court held that Commercial Code sections 2712, 2713, and 2714 all allow incidental and consequential damages as defined by section 2715. Section 2715(1) is open-ended in terms of what may be considered incidental damages: "Incidental damages resulting from the seller's breach include ... any other reasonable expense incident to the delay or other breach."	does say: "California Uniform Commercial Code sections 2711 to 2715, in turn, set out the damages for breach of a seller's obligations. Sections 2712, 2713 and 2714 all allow recovery of incidental or consequential damages as defined in section 2715." But *Kwan* concerns recovery of emotional distress damages under the Song-Beverly Consumer Warranty Act (Song-Beverly). *Kwan* quotes the distinction of remedies in Civil Code section 1794(b) based on whether the buyer accepted or rejected the goods (see analysis below). *Kwan* does not say that incidental and consequential damages are recoverable under 2715 regardless of whether the buyer accepts or rejects the goods.
		The National Consumer Law Center treatise on Lemon Law makes clear that incidental damages are available whether the buyer cancels the sale and demands return of the purchase price or not. Additionally, two other leading treatises on warranty laws and the UCC are The Law of Product Warranties by Clark and Smith and White & Summers on the UCC. These works also explain that incidental damages are available in all breach of warranty cases. (see The Law of Product Warranties, § 7:25-33 and Uniform Commercial Code Practitioner Treatise Series, § 6-5)	These sources do support the commentator's position under the UCC. The Law of Product Warranties section 7:25 states that "[t]he case law has unanimously supported the right of the aggrieved buyer to return the defective goods to the seller without losing any claim for incidental and consequential damages." It cites, along with other jurisdiction cases, *Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, 20. But *Dorman* is not a Song-Beverly case. The other treatises state the same rule, but without any citation to California authority.

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Instruction	Commentator	Summary of Comment	Committee Response
			The majority of the committee believes that the most likely statutory interpretation of Civil Code section 1794(b) is that the rule is different under Song-Beverly and that the right of a rejecting buyer to recover incidental and consequential damages is limited. The lack of any clear indication that the Legislature intended to create a rule for Song-Beverly that differs from the rule under the UCC is of concern. The committee recognizes that there is room for alternative statutory interpretations and has modified the Directions for Use to set forth the language of 1794(b) without drawing any conclusion as to its effect.
		There is extensive case law stating that in a breach of warranty case, incidental damages may include finance charges, rental of substitute goods, repair costs, insurance premiums, DMV fees, etc.	The issue is not what might be recoverable as incidental damages, it is whether any incidental damages are recoverable at all if the buyer rejects the goods.
3244, *Civil Penalty—Willful Violation*	Martin W. Anderson, Attorney at Law, Santa Ana Gregory T. Babbitt, Rosner, Barry & Babbitt, San Diego Steven A. Simons, Attorney at Law, Granada Hills Louis A. Liberty, Attorney at Law, Redwood City	The advisory committee proposes adding "e.g. repurchase or replace the vehicle after a reasonable number of repair opportunities" after "[*describe violation of Song-Beverly Consumer Warranty Act*." I proposed adding the following: "e.g., repurchase or replace the vehicle after a reasonable number of repair opportunities were unsuccessful, [or] failure to commence repairs within a reasonable time and/or to complete them within 30 days, [or] breach of express warranty." This language is appropriate because civil penalties for a willful violation of Song-	The purpose is to provide an example of a claim under Song-Beverly. The committee believes that a single example best serves this purpose.

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Instruction	Commentator	Summary of Comment	Committee Response
		Beverly are not limited to claims for violation of Civil Code section 1793.2(d). Rather, they are available for any willful violation of Song-Beverly's provisions and for any breach of express warranty.	
3712, *Joint Ventures*	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The second paragraph of the Directions for Use explains how to modify the instruction if the joint venture was for a noncommercial purpose. The committee believes that more guidance should be provided on how to modify the instruction in those circumstances. *Shook v. Beals* (1950) 96 Cal.App.2d 963, 969–970, refers to a "common purpose" in a noncommercial joint undertaking. We believe that similar general language should be used in the instruction. Accordingly, we suggest that the second paragraph of the Directions for Use be modified as follows: "If there is no commercial purpose to the venture, this instruction may be modified as follows: (i) by deleting elements 2 and 4, which do not apply to a noncommercial enterprise. (ii) by changing element 1, substituting for "business undertaking" the phrase "common purpose or objective"; and (iii) by changing element 3, substituting for "the business" the phrase "common undertaking."	The committee does not believe that there is sufficient authority for specific words for a noncommercial venture.
VF-4200, *Actual Intent to Defraud*	State Bar Litigation Section Jury Instructions	Questions in the proposed verdict forms deviate from the instruction on which they are	The original CACI task force decided that the jury did not have to make separate

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Instruction	Commentator	Summary of Comment	Committee Response
Creditor—Affirmative Defense—Good Faith, VF-4201. *Constructive Fraudulent Transfer,* and VF-4202. *Constructive Fraudulent Transfer--Insolvency*	Committee, by Reuben A. Ginsberg, Chair	based by combining two elements—that the plaintiff was harmed and that the debtor's conduct was a substantial factor in causing harm—in one question. We believe that these two elements involve two distinct factual findings that should be separate in the verdict form. Accordingly, we suggest that harm and substantial factor be separated into two questions.	findings on harm and substantial factor. Therefore, all the CACI verdict forms that include harm and causation combine them into a single question.
VF-4201. *Constructive Fraudulent Transfer*	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We believe that the jury would more readily comprehend question 3 if it were modified as follows: "Did [*name of debtor*] receive a reasonably equivalent value in exchange for the [transfer/obligation]?" (instead of "fail to receive") In our view, a more straightforward question is more important than making the yes/no answers fall in line, and the jury will not be thrown off by a "no" answer to this question after previous "yes" answers because the verdict form tells the jury what to do in the event of either a "yes" or a "no" answer to this question.	Standard CACI verdict format is to phrase questions so that "no" means stop and "yes" means go on. The committee does not believe that there is anything confusing about asking the jury to find whether or not a party "failed" to do something. It believes that shifting the "stop" answer from "no" to "yes" is more likely to produce confusion.
4302, *Termination for Failure to Pay Rent—Essential Factual Element*s and 4303, *Sufficiency and*	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees with the proposed revisions, except for the sentence in the Directions for Use that states: "Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual	One purpose of the Directions for Use is to advise as to why something that a user might expect to be in the instruction is not there. The committee believes that this is such a situation, particularly because this language has been in the instruction and is now being

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Instruction	Commentator	Summary of Comment	Committee Response
Service of Notice of Termination for Failure to Pay Rent		receipt." This sentence explains why language referring to the actual receipt of notice is omitted from the instruction. After the Directions for Use have stated the rule that compliance with the statutory requirements must be shown if the fact of receipt (or "service") is disputed, we believe that this additional step explaining why the language has been deleted from the instruction is unwarranted. We would delete this sentence.	removed in light of *Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419.
4328, *Affirmative Defense—Tenant Was Victim of Domestic Violence, Sexual Assault, or Stalking*	Orange County Bar Association, by John C. Hueston, President	Recommend that the last sentence of the Directions for Use be modified to read: "The advisory committee doubts that 'dwelling unit' would include an apartment building, so that the victim could NOT be evicted if the perpetrator lives in the same building but not the same apartment." If the perpetrator lives in the same building then the affirmative defense would be available and the victim could not be evicted.	The committee has revised this sentence along the lines suggested by the commentator.
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	According to Code of Civil Procedure section 1161.3, the prior act of domestic violence, sexual assault, or stalking must be documented in a court order or law enforcement report issued or written "within the last 180 days." (Code Civ. Proc., § 1161.3(a)(1)(A), (B).) This apparently means within 180 days before the termination of the tenancy (see *id.*, subd.(a)), which could be described as the end of the three-day notice period. Accordingly, the committee suggests modifying the second element as follows:	As the commentator notes, the statute says: only "issued (or written) within the last 180 days." The committee does not think it appropriate to speculate as to how the 180 is calculated. It could be 180 days from the filing of the unlawful detainer.

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Instruction	Commentator	Summary of Comment	Committee Response
		That the act[s] of [domestic violence/sexual assault/[or] stalking] [was/were] documented in a [court order/law enforcement report] <u>[issued/written] within 180 days before the end of the three-day notice period</u>;	
		Subdivision (a) of the statute states that "a landlord shall not terminate a tenancy or fail to renew a tenancy based on . . ." the specified acts. The fourth element of the instruction states this requirement as follows: That [*name of plaintiff*] filed this lawsuit because of the act[s] of domestic violence/sexual assault/[or] stalking]. The committee suggests that it would be more faithful to the statute to state not that the plaintiff filed the lawsuit because of the acts, but that the plaintiff sought to terminate the tenancy because of the acts. Accordingly, we suggest the following modifications: That [*name of plaintiff*] ~~filed this lawsuit~~ <u>served the three-day notice to pay rent or vacate the property</u> because of the act[s] of domestic	The sentence in the statute is not a time trigger but only a statement of motivation. Both "filed this lawsuit" and "served the three-day notice to pay rent or vacate the property" are legally reasonable translations of the statutory language, The committee believes that "filed this lawsuit" is shorter and cleaner.

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Instruction	Commentator	Summary of Comment	Committee Response
		violence/sexual assault/[or] stalking].	
		The latter part of the instruction pertains to an exception allowing the landlord to terminate the tenancy in certain circumstances (Code Civ. Proc., § 1161.3(b)) even if the plaintiff establishes the elements of the affirmative defense. The first element in this part of the instruction states that the defendant "later" allowed the offender to visit the property. The committee believes that "later" in this context is potentially ambiguous as to later than what, and the latter part of the sentence explains that the defendant must have allowed the offender to visit the property after the police report or court order. We suggest deleting the word "later."	The committee agrees and has deleted "later."
		Code of Civil Procedure section 1161.3(b)(1)(B) refers to the landlord's reasonable belief that the offender "poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to quiet possession … ." The second option in the first element in the latter part of the instruction refers to a physical threat to persons, but omits any reference to a tenant's right to quiet possession. We note that the statute does not refer to merely a "threat" to a tenant's right of quiet possession, but to a "physical threat" to a tenant's right of quiet possession. We suggest that the second option in the first element be modified as follows:	The committee has replicated the statutory language in a way that is similar to the suggestion of the commentator.

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Instruction	Commentator	Summary of Comment	Committee Response
		[*Name of plaintiff*] reasonably believed that the presence of the person who committed the act[s] of [domestic violence/sexual assault/[or] stalking] posed a physical threat to other persons with a right to be on the property or to another tenant's right of quiet possession.	
		The second element in the latter part of the instruction states that the landlord "previously gave at least three days' notice to [*name of defendant*] to correct this situation." The committee believes that "this situation" should be clarified and that the instruction should expressly state that the conduct described in the first element must have persisted for the landlord to establish this exception to the affirmative defense. We suggest the following modifications: [*Name of plaintiff*] previously gave at least three days' notice to [*name of defendant*] to correct ~~this~~ the situation described immediately above, but the defendant failed to do so.	The statute requires only that the notice be given to the tenant to "correct the situation." It is silent as to what the tenant must do in response and the consequences if the problem persists. The committee believes that imposing a requirement that the tenant actually correct the situation goes beyond the statute and leads the jury into unwarranted speculation about what the tenant could have or should have done.
User Guide	State Bar Litigation Section Jury Instructions Committee, by Reuben A.	The committee suggests the following modifications to the paragraph on Uncontested Elements for greater clarity:	The committee does not believe that the suggested revisions improve the text.

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Instruction	Commentator	Summary of Comment	Committee Response
	Ginsberg, Chair	"In many cases, elements that are uncontested may be omitted. For example, ~~the requirement that the plaintiff~~ in an age discrimination case, the defendant may not dispute that the plaintiff is ~~must be~~ age 40 or older ~~may be obvious to the jury and safely omitted~~. In other cases, however, omitting uncontested elements may leave the jury with an incomplete understanding of the cause of action and the plaintiff's full burden of proof. In these cases, it is better to include all the elements and then indicate that one or more of them have been agreed to by the parties as ~~not at issue~~ established. One possible approach is as follows:"	
		The committee suggests the following modifications to the paragraph on Irrelevant Factors for greater clarity: "Factors are matters that the jury might consider in ~~determining whether a party's burden of proof on the elements has been met~~ making a factual finding. From a list of possible factors, there may be some that have no relevance to the case and on which no evidence was presented. These irrelevant factors may safely be omitted from the instruction.	The committee does not believe that the suggested revisions improve the text.
Multiple	Orange County Bar Association, by John C Hueston, President	Agree with all new and revised instructions except as indicated above	No response necessary.

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APPENDIX

Additional commentators expressing or endorsing the views of the Consumer Attorneys of California (CAOC) with regard to the proposed changes to CACI No. 1205, Strict Liability—Failure to Warn—Essential Factual Elements

1. Donald C. Arbitblit, Lieff Cabraser Heimann & Bernstein, San Francisco
2. Robert A. Balbuena, Balbuena Legal, Van Nuys
3. Joseph M. Barrett, The Cochran Firm, Los Angeles
4. Philip C. Bourdette, Bourdette & Partners, Visalia
5. Brian L. Burchett, Sullivan, Hill, Lewin, Rez & Engel, San Diego
6. Elizabeth J. Cabraser, Lieff Cabraser Heimann & Bernstein, San Francisco
7. Kevin F. Calcagnie, Robinson Calcagnie Robinson Shapiro Davis, Inc., Newport Beach
8. Capitol City Trial Lawyers Association, by Wendy C. York, President, Sacramento
9. Brian D. Chase, Bisnar Chase, Newport Beach

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10. Stephen N. Cole, The Cole Law Firm, Sacramento
11. Michael S. Danko, The Danko Law Firm, San Mateo
12. Nimish R. Desai, Lieff Cabraser Heimann & Bernstein, San Francisco
13. Mark F. Didak, Mark F. Didak, Los Angeles
14. Simmona Farisse, Carla, Minnard, Farisse Law Firm, Los Angeles
15. Daniel A. Hoffiz, Wattel & York, Torrance
16. Paul R. Kiesel, Kiesel, Boucher, Larson, , Beverly Hills
17. John P. Kristensen, Strange & Carpenter, Los Angeles
18. Anthony A. Liberatore, Attorney at Law, Los Angeles
19. Sarah London, Lieff Cabraser Heimann & Bernstein, San Francisco
20. Timothy A. Loranger, Rodier & Rodier, Beverly Hills
21. E. Gerard Mannion, Mannion & Lowe, San Francisco
22. Craig R. McClellan, The McClellan Law Firm, San Diego
23. Minh T. Nguyen, Jeffrey S. Pop & Associates, Beverly Hills
24. Norman Pine, Attorney at Law, Sherman Oaks
25. Ronald H. Rouda, Attorney at Law, San Francisco
26. John D. Rowell, Cheong, Denove, Rowell & Bennett, Santa Monica

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27. Deborah F. Schweizer, Clapper, Patti, Schweizer & Mason, Sausalito

28. Adam Shea, Panish, Shea & Boyle, , Los Angeles

29. Carolin K. Shining, Law Offices of Carolin K. Shining, Los Angeles

30. Antony Stuart, Stuart Law Firm, Los Angeles

31. Fabrice Vincent, Lieff Cabraser Heimann & Bernstein, San Francisco

32. Todd A. Walburg, Lieff Cabraser Heimann & Bernstein, San Francisco

CIVIL JURY INSTRUCTIONS (CACI 11–02)
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100. Preliminary Admonitions

You have now been sworn as jurors in this case. I want to impress on you the seriousness and importance of serving on a jury. Trial by jury is a fundamental right in California. The parties have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a verdict based on the evidence presented. Before we begin, I need to explain how you must conduct yourselves during the trial.

Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists.

This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic device or media, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or Web site, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.

During the trial you must not listen to anyone else talk about the case or the people involved in the case. You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case. If anyone tries to talk to you about this case, tell that person that you cannot discuss it because you are a juror. If he or she keeps talking to you, simply walk away and report the incident to the court [attendant/bailiff] as soon as you can.

After the trial is over and I have released you from jury duty, you may discuss the case with anyone, but you are not required to do so.

During the trial, do not read, listen to, or watch any news reports about this case. [I have no information that there will be news reports concerning this case.] This prohibition extends to the use of the Internet in any way, including reading any blog about the case or about anyone involved with it or using Internet maps or mapping programs or any other program or device to search for or to view any place discussed in the testimony.

~~**You must decide this case based only on the evidence presented in this trial and the instructions of law that I will provide. Nothing that you see, hear, or learn outside this courtroom is evidence unless I specifically tell you it is. If you receive any information about this case from any source outside of the courtroom, promptly report it to the court [attendant/bailiff]. It is important that all jurors see and hear the same evidence at the same time.**~~

Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other

reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. If you do need to view the scene during the trial, you will be taken there as a group under proper supervision.

[If you violate any of these prohibitions on communications and research, including prohibitions on electronic communications and research, you may be held in contempt of court or face other sanctions. That means that you may have to serve time in jail, pay a fine, or face other punishment for that violation.]

You must decide this case based only on the evidence presented in this trial and the instructions of law that I will provide. Nothing that you see, hear, or learn outside this courtroom is evidence unless I specifically tell you it is. If you receive any information about this case from any source outside of the courtroom, promptly report it to the court [attendant/bailiff]. It is important that all jurors see and hear the same evidence at the same time.

It is important that you keep an open mind throughout this trial. Evidence can only be presented a piece at a time. Do not form or express an opinion about this case while the trial is going on. You must not decide on a verdict until after you have heard all the evidence and have discussed it thoroughly with your fellow jurors in your deliberations.

Do not concern yourselves with the reasons for the rulings I will make during the course of the trial. Do not guess what I may think your verdict should be from anything I might say or do.

When you begin your deliberations, you may discuss the case only in the jury room and only when all the jurors are present.

You must decide what the facts are in this case. And, I repeat, your verdict must be based only on the evidence that you hear or see in this courtroom. Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law.

New September 2003; Revised April 2004, October 2004, February 2005, June 2005, December 2007, December 2009

Directions for Use

This instruction should be given at the outset of every case, even as early as when the jury panel enters the courtroom (without the first sentence).

If the jury is allowed to separate, Code of Civil Procedure section 611 requires the judge to admonish the jury that "it is their duty not to converse with, or suffer themselves to be addressed by any other person,

on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them."

Sources and Authority

- Article I, section 16 of the California Constitution provides that "trial by jury is an inviolate right and shall be secured to all."

- Code of Civil Procedure section 608 provides, in part: "In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact." (See also Evid. Code, § 312; Code Civ. Proc., § 592.)

- Code of Civil Procedure section 611 provides: "If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to conduct research, disseminate information, or converse with, or permit themselves to be addressed by, any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them. The court shall clearly explain, as part of the admonishment, that the prohibition on research, dissemination of information, and conversation applies to all forms of electronic and wireless communication."

- Code of Civil Procedure section 1209(a) provides in part:

  (a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

  (1)–(5) omitted

  (6) Willful disobedience by a juror of a court admonishment related to the prohibition on any form of communication or research about the case, including all forms of electronic or wireless communication or research.

  (7)–(12) omitted

- Under Code of Civil Procedure section 611, jurors may not "form or express an opinion" prior to deliberations. (See also *City of Pleasant Hill v. First Baptist Church of Pleasant Hill* (1969) 1 Cal.App.3d 384, 429 [82 Cal.Rptr. 1]. It is misconduct for a juror to prejudge the case. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 443-444 [54 Cal.Rptr. 68].)

- Jurors must not undertake independent investigations of the facts in a case. (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 36 [224 P.2d 808]; *Walter v. Ayvazian* (1933) 134 Cal.App. 360, 365 [25 P.2d 526].)

- Jurors are required to avoid discussions with parties, counsel, or witnesses. (*Wright v. Eastlick* (1899) 125 Cal. 517, 520-521 [58 P. 87]; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144 [45 Cal.Rptr. 313, 403 P.2d 721].)

- It is misconduct for jurors to engage in experiments that produce new evidence. (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746 [286 Cal.Rptr. 435].)

- Unauthorized visits to the scene of matters involved in the case are improper. (*Anderson v. Pacific Gas & Electric Co.* (1963) 218 Cal.App.2d 276, 280 [32 Cal.Rptr. 328].)

- It is improper for jurors to receive information from the news media about the case. (*Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1679 [25 Cal.Rptr.2d 667], disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41 [32 Cal.Rptr.2d 200, 876 P.2d 999]; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 408 [196 Cal.Rptr. 117].)

- Jurors must avoid bias: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.' " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132], internal citations omitted.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid*.)

- An instruction to disregard any appearance of bias on the part of the judge is proper and may cure any error in a judge's comments. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478 [6 Cal.Rptr. 289, 353 P.2d 929].) "It is well understood by most trial judges that it is of the utmost importance that the trial judge not communicate in any manner to the jury the judge's opinions on the case submitted to the jury, because juries tend to attach inflated importance to any such communication, even when the judge has no intention whatever of influencing a jury's determination." (*Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 Cal.App.3d 302, 307 [134 Cal.Rptr. 344].)

Secondary Sources

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.05

333. Affirmative Defense—Economic Duress

[*Name of defendant***] claims that there was no contract because [his/her/its] consent was given under duress. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] used a wrongful act or wrongful threat to pressure [***name of defendant***] into consenting to the contract;**

2. **That a reasonable person in [***name of defendant***]'s position would have ~~felt~~ believed that he or she had no reasonable alternative except to consent to the contract; and**

3. **That [***name of defendant***] would not have consented to the contract without the wrongful act or wrongful threat.**

An act or a threat is wrongful if [*insert relevant rule, e.g., "a bad-faith breach of contract is threatened"***].**

If you decide that [*name of defendant***] has proved all of the above, then no contract was created.**

New September 2003; Revised December 2005, June 2011, December 2011

Directions for Use

Different elements may apply if economic duress is alleged to avoid an agreement to settle a debt. (See *Perez v. Uline, Inc.* (2007) 157 Cal.App.4th 953, 959–960 [68 Cal.Rptr.3d 872].)

Element 2 requires that the defendant have had "no reasonable alternative" other than to consent. Economic duress to avoid a settlement agreement may require that the creditor be placed in danger of imminent bankruptcy or financial ruin. (See *Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1156–1157, 204 Cal.Rptr. 86].) At least one court has stated this standard in a case not involving a settlement (see *Uniwill v. City of Los Angeles* (2004) 124 Cal.App.4th 537, 545 [21 Cal.Rptr.3d 464]), though most cases do not require that the only alternative be bankruptcy or financial ruin. (See, e.g., *Chan v. Lund* (2010) 188 Cal.App.4th 1159, 1173–1174 [116 Cal.Rptr.3d 122].)

In the next-to-last paragraph, state the rule that makes the alleged conduct wrongful. The conduct must be something more than the breach or threatened breach of the contract itself. An act for which a party has an adequate legal remedy is not duress. (*River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1425 [45 Cal.Rptr.2d 790].)

Sources and Authority

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- "The doctrine of 'economic duress' can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract. The party subjected to the coercive act, and having no reasonable alternative, can then plead 'economic duress' to avoid the contract." (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644 [76 Cal.Rptr.2d 615], internal citation omitted.)

- The nonexistence of a "reasonable alternative" is a question of fact. (*CrossTalk Productions, Inc., supra,* 65 Cal.App.4th at p. 644.)

- " 'At the outset it is helpful to acknowledge the various policy considerations which are involved in cases involving economic duress. Typically, those claiming such coercion are attempting to avoid the consequences of a modification of an original contract or of a settlement and release agreement. On the one hand, courts are reluctant to set aside agreements because of the notion of freedom of contract and because of the desirability of having private dispute resolutions be final. On the other hand, there is an increasing recognition of the law's role in correcting inequitable or unequal exchanges between parties of disproportionate bargaining power and a greater willingness to not enforce agreements which were entered into under coercive circumstances.' " (*Rich & Whillock, Inc.*, *supra*, ~~*v. Ashton Development, Inc.* (1984)~~ 157 Cal.App.3d at p.~~1154,~~ 1158 ~~[204 Cal.Rptr. 86]~~.)

- " 'As it has evolved to the present day, the economic duress doctrine is not limited by early statutory and judicial expressions requiring an unlawful act in the nature of a tort or a crime. … Instead, the doctrine now may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure. … The assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment may constitute a wrongful act for purposes of the economic duress doctrine. … Further, a reasonably prudent person subject to such an act may have no reasonable alternative but to succumb when the only other alternative is bankruptcy or financial ruin. …' " (*Chan*, *supra*, ~~*v. Lund* (2010)~~ 188 Cal.App.4th at pp.~~1159,~~ 1173–1174 ~~[116 Cal.Rptr.3d 122]~~.)

- " 'It is not duress . . . to take a different view of contract rights, even though mistaken, from that of the other contracting party, and it is not duress to refuse, in good faith, to proceed with a contract, even though such refusal might later be found to be wrong. [¶] . . . "A mere threat to withhold a legal right for the enforcement of which a person has an adequate [legal] remedy is not duress." ' " (*River Bank America*, *supra*, 38 Cal.App.4th at p. 1425.)

- "[W]rongful acts will support a claim of economic duress when 'a reasonably prudent person subject to such an act may have no reasonable alternative but to succumb when the only other alternative is bankruptcy or financial ruin.' " (*Uniwill*, *supra*, 124 Cal.App.4th at p. 545.)

- "Economic duress has been recognized as a basis for rescinding a settlement. However, the courts, in desiring to protect the freedom of contracts and to accord finality to a privately negotiated dispute resolution, are reluctant to set aside settlements and will apply 'economic duress' only in limited circumstances and as a 'last resort.' " (*San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1058 [37 Cal.Rptr.2d 501].)

- "Required criteria that must be proven to invalidate a settlement agreement are: '(1) the debtor knew there was no legitimate dispute and that it was liable for the full amount; (2) the debtor nevertheless refused in bad faith to pay and thereby created the economic duress of imminent bankruptcy; (3) the debtor, knowing the vulnerability its own bad faith had created, used the situation to escape an acknowledged debt; and (4) the creditor was forced to accept an inequitably low amount. …' " (*Perez, supra,* 157 Cal.App.4th at pp. 959–960.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 313–315

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake,* §§ 215.22, 215.122 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.24 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions,* 8.07

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence,* 17.03–17.06, 17.20–17.24[2]

408. Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Activity

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[*Name of plaintiff***] claims [he/she] was harmed while participating in [***specify sport or other activity, e.g., touch football***] and that [***name of defendant***] is responsible for that harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] either intentionally injured [***name of plaintiff***] or acted so recklessly that [his/her] conduct was entirely outside the range of ordinary activity involved in [***sport or other activity***];**

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

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

Conduct is entirely outside the range of ordinary activity involved in [*sport or other activity***] if that conduct can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the [sport/activity].**

[*Name of defendant***] is not responsible for an injury resulting from conduct that was merely accidental, careless, or negligent.**

New September 2003; Revised April 2004, October 2008, April 2009, December 2011

Directions for Use

This instruction sets forth a plaintiff's response to the affirmative defense of primary assumption of risk asserted by a defendant who was a coparticipant in the sport or activity. For an instruction applicable to coaches, instructors, or trainers, see CACI No. 409, *Liability of Instructors, Trainers, or Coaches*.

Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) Element 1 sets forth the exceptions in which there is a duty.

While duty is generally a question of law, there may be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

Sources and Authority

- "Though most cases in which the doctrine of primary assumption of risk exists involve recreational sports, the doctrine has been applied to dangerous activities in other contexts (see, e.g., *Saville v. Sierra College* (2005) 133 Cal.App.4th 857 [36 Cal.Rptr.3d 515] [training in peace officer takedown

maneuvers]; *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 [2 Cal.Rptr.3d 168] [training on physical restraint methods]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112 [75 Cal.Rptr.2d 801] [practice of cheerleader routines]; *Bushnell [v. Japanese-American Religions & Cultural Center]*, 43 Cal.App.4th 525 [50 Cal.Rptr.2d 671] [practice of moves in judo class]; and *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 [53 Cal.Rptr.2d 713] [injury to nurse's aide by nursing home patient]).” (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 999–1000 [70 Cal.Rptr.3d 519], internal citation omitted.)

- “Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk ... bar[s] recovery because no duty of care is owed as to such risks.” (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)

- “A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent.” (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30, 834 P.2d 724].)

- “[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.” (*Knight, supra, ~~v. Jewett (1992)~~* 3 Cal.4th at p. ~~296,~~ 320 ~~[11 Cal.Rptr.2d 2, 834 P.2d 696]~~.)

- “The *Knight* rule, however, ‘does not grant unbridled legal immunity to all defendants participating in sporting activity. The Supreme Court has stated that “it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.” Thus, even though “defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself,” they may not increase the likelihood of injury above that which is inherent.’ ” (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1261 [102 Cal.Rptr.2d 813], internal citations omitted.)

- “In *Freeman v. Hale,* the Court of Appeal advanced a test ... for determining what risks are inherent in a sport: ‘[C]onduct is totally outside the range of ordinary activity involved in the sport (and thus any risks resulting from that conduct are not inherent to the sport) if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.’ ” (*Distefano, supra,* 85 Cal.App.4th at p. 1261.)

- “[G]olfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is ‘so reckless as to be totally outside the range of the ordinary activity involved in the sport.’ ” (*Shin, supra, ~~v. Ahn (2007)~~* 42 Cal.4th at p.~~482,~~ 497 ~~[64 Cal.Rptr.3d 803, 165 P.3d 581]~~.)

- “[W]hether defendant breached the limited duty of care he owed other golfers by engaging in conduct that was ‘so reckless as to be totally outside the range of the ordinary activity involved in [golf]’ depends on resolution of disputed material facts. Thus, defendant's summary judgment motion was properly denied.” (*Shin, supra,* 42 Cal.4th at p. 486, internal citation omitted.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588].)

- "Primary assumption of the risk is an objective test. It does not depend on a particular plaintiff's subjective knowledge or appreciation of the potential for risk." (*Saville, supra,* 133 Cal.App.4th at p. 866.)

- "A jury could find that, by using a snowboard without the retention strap, in violation of the rules of the ski resort and a county ordinance, defendant unnecessarily increased the danger that his snowboard might escape his control and injure other participants such as plaintiff. The absence of a retention strap could therefore constitute conduct not inherent to the sport which increased the risk of injury." (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 829 [89 Cal.Rptr.2d 519].)

- "The existence and scope of a defendant's duty depends on the role that defendant played in the activity. Defendants were merely the hosts of a social gathering at their cattle ranch, where [plaintiff] asked to ride one of their horses; they were not instructors and did not assume any of the responsibilities of an instructor." (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1550–1551 [98 Cal.Rptr.3d 779], internal citation omitted.)

- "[T]he doctrine [of primary assumption of risk] applies not only to sports, but to other activities involving an inherent risk of injury to voluntary participants … , where the risk cannot be eliminated without altering the fundamental nature of the activity." (*Beninati v. Black Rock City, LLC* (2009) 175

Cal.App.4th 650, 658 [96 Cal.Rptr.3d 105].)

- "Whether a duty exists 'does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on [(1)] the nature of the activity or sport in which the defendant is engaged and [(2)] the relationship of the defendant and the plaintiff to that activity or sport.' It is the 'nature of the activity' and the parties' relationship to it that determines whether the doctrine applies—not its characterization as a sporting event." (*McGarry, supra,* 158 Cal.App.4th at p. 999, internal citations omitted.)

- "[T]o the extent that ' " 'a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence,' " ' he or she is subject to the defense of comparative negligence but not to an absolute defense. This type of comparative negligence has been referred to as ' "secondary assumption of risk." ' Assumption of risk that is based upon the absence of a defendant's duty of care is called ' "primary assumption of risk." ' 'First, in "primary assumption of risk" cases—where the defendant owes no duty to protect the plaintiff from a particular risk of harm—a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was *reasonable* or unreasonable. Second, in "secondary assumption of risk" cases—involving instances in which the defendant has breached the duty of care owed to the plaintiff—the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such breach, simply because the plaintiff's conduct in encountering the risk of such an injury was reasonable rather than unreasonable.' " (*Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, 1259 [84 Cal.Rptr.3d 824], original italics, internal citations omitted.)

- "Even were we to conclude that [plaintiff]'s decision to jump off the boat was a voluntary one, and that therefore he assumed a risk inherent in doing so, this is not enough to provide a complete defense. Because voluntary assumption of risk as a complete defense in a negligence action was abandoned in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226], only the absence of duty owed a plaintiff under the doctrine of primary assumption of risk would provide such a defense. But that doctrine does not come into play except when a plaintiff and a defendant are engaged in certain types of activities, such as an 'active sport.' That was not the case here; plaintiff was merely the passenger on a boat. Under *Li,* he may have been contributorily negligent but this would only go to reduce the amount of damages to which he is entitled." (*Kindrich, supra,* 167 Cal.App.4th at p. 1258.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1339, 1340, 1343–1350

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03, Ch. 15, *General Premises Liability*, § 15.21 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.30 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.172 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.401 (Matthew Bender)

417. Special Doctrines: Res ipsa loquitur

[*Name of plaintiff*] may prove that [*name of defendant*]'s negligence caused [his/her] harm if [he/she] proves all of the following:

1. **That [*name of plaintiff*]'s harm ordinarily would not have happened unless someone was negligent;**

2. **That the harm was caused by something that only [*name of defendant*] controlled; and**

3. **That [*name of plaintiff*]'s voluntary actions did not cause or contribute to the event[s] that harmed [him/her].**

If you decide that [*name of plaintiff*] did not prove one or more of these three things, you must decide whether [*name of defendant*] was negligent in light of the other instructions I have read.

If you decide that [*name of plaintiff*] proved all of these three things, you may, but are not required to, find that [*name of defendant*] was negligent or that [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm, or both.

~~[~~**[*Name of defendant*] ~~presented evidence that would support a finding~~contends that [he/she/it] was not negligent or that [his/her/its] negligence, if any, did not cause [*name of plaintiff*] harm. If after weighing all of the evidence, you believe that it is more probable than not that [*name of defendant*] was negligent and that [his/her] negligence was a substantial factor in causing [*name of plaintiff*]'s harm, you must decide in favor of [*name of plaintiff*]. Otherwise, you must decide in favor of [*name of defendant*].~~]

New September 2003; Revised June 2011, December 2011

Directions for Use

The first paragraph of this instruction sets forth the three elements of res ipsa loquitur. The second paragraph explains that if the plaintiff fails to establish res ipsa loquitur as a presumption, the jury may still find for the plaintiff if it finds based on its consideration of all of the evidence that the defendant was negligent~~the plaintiff's evidence presented in support of res ipsa loquitur more persuasive than the defendant's evidence~~. (See *Howe v. Seven Forty Two Co., Inc.* (2010) 189 Cal.App.4th 1155, 1163–1164 [117 Cal.Rptr.3d 126].)

If the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find that the accident resulted from the defendant's negligence unless the defendant comes forward with evidence that would support a contrary finding. (See Cal. Law Revision Com. Comment to Evid. Code, § 646.) ~~Give the~~The last two paragraphs of the instruction assume that ~~if~~ the defendant has presented evidence that would support a finding that the defendant was not negligent or that any negligence on the defendant's part was not a proximate cause of the accident. In this case, the presumption drops out, and

the plaintiff must then prove the elements of negligence without the benefit of the presumption of res ipsa loquitur. (See *Howe, supra,* 189 Cal.App.4th at pp. 1163–1164; see also Evid. Code, § 646(c).)

Sources and Authority

- Evidence Code section 646(c) provides:

> If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:
>
> (1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and
>
> (2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.

- Evidence Code section 604 provides: "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate."

- "In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' The presumption arises when the evidence satisfies three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant ... .' If the defendant introduces 'evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard to the presumption, simply by weighing the evidence." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825–826 [15 Cal.Rptr.2d 679, 843 P.2d 624], internal citations omitted.)
- " 'The doctrine of res ipsa loquitur is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible.' " (*Howe, supra,* 189 Cal.App.4th at p. 1161.)

- "Res ipsa loquitur is an evidentiary rule for 'determining whether circumstantial evidence of negligence is sufficient.' " (*Howe, supra,* 189 Cal.App.4th at p. 1161, internal citation omitted.)

- The doctrine "is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, permitting a common sense inference of negligence from the happening of the accident." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 [215 Cal.Rptr. 834].)

- "All of the cases hold, in effect, that it must appear, either as a matter of common experience or from evidence in the case, *that the accide*nt is of a type which probably would not happen unless someone was negligent." (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 Cal.2d 436, 442–443 [247 P.2d 344].)

- The purpose of the second "control" requirement is to "link the defendant with the probability, already established, that the accident was negligently caused." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 362 [124 Cal.Rptr. 193, 540 P.2d 33].)

- "The purpose of [the third] requirement, like that of control by the defendant is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence is such as to eliminate his conduct as a factor contributing to the occurrence." (*Newing, supra,* 15 Cal.3d at p. 363, internal citations omitted.)

- The third condition "should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof. ... [I]ts purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident." (*Zentz, supra,* 39 Cal.2d at p. 444.)

- "[Evidence Code section 646] … classified the doctrine as a presumption affecting the burden of producing evidence. Under that classification, when the predicate facts are established to give rise to the presumption, the burden of producing evidence to rebut it shifts to the defendant to prove lack of negligence or lack of proximate cause that the injury claimed was the result of that negligence. As a presumption affecting the burden of producing evidence (as distinguished from a presumption affecting the burden of proof), if evidence is presented to rebut the presumed fact, the presumption is out of the case—it 'disappears.' But if no such evidence is submitted, the trier of fact must find the presumed fact to be established." (*Howe, supra,* 189 Cal.App.4th at p. 1162.)

- " 'If evidence is produced that would support a finding that the defendant was not negligent or that any negligence on his part was not a proximate cause of the accident, the presumptive effect of the doctrine vanishes.' '[T]he mere introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact causes the presumption, as a matter of law, to disappear.' When the presumptive effect vanishes, it is the plaintiff's burden to introduce actual evidence that would show that the defendant is negligent and that such negligence was the proximate cause of the accident." (*Howe, supra,* 189 Cal.App.4th at p. 1163, internal citations omitted.)

- "As the [Law Revision Commission] Comment [to Evidence Code section 646] explains, even though

the presumptive effect of the doctrine vanishes, 'the jury may still be able to draw an inference that the accident was caused by the defendant's lack of due care from the facts that gave rise to the presumption. … [¶] … [¶] … An inference of negligence may well be warranted from all of the evidence in the case even though the plaintiff fails to establish all the elements of res ipsa loquitur. In appropriate cases, therefore, the jury may be instructed that, even though it does not find that the facts giving rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more probable than not that the defendant was negligent.' " (*Howe, supra,* 189 Cal.App.4th at p. 1163, internal citation omitted.)

- "It follows that where part of the facts basic to the application of the doctrine of res ipsa loquitur is established as a matter of law but that others are not, the court should instruct that application of the doctrine by the jury depends only upon the existence of the basic facts not conclusively established." (*Rimmele v. Northridge Hospital Foundation* (1975) 46 Cal.App.3d 123, 130 [120 Cal.Rptr. 39].)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, §§ 114–118

7 Witkin, California Procedure (5th ed.) Trial, § 300

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-G, *Inability To Prove Negligence Or Causation—Res Ipsa Loquitur, "Alternative Liability" And "Market Share Liability,"* ¶¶ 2:1751–2:1753 (The Rutter Group)

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.20 et seq. (Matthew Bender)

1A California Trial Guide, Unit 11, *Opening Statement*, § 11.42, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.11 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.340 et seq. (Matthew Bender)

427. Furnishing Alcoholic Beverages to Minors (Civ. Code, § 1714(d))

[*Name of plaintiff***] claims [***name of defendant***] is responsible for [his/her] harm because [***name of defendant***] furnished alcoholic beverages to [him/her/[***name of minor***]], a minor, at [***name of defendant***]'s home.**

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

1. **That [***name of defendant***] was an adult;**

2. **That [***name of defendant***] knowingly furnished alcoholic beverages to [him/her/[***name of minor***]] at [***name of defendant***]'s home;**

3. **That [***name of defendant***] knew or should have known that [he/she/[***name of minor***]] was less than 21 years old at the time;**

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

5. **That [***name of defendant***]'s furnishing alcoholic beverages to [[***name of plaintiff***]/[***name of minor***]] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2011

Directions for Use

This instruction is for use for a claim of social host (noncommercial) liability for furnishing alcohol to a minor. (See Civ. Code, § 1714(d).) For an instruction for commercial liability, see CACI No. 422, *Sale of Alcoholic Beverages to Obviously Intoxicated Minors*.

Under the statute, the minor may sue for his or her own injuries, or a third person may sue for injuries caused by the minor. (Civ. Code, § 1714(d)(2).) If the minor is the plaintiff, use the appropriate pronoun throughout. If the plaintiff is a third person, select "[*name of minor*]" throughout and include "by [*name of minor*] in element 4.

Sources and Authority

- Civil Code section 1714 provides in relevant part:

  (c) Except as provided in subdivision (d), no social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of those beverages.

  (d)

(1) Nothing in subdivision (c) shall preclude a claim against a parent, guardian, or another adult who knowingly furnishes alcoholic beverages at his or her residence to a person whom he or she knows or should have known to be under 21 years of age, in which case, notwithstanding subdivision (b), the furnishing of the alcoholic beverage may be found to be the proximate cause of resulting injuries or death.

(2) A claim under this subsection may be brought by or on behalf of the minor or by a person harmed by the minor.

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1070

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

3 California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability*, §§ 19.11, 190.13 (Matthew Bender)

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

451. Affirmative Defense—~~Express~~ Contractual Assumption of Risk

[*Name of defendant*] claims that [*name of plaintiff*] may not recover any damages because [he/she] agreed before the incident that [he/she] would not hold [*name of defendant*] responsible for any damages.

If [*name of defendant*] proves that there was such an agreement and that it applies to [*name of plaintiff*]'s claim, then ~~you must find that~~ [*name of defendant*] is not responsible for [*name of plaintiff*]'s harm[, unless you find that [*name of defendant*] was grossly negligent or intentionally harmed [*name of plaintiff*]].

[If you find that [*name of defendant*] was grossly negligent or intentionally harmed [*name of plaintiff*], then the agreement does not apply. You must then determine whether [he/she/it] is responsible for [*name of plaintiff*]'s harm based on the other instructions that I have given you.]

New September 2003; Revised December 2011

Directions for Use

This instruction sets forth the affirmative defense of express or contractual assumption of risk. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856 [120 Cal.Rptr.3d 90].) It will be given in very limited circumstances. ~~In reviewing the case law in this area, it appears that b~~Both the interpretation of a waiver agreement and application of its legal effect are generally resolved by the judge before trial. T~~his is probably because " '[t~~he existence of a duty is a question of law for the court, as' ~~[citation]. So~~ is the interpretation of a written instrument ~~where~~ if the interpretation does not turn on the credibility of extrinsic evidence.~~"~~ (*Allabach v. Santa Clara County Fair Assn., Inc.* (1996) 46 Cal.App.4th 1007, 1011 [54 Cal.Rptr.2d 330].)

However, ~~T~~there may be contract law defenses (such as fraud, lack of consideration, duress, unconscionability) that could be asserted by the plaintiff to contest the validity of a waiver. If these defenses ~~were~~ depend on disputed facts that must~~to~~ be considered by a jury, then this~~an~~ instruction should also be given~~on express assumption of the risk would probably be necessary~~.

Express assumption of risk does not relieve the defendant of liability if there was gross negligence or willful injury. (See Civ.Code, § 1668.)However, the doctrine of primary assumption of risk may then become relevant if an inherently dangerous sport or activity is involved. (See *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1081 [122 Cal.Rptr.3d 22].)

If there are jury issues with regard to gross negligence, include the bracketed language on gross negligence. Also give CACI No. 425, *"Gross Negligence" Explained.* If the jury finds no gross negligence, then the action is barred by express assumption of risk unless there are issues of fact with regard to contract formation.

Sources and Authority

- Civil Code section 1668 provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

- "Express assumption occurs when the plaintiff, in advance, expressly consents ... to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. ... The result is that ... being under no duty, [the defendant] cannot be charged with negligence." (*Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 764 [276 Cal.Rptr. 672], internal citations omitted.)

- "[C]ases involving express assumption of risk are concerned with instances in which, as the result of an express agreement, the defendant owes no duty to protect the plaintiff from an injury-causing risk. Thus in this respect express assumption of risk properly can be viewed as analogous to primary assumption of risk." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308-309, fn. 4 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

- A release may also bar a wrongful death action, depending on the circumstances and terms of an agreement. (See *Coates v. Newhall Land and Farming, Inc.* (1987) 191 Cal.App.3d 1, 7–8 [236 Cal.Rptr. 181].)

- Valid waivers will be upheld provided that they are not contrary to the "public interest." (*Tunkl v. Regents of Univ. of California* (1963) 60 Cal.2d 92, 101 [32 Cal.Rptr. 33, 383 P.2d 441].)

- "The issue [of whether something is in the public interest] is tested *objectively*, by the activity's importance to the *general public*, not by its subjective importance to the particular plaintiff." (*Booth v. Santa Barbara Biplane Tours, LLC* (2008) 158 Cal.App.4th 1173, 1179–1180 [70 Cal.Rptr.3d 660], original italics.)

- "[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095], original italics.)

- " ' ' "A written release may exculpate a tortfeasor from future negligence or misconduct. [Citation.] To be effective, such a release '*must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties*.' [Citation.] The release need not achieve perfection. [Citation.] Exculpatory agreements in the recreational sports context do not implicate the public interest and therefore are not void as against public policy. [Citations.]" ' ' " An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. [Citations.]" ' " (*Huverserian v. Catalina Scuba Luv, Inc.* (2010) 184 Cal.App.4th 1462, 1467 [110 Cal.Rptr.3d 112], original italics, internal citations omitted.)

- "Plaintiffs assert that Jerid did not 'freely and knowingly' enter into the Release because (1) the

> [defendant's] employee represented the Release was a sign-in sheet; (2) the metal clip of the clipboard obscured the title of the document; (3) the Release was written in a small font; (4) [defendant] did not inform Jerid he was releasing his rights by signing the Release; (5) Jerid did not know he was signing a release; (6) Jerid did not receive a copy of the Release; and (7) Jerid was not given adequate time to read or understand the Release. [¶] We do not find plaintiffs' argument persuasive because … there was nothing preventing Jerid from reading the Release. There is nothing indicating that Jerid was prevented from (1) reading the Release while he sat at the booth, or (2) taking the Release, moving his truck out of the line, and reading the Release. In sum, plaintiffs' arguments do not persuade us that Jerid was denied a reasonable opportunity to discover the true terms of the contract." (*Rosencrans, supra, ~~v. Dover Images, Ltd.~~ (2011)* 192 Cal.App.4th at pp.~~1072,~~ 1080–1081 ~~[122 Cal.Rptr.3d 22]~~.)

- "Whether a contract provision is clear and unambiguous is a question of law, not of fact." (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598 [250 Cal.Rptr. 299].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1282, 1292–1294

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.44

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.171 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.402 (Matthew Bender)

453. Injury Incurred in Course of Rescue

[*Name of plaintiff*] claims that [he/she] was not ~~responsible~~ at fault for [his/her] own injury because [he/she] was attempting to rescue a person who was ~~placed~~ in danger [as a result of [*name of defendant*]'s negligence].

To establish this claim, [~~*Name* *name* of plaintiff~~] must prove ~~is not responsible for [his/her] own injuries if [he/she] proves~~ all of the following:

1. **That there was, or a reasonable person would have perceived that there was, an emergency situation in which someone was in actual or apparent danger of immediate injury;**

2. **That [the emergency/a danger to [*name of plaintiff*]] was created by [*name of defendant*]'s negligence; and**

3. **That [*name of plaintiff*] was harmed while attempting to rescue the person in danger.~~That [*name of plaintiff*] did not act rashly or recklessly when [he/she] attempted to rescue the victim.~~**

New September 2003; Revised December 2011

Directions for Use

This instruction sets forth the rescue doctrine. As originally developed, the doctrine established a duty of care toward the rescuer and was also the rescuer's response to the affirmative defense of contributory negligence when contributory negligence was a complete bar to recovery. (See *Solgaard v. Guy F. Atkinson Co.* (1971) 6 Cal.3d 361, 368 [99 Cal.Rptr. 29, 491 P.2d 821].) Today it may be asserted in much the same way as a response to a claim for comparative fault. (See *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 536–537 [34 Cal.Rptr.2d 630, 882 P.2d 347] [rescue doctrine discussed in case decided after contributory negligence was no longer a complete bar].)

The doctrine does not apply if the plaintiff acted rashly or recklessly in attempting the rescue. The defendant has the burden of proving rash or reckless conduct. (*Solgaard*, *supra*, 6 Cal.3d at p. 368.)

One older case has held that the doctrine can apply to a defendant other than one who created the emergency if the defendant negligently increased the plaintiff's peril. (See *Scott v. Texaco, Inc.* (1966) 239 Cal.App.2d 431, 435–436 [48 Cal.Rptr.785] [defendant's vehicle negligently struck plaintiff while she was trying to stop traffic because of an accident up ahead].) Subsequently, the California Supreme Court stated the doctrine as a right to recover from the person *whose negligence created the peril*. (*Solgaard*, *supra*, 6 Cal.3d at p. 368, emphasis added.) However, the negligence of someone other than the one who created the emergency was not at issue in the case, so it is not clear that the court's language would foreclose such a claim. To use this instruction for such a case, select "a danger to [*name of plaintiff*]" in element 2. Also omit the bracketed material in the opening sentence.

Sources and Authority

- ~~In *Solgaard v. Guy F. Atkinson Co.* (1971) 6 Cal.3d 361 [99 Cal.Rptr. 29, 491 P.2d 821], the Court stated the rescue doctrine as follows:~~ "The cases have developed the rule that persons injured in the course of undertaking a necessary rescue may, absent rash or reckless conduct on their part, recover from the person whose negligence created the peril which necessitated the rescue. [¶] Although its precise limits are not yet fully developed, the rescue doctrine varies the ordinary rules of negligence in two important respects: (1) it permits the rescuer to sue on the basis of defendant's initial negligence toward the party rescued, without the necessity of proving negligence toward the rescuer, and (2) it substantially restricts the availability of the defense of contributory negligence by requiring defendant to prove that the rescuer acted rashly or recklessly under the circumstances." (*Solgaard, supra*, 6 Cal.3d ~~*Id.*~~ at p. 368, footnote omitted.)

- "The rescue doctrine contemplates a voluntary act by one who, in an emergency and prompted by spontaneous human motive to save human life, attempts a rescue that he had no duty to attempt by virtue of a legal obligation or duty fastened on him by his employment." (*Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 784 [38 Cal.Rptr.2d 291].)

- "[T]he rescue doctrine arose in an era of contributory negligence, where any negligence on the part of a plaintiff barred the action. 'The purpose of the rescue doctrine when it was first created was to avoid having a plaintiff be found contributorily negligent as a matter of law when he voluntarily placed himself in a perilous position to prevent another person from suffering serious injury or death, the courts often stating that the plaintiff's recovery should not be barred unless his rescue attempt was recklessly or rashly made.' Most defendants could point to some negligence by the rescuer and simply approaching the danger could be construed as negligent, or as an assumption of the risk. This advanced no tenable public policy: It deterred rescues and ran counter to the human impulse to help others in need. Accordingly, the courts ruled the act of approaching danger did not interrupt the normal causal reach of tort liability and did not, of itself, establish contributory negligence." (*Sears v. Morrison* (1999) 76 Cal.App.4th 577, 581 [90 Cal.Rptr.2d 528], internal citations omotted.)

- "In order to assert the rescue doctrine, the rescuer must show that there was someone in peril and that he acted to rescue such person from the peril." (*Tucker v. CBS Radio Stations Inc.* (2011) 194 Cal.App.4th 1246, 1252 [124 Cal.Rptr.3d 245].)

- "The evidence in the instant case was uncontradicted that defendant's employees … were in peril of their lives, that immediate action was required to save or assist them, that plaintiff undertook to rescue them, and that he was injured while in the course of doing so. It is apparent, therefore, that plaintiff was, as a matter of law, a rescuer and entitled to the benefits of the rescuer doctrine, including an instruction to the jury that as a rescuer, plaintiff could recover on the basis of defendant's negligence to [its employees], if plaintiff's injury was a proximate result thereof, and if plaintiff acted neither rashly nor recklessly under the circumstances ~~The Court found that a doctor, who was injured while attempting to rescue two injured workers, was "entitled to the benefits of the rescue doctrine, including an instruction to the jury that as a rescuer, plaintiff could recover on the basis of defendant's negligence to [the victims], if plaintiff's injury was a proximate result thereof, and if plaintiff acted neither rashly nor recklessly under the circumstances~~." (~~*Id.*~~*Solgaard, supra*, 6

Cal.3d at p. 369.)

- ~~Before *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226], the rescue doctrine helped plaintiffs establish duty and was also a defense to the former bar of contributory negligence. (*Solgaard, supra*, 6 Cal.3d at p. 368.) The rescue doctrine may still be a viable counter to a charge of contributory negligence.~~

- ~~In *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532 [34 Cal.Rptr.2d 630, 882 P.2d 347], the Court observed that~~ "One also generally owes a duty of care to bystanders who attempt a rescue that becomes necessary due to one's own negligence. Thus, although it is contributory negligence unreasonably to expose oneself to a risk created by the defendant's negligence, a person is not contributorily negligent who, with due care, encounters the risk created by the defendant~~'~~'s negligence in order to perform a rescue necessitated by that negligence." (*Neighbarger*, *supra*, 8 Cal.4th ~~*Id.*~~ at p. 537.)~~ This observation was not essential to the holding of the case, which focused on the issue of duty. Nevertheless, it suggests that the rescue doctrine may still play a role in determining whether or not the plaintiff was at fault.~~

- "We do not accept this narrow view of the rescue rule, which would focus attention on the person creating the original danger and not on the person of the rescuer. We think the force of the rule should properly be centered on the rescuer, for it is the quality of his conduct which is being weighed. Whether he was induced to enter a position of danger as a result of the act of a particular defendant or as a result of some outside force is inconsequential to the process of evaluating the quality of his behavior." (*Scott*, *supra*, 239 Cal.App.2d at pp. 435–436.)

- "[Plaintiff] asserts that he should not have been required to show that respondents' negligence threatened real and imminent harm to himself or others, but only that he reasonably perceived the appearance of such danger … . We agree." (*Harris v. Oaks Shopping Ctr.* (1999) 70 Cal.App.4th 206, 210 [82 Cal.Rptr.2d 523].)

- "Under the rescue doctrine, an actor is usually liable for injuries sustained by a rescuer attempting to help another person placed in danger by the actor's negligent conduct. The question here is whether an actor is liable for injuries sustained by a person who is trying to rescue *the actor* from his own negligence. The answer is yes." (*Sears*, *supra*, 76 Cal.App.4th at p. 579, original italics.)

- "In general, the rescue doctrine permits a rescuer to recover for injuries sustained while attempting to rescue a party placed in danger by the defendant's conduct. In this case we conclude that the rescuer cannot maintain negligence claims against defendant because he failed to establish that a duty of care was owed to the rescued party." (*Tucker*, *supra*, 194 Cal.App.4th at p. 1248.)

- "There is some disagreement among the authorities where the danger is only to property. In *Henshaw v. Belyea* (1934) 220 C. 458, 31 P.2d 348, plaintiff ran from a safe place on the sidewalk in an attempt to save his employer's truck from slipping downhill by placing a block under a wheel, and his foot was crushed. The court approved the extension of the rescue doctrine to such a case. (220 C. 463.) (See 23 Cal. L. Rev. 110; 8 So. Cal. L. Rev. 159.)" (6 Witkin Summary of California Law (10th ed. 2005) Torts, § 1308.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1306–1308

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.41

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.03[4], 1.30 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.30[5][e][v] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.140 (Matthew Bender)

VF-403. Primary Assumption of Risk—Liability of Coparticipant

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] either intentionally injure [***name of plaintiff***] or act so recklessly that [his/her] conduct was entirely outside the range of ordinary activity involved in [***specify sport or activity, e.g., touch football***]?**
   ____ Yes ____ No

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

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

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

3. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss
   [lost earnings $ _____]
   [lost profits $ _____]
   [medical expenses $ _____]
   [other past economic loss $ _____]
   Total Past Economic Damages: $ _____]

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

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

   [d. Future noneconomic loss, including [physical

pain/mental suffering:]

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

This verdict form is based on CACI No. 408, *Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Activity*.

If specificity is not required, users do not have to itemize all the damages listed in question 3 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

518. Medical Malpractice: Res ipsa loquitur

~~In this case,~~ [~~*name* *Name* of plaintiff~~] may prove that [*name of defendant*]'s negligence caused [his/her] harm if [he/she] proves all of the following:

1. **That [*name of plaintiff*]'s harm ordinarily would not have occurred unless someone was negligent [In deciding this issue, you must consider [only] the testimony of the expert witnesses];**

2. **That the harm occurred while [*name of plaintiff*] was under the care and control of [*name of defendant*]; and**

3. **That [*name of plaintiff*]'s voluntary actions did not cause or contribute to the event[s] that harmed [him/her].**

If you decide that [*name of plaintiff*] did not prove one or more of these three things, then ~~[*insert one of the following*]~~

~~[your verdict must be for [*name of defendant*].]~~

~~[~~you must decide whether [*name of defendant*] was negligent in light of the other instructions I have read.~~]~~

If you decide that [*name of plaintiff*] proved all of these three things, you may, but are not required to, find that [*name of defendant*] was negligent or that [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm, or both.

~~You must carefully consider the evidence presented by both [*name of plaintiff*] and [*name of defendant*] before you make your decision. You should not decide in favor of [*name of plaintiff*] unless you believe, after weighing all of the evidence, that it is more likely than not that [*name of defendant*] was negligent and that [his/her] negligence was a substantial factor in causing [*name of plaintiff*]'s harm.~~
[*Name of defendant*] contends that [he/she/it] was not negligent or that [his/her/its] negligence, if any, did not cause [*name of plaintiff*] harm. If after weighing all of the evidence you believe that it is more probable than not that [*name of defendant*] was negligent and that [his/her/its] negligence was a substantial factor in causing [*name of plaintiff*]'s harm, you must decide in favor of [*name of plaintiff*]. Otherwise, you must decide in favor of [*name of defendant*].

New September 2003; Revised December 2011

Directions for Use

The first paragraph of this instruction sets forth the three elements of res ipsa loquitur. The bracketed

sentence in element 1 should be read only if expert testimony is introduced. The word "only" within that sentence is to be used ~~only in those cases where~~if the court has determined that the issue of the defendant's negligence involves matters beyond common knowledge.

The second paragraph explains that if the plaintiff fails to establish res ipsa loquitur as a presumption, the jury may still find for the plaintiff if it finds based on its consideration of all of the evidence that the defendant was negligent. (See *Howe v. Seven Forty Two Co., Inc.* (2010) 189 Cal.App.4th 1155, 1163–1164 [117 Cal.Rptr.3d 126].)

If the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find that the accident resulted from the defendant's negligence unless the defendant comes forward with evidence that would support a contrary finding. (See Cal. Law Revision Com. comment to Evid. Code, § 646.) The last two paragraphs of the instruction assume that the defendant has presented evidence that would support a finding that the defendant was not negligent or that any negligence on the defendant's part was not a proximate cause of the accident. In this case, the presumption drops out, and the plaintiff must then prove the elements of negligence without the benefit of the presumption of res ipsa loquitur. (See *Howe*, *supra*, 189 Cal.App.4th at pp. 1163–1164; see also Evid. Code, § 646(c).) ~~In the second paragraph, the first bracketed option is to be used when plaintiff is relying solely on a res ipsa loquitur theory and has introduced no other evidence of defendant's negligence. The second option is to be used when plaintiff has introduced other evidence of defendant's negligence.~~

~~"It follows that where part of the facts basic to the application of the doctrine of res ipsa loquitur is established as a matter of law but that others are not, the court should instruct that application of the doctrine by the jury depends only upon the existence of the basic facts not conclusively established." (*Rimmele v. Northridge Hospital Foundation* (1975) 46 Cal.App.3d 123, 130 [120 Cal.Rptr. 39].)~~

Sources and Authority

- Evidence Code section 646(c) provides:

  If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:

  (1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and

  (2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.

Evidence Code section 604 provides: "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate."

- "In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' The presumption arises when the evidence satisfies three conditions: ' "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." ' A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant. ...' If the defendant introduces `evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard to the presumption, simply by weighing the evidence." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825–826 [15 Cal.Rptr.2d 679, 843 P.2d 624], internal citations omitted.)

- " 'The doctrine of res ipsa loquitur is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible.' " (*Howe*, *supra*, 189 Cal.App.4th at p. 1161.)~~Stated less mechanically, a plaintiff suing in a personal injury action is entitled to the benefit of res ipsa loquitur when: 'the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.' " (*Rimmele, supra*, 46 Cal.App.3d at p. 129, internal citations omitted.)~~

~~• Evidence Code section 646(c) provides:~~

~~If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:~~

~~(1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and~~

~~(2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.~~

- "Res ipsa loquitur is an evidentiary rule for 'determining whether circumstantial evidence of negligence is sufficient.' " (*Howe*, *supra*, 189 Cal.App.4th at p. 1161, internal citation omitted.)

- ~~Under Evidence Code section 604, a presumption affecting the burden of producing evidence "require[s] the trier of fact to assume the existence of the presumed fact" unless the defendant introduces evidence to the contrary. Here, the presumed fact is that "a proximate cause of the occurrence was some negligent conduct on the part of the defendant." (Evid. Code, § 646(c)(1); *Brown, supra*, 4 Cal.4th at p. 826.)~~

- ~~"The doctrine of res ipsa loquitur is fundamentally a doctrine predicated upon inference deducible from circumstantial evidence." (*Hale v. Venuto* (1982) 137 Cal.App.3d 910, 918 [187 Cal.Rptr. 357].)~~

- The doctrine "is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, permitting a common sense inference of negligence from the happening of the accident." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 [215 Cal.Rptr. 834].)

- "All of the cases hold, in effect, that it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent." (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 Cal.2d 436, 442–443 [247 P.2d 344].)

- "In determining the applicability of res ipsa loquitur, courts have relied on both expert testimony and common knowledge. The standard of care in a professional negligence case can be proved only by expert testimony unless the conduct required by the particular circumstances is within the common knowledge of the layperson." (*Blackwell v. Hurst* (1996) 46 Cal.App.4th 939, 943 [54 Cal.Rptr.2d 209], internal citations omitted.)

- "Under the doctrine of res ipsa loquitur and this common knowledge exception, it is proper to instruct the jury that it can infer negligence from the happening of the accident itself, if it finds based on common knowledge, the testimony of physicians called as expert witnesses, and all the circumstances, that the injury was more likely than not the result of negligence." (*Gannon v. Elliot* (1993) 19 Cal.App.4th 1, 6 [23 Cal.Rptr.2d 86], internal citation omitted.)

- "The fact that a particular injury rarely occurs does not in itself justify an inference of negligence unless some other evidence indicates negligence. To justify res ipsa loquitur instructions, appellant must have produced sufficient evidence to permit the jury to make the necessary decision. He must have presented 'some substantial evidence which, if believed by the jury, would entitle it to draw an inference of negligence from the happening of the accident itself.' " (*Blackwell, supra,* 46 Cal.App.4th at p. 944, internal citations omitted.)

- The purpose of the second "control" requirement is to "link the defendant with the probability, already established, that the accident was negligently caused." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 362 [124 Cal.Rptr. 193, 540 P.2d 33].) The control requirement is not absolute. (*Zentz, supra,* 39 Cal.2d at p. 443.)

- "The purpose of [the third] requirement, like that of control by the defendant is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence is such as to eliminate his conduct as a factor contributing to the occurrence." (*Newing, supra,* 15 Cal.3d at p. 363, internal citations omitted.)

- The third condition "should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof. ... [I]ts purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident." (*Zentz, supra,* 39 Cal.2d at p. 444.)

- "[Evidence Code section 646] … classified the doctrine as a presumption affecting the burden of producing evidence. Under that classification, when the predicate facts are established to give rise to the presumption, the burden of producing evidence to rebut it shifts to the defendant to prove lack of negligence or lack of proximate cause that the injury claimed was the result of that negligence. As a presumption affecting the burden of producing evidence (as distinguished from a presumption affecting the burden of proof), if evidence is presented to rebut the presumed fact, the presumption is out of the case—it 'disappears.' But if no such evidence is submitted, the trier of fact must find the presumed fact to be established." (*Howe*, *supra*, 189 Cal.App.4th at p. 1162.)

- " 'If evidence is produced that would support a finding that the defendant was not negligent or that any negligence on his part was not a proximate cause of the accident, the presumptive effect of the doctrine vanishes.' '[T]he mere introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact causes the presumption, as a matter of law, to disappear.' When the presumptive effect vanishes, it is the plaintiff's burden to introduce actual evidence that would show that the defendant is negligent and that such negligence was the proximate cause of the accident." (*Howe*, *supra*, 189 Cal.App.4th at p. 1163, internal citations omitted.)

- "As the [Law Revision Commission] Comment [to Evidence Code section 646] explains, even though the presumptive effect of the doctrine vanishes, 'the jury may still be able to draw an inference that the accident was caused by the defendant's lack of due care from the facts that gave rise to the presumption. … [¶] … [¶] … An inference of negligence may well be warranted from all of the evidence in the case even though the plaintiff fails to establish all the elements of res ipsa loquitur. In appropriate cases, therefore, the jury may be instructed that, even though it does not find that the facts giving rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more probable than not that the defendant was negligent.' " (*Howe*, *supra*, 189 Cal.App.4th at p. 1163, internal citation omitted.)

- "It follows that where part of the facts basic to the application of the doctrine of res ipsa loquitur is established as a matter of law but that others are not, the court should instruct that application of the doctrine by the jury depends only upon the existence of the basic facts not conclusively established." (*Rimmele v. Northridge Hosp. Foundation* (1975) 46 Cal.App.3d 123, 130 [120 Cal.Rptr. 39].)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, §§ 114–118

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.32 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.11[2] (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.50 (Matthew Bender)

1009C. Liability to Employees of Independent Contractors for Unsafe Conditions—Nondelegable Duty

Revoked December 2011
See *Seabright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th590 [-- Cal.Rptr.3d --, -- P.3d --. 2011].

~~**[*Name of plaintiff*] claims that [he/she] was harmed while employed by [*name of plaintiff's employer*] and working on [*name of defendant*]'s property because [*name of defendant*] breached a duty to [him/her]. There is a duty that cannot be delegated to another person arising from [*insert statute or regulation establishing nondelegable duty*] that is as follows: [*quote from statute/regulation or paraphrase duty*].**~~

~~**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*] breached this duty;**~~

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

~~**4. That [*name of defendant*]'s breach of this duty was a substantial factor in causing [*name of plaintiff*]'s harm.**~~

~~*New April 2008; Revised April 2009, December 2010*~~

~~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 breached a duty established by a statute or regulation and that this duty was nondelegable as a matter of law. The statute or regulation that creates the duty may be paraphrased rather than quoted verbatim if its language would be confusing to the jury.~~

~~For an instruction for injuries to others involving a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries to an employee of an independent contractor 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 owner's retained control, 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'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 breach of a nondelegable duty must have "affirmatively contributed" to the plaintiff's injury. (*Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 147 [62 Cal.Rptr.3d 479].) However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. (Id. at p. 147.) The advisory committee believes that the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately expresses the "affirmative contribution" requirement.

Sources and Authority

- "The nondelegable duty doctrine addresses an affirmative duty imposed by reason of a person or entity's relationship with others. Such a duty cannot be avoided by entrusting it to an independent contractor. Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure the safety of others." (*Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 671–672 [82 Cal.Rptr.3d 869], internal citations omitted.)

- "One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions." (*Evard*, *supra*, 153 Cal.App.4th at p. 146.)

- "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 v. Dep't of Transp.* (2002) 27 Cal.4th 198, 211–212 [115 Cal.Rptr.2d 853, 38 P.3d 1081], original italics, internal citations omitted.)

- "[T]he liability of a hirer for injury to employees of independent contractors caused by breach of a nondelegable duty imposed by statute or regulation remains subject to the *Hooker* test. Under that test, the hirer will be liable if its breach of regulatory duties affirmatively contributes to the injury of a contractor's employee." (*Padilla*, *supra*, 166 Cal.App.4th at p. 673, internal citations omitted.)

- "[A]n owner may be liable if its breach of regulatory duties affirmatively contributes to injury of a contractor's employee." (*Evard*, *supra*, 153 Cal.App.4th at p. 147.)

- "Liability may be predicated on a property owner's 'breach of its own regulatory duties, regardless of whether or not it voluntarily retained control or actively participated in the project. … For purposes of imposing liability for affirmatively contributing to a plaintiff's injuries, the affirmative contribution need not be active conduct but may be in the form of an omission to act.' " (*Evard*, *supra*, 153 Cal.App.4th at p. 147.)

- "Notwithstanding *Evard's* conclusion that the regulation at issue imposed a nondelegable duty, we do not agree with plaintiff's inference from that case that in every instance Cal-OSHA regulations impose a nondelegable duty. While a nondelegable duty may arise when a statute or regulation requires specific safeguards or precautions to insure others' safety, it is the nature of the regulation itself that determines whether the duties it creates are nondelegable." (*Padilla*, *supra*, 166 Cal.App.4th at pp. 672–673, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1117

1 California Construction Contracts and Disputes, Ch. 6, *Negligence and Strict Liability for Dangerous Condition on Worksite* (Cont.Ed.Bar 3d ed.) § 6.11

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*, § 421.33 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.90 et seq. (Matthew Bender)

1205. Strict Liability—Failure to Warn—Essential Factual Elements

[*Name of plaintiff***] claims that the [***product***] lacked sufficient [instructions] [or] [warning of potential [risks/side effects/allergic reactions]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**

2. **That the [***product***] had potential [risks/side effects/allergic reactions] that were [known/ [or] ~~[~~knowable in light of the [scientific/ [and] medical] knowledge that was generally accepted in the scientific community~~knowable by the use of scientific knowledge available~~] at the time of [manufacture/distribution/sale];**

3. **That the potential [risks/side effects/allergic reactions] presented a substantial danger when the [***product***] is used or misused in an intended or reasonably foreseeable way;**

4. **That ordinary consumers would not have recognized the potential [risks/side effects/allergic reactions];**

5. **That [***name of defendant***] failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];**

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

7. **That the lack of sufficient [instructions] [or] [warnings] was a substantial factor in causing [***name of plaintiff***]'s harm.**

[The warning must be given to the prescribing physician and must include the potential risks, side effects, or allergic reactions that may follow the foreseeable use of the product. [*Name of defendant***] had a continuing duty to warn physicians as long as the product was in use.]**

New September 2003; Revised April 2009, December 2009, June 2011, December 2011

Directions for Use

~~A fuller definition of "scientific knowledge" may be appropriate in certain cases. Such a definition would advise that the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was "knowable in light of the generally recognized and prevailing best scientific and medical knowledge available." (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162, 920 P.2d 1347].)~~

With regard to element 2, it has been often stated in the case law that a manufacturer is liable for failure to warn of a risk that is "knowable in light of generally recognized and prevailing best scientific and medical knowledge available." (See, e.g., *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d

987, 1002–1003 [281 Cal.Rptr. 528, 810 P.2d 549]; *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112; *Saller v. Crown Cork & Seal Company* (2010) 187 Cal.App.4th 1220, 1239; *Rosa v. City of Seaside* (N.D. Cal. 2009) 675 F.Supp. 2d 1006, 1012.) The advisory committee believes that this standard is captured by the phrase "generally accepted in the scientific community." A risk may be "generally recognized" as a view (knowledge) advanced by one body of scientific thought and experiment, but it may not be the "prevailing" or "best" scientific view; that is, it may be a minority view. The committee believes that when a risk is (1) generally recognized (2) as prevailing in the relevant scientific community, and (3) represents the best scholarship available, it is sufficient to say that the risk is knowable in light of "the generally accepted" scientific knowledge.

The last bracketed paragraph should be read only in prescription product cases: "In the case of prescription drugs and implants, the physician stands in the shoes of the 'ordinary user' because it is through the physician that a patient learns of the properties and proper use of the drug or implant. Thus, the duty to warn in these cases runs to the physician, not the patient." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1483 [81 Cal.Rptr.2d 252].)

To make a prima facie case, the plaintiff has the initial burden of producing evidence that he or she was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590] [risk-benefit design defect case].) See also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

- "Our law recognizes that even ' "a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes 'defective' simply by the absence of a warning." …' Thus, manufacturers have a duty to warn consumers about the hazards inherent in their products. The purpose of requiring adequate warnings is to inform consumers about a product's hazards and faults of which they are unaware, so that the consumer may then either refrain from using the product altogether or avoid the danger by careful use." (*Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564, 577 [90 Cal.Rptr.3d 414], internal citations and footnote omitted.)

- "Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury." (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299].)

- "[F]ailure to warn in strict liability differs markedly from failure to warn in the negligence context.

Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. ... [¶] [T]he manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial." (*Anderson, supra, ~~v. Owens-Corning Fiberglas Corp.~~ (1991)* 53 Cal.3d ~~987~~ at pp. 1002–1003 ~~[281 Cal.Rptr. 528, 810 P.2d 549]~~.)

- "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. … [¶] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418].)

- "The actual knowledge of the individual manufacturer, even if reasonably prudent, is not the issue. We view the standard to require that the manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances." (*Carlin, supra,* 13 Cal.4th at p. 1113, fn. 3.)

- "[A] defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution." (*Anderson, supra,* 53 Cal.3d at p. 1004.)

- "[T]here can be no liability for failure to warn where the instructions or warnings sufficiently alert the user to the possibility of danger." (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1042 [228 Cal.Rptr. 768], internal citation omitted.)

- "A duty to warn or disclose danger arises when an article is or should be known to be dangerous for its intended use, either inherently or because of defects." (*DeLeon v. Commercial Manufacturing and Supply Co.* (1983) 148 Cal.App.3d 336, 343 [195 Cal.Rptr. 867], internal citation omitted.)

- " California is well settled into the majority view that knowledge, actual or constructive, is a requisite for strict liability for failure to warn ... ." (*Anderson, supra,* 53 Cal.3d at p. 1000.)

- "[T]he duty to warn is not conditioned upon [actual or constructive] knowledge [of a danger] where the defectiveness of a product depends on the adequacy of instructions furnished by the supplier which are essential to the assembly and use of its product." (*Midgley v. S. S. Kresge Co.* (1976) 55

Cal.App.3d 67, 74 [127 Cal.Rptr. 217].)

- Under *Cronin,* plaintiffs in cases involving manufacturing and design defects do not have to prove that a defect made a product unreasonably dangerous; however, that case "did not preclude weighing the degree of dangerousness in the failure to warn cases." (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 343 [157 Cal.Rptr. 142].)

- "[T]he warning requirement is not limited to unreasonably or unavoidably dangerous products. Rather, directions or warnings are in order where reasonably required *to prevent the use of a product from becoming unreasonably dangerous*. It is the lack of such a warning which renders a product unreasonably dangerous and therefore defective." (*Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal.App.3d 1143, 1151 [238 Cal.Rptr. 18], original italics.)

- "In most cases, ... the adequacy of a warning is a question of fact for the jury." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320 [273 Cal.Rptr. 214].)

- "[A] pharmaceutical manufacturer may not be required to provide warning of a risk known to the medical community." (*Carlin, supra,* 13 Cal.4th at p. 1116.)

- "To be liable in California, even under a strict liability theory, the plaintiff must prove that the defendant's failure to warn was a substantial factor in causing his or her injury. (CACI No. 1205.) The natural corollary to this requirement is that a defendant is not liable to a plaintiff if the injury would have occurred even if the defendant had issued adequate warnings." (*Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1604 [116 Cal.Rptr.3d 453].)

- "[A] manufacturer's liability to the ultimate consumer may be extinguished by 'intervening cause' where the manufacturer either provides adequate warnings to a middleman or the middleman alters the product before passing it to the final consumer." (*Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 661 [74 Cal.Rptr.3d 359].)

- " 'A manufacturer's duty to warn is a continuous duty which lasts as long as the product is in use.' ... [T]he manufacturer must continue to provide physicians with warnings, at least so long as it is manufacturing and distributing the product." (*Valentine, supra,* 68 Cal.App.4th at p. 1482.)

- " '[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse. … [T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact. … [A] manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product.' " (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1235 [63 Cal.Rptr.2d 422].)

- "California case law has not imposed on manufacturers a duty to warn about the dangerous propensities of other manufacturers' products. California courts will not impose a duty to warn on a manufacturer where the manufacturer's product 'did not cause or create the risk of harm.' As one commentary explains, '[t]he product must, in some sense of the word, "create" the risk. If it does not, then the manufacturer should not be required to supply warnings, even if the risks are not obvious to

users and consumers.' As California law now stands, unless the manufacturer's product in some way causes or creates the risk of harm, 'the risks of the manufacturer's own product … are the only risks [the manufacturer] is required to know.' " (*Taylor, supra,* 171 Cal.App.4th at p. 583, internal citations omitted; cf. *O'Neil v. Crane Co.* (2009) 177 Cal. App. 4th 1019, 1030–1031 [99 Cal. Rptr. 3d 533], review granted December 23, 2009 (S177401) [disagreeing with *Taylor*].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467–1479

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability ~~For~~ for Defective Products*, ¶¶ 2:1275 – 2:1276 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.05 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.164 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.194 (Matthew Bender)

VF-1203. Strict Products Liability—Failure to Warn

We answer the questions submitted to us as follows:

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

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

2. **Did the [*product*] have potential [risks/side effects/allergic reactions] that were [known~~]~~/ [or] ~~[~~knowable in light of the [scientific/ [and] medical] knowledge that was generally accepted in the scientific community ~~through the use of scientific knowledge available~~] at the time of [manufacture/distribution/sale]?**
   ____ Yes ____ No

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

3. **Did the potential [risks/side effects/allergic reactions] present a substantial danger to persons using or misusing the [*product*] in an intended or reasonably foreseeable way?**
   ____ 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. **Would ordinary consumers have recognized the potential [risks/side effects/allergic reactions]?**
   ____ Yes ____ No

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

5. **Did [*name of defendant*] fail to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions]?**
   ____ 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 the lack of sufficient [instructions] [or] [warnings] a substantial factor in**

causing harm to [*name of plaintiff***]?**
____ Yes ____ No

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

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

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

This verdict form is based on CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements.* If product misuse or modification is alleged as a complete defense (see CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*), questions 2 and 3 of CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification,* may be included after question 1. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 7 through 9 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue,* may be added at the end.

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

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

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

2021. Private Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] interfered with [***name of plaintiff***]'s use and enjoyment of [his/her] land. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of defendant***], by acting or failing to act, created a condition or permitted a condition to exist that [***insert one or more of the following:***]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;]

3. **That this condition interfered with [***name of plaintiff***]'s use or enjoyment of [his/her] land;**

4. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**

5. **That an ordinary person would be reasonably annoyed or disturbed by** [*name of defendant*]**'s conduct;**

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

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

8. **That the seriousness of the harm outweighs the public benefit of [***name of defendant***]'s conduct.**

New September 2003; Revised February 2007, December 2011

Directions for Use

For instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- Civil Code section 3479 provides: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

- Civil Code section 3482 provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ... ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.' " " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)

- "In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff's property; proof of interference with the plaintiff's use and enjoyment of that property is sufficient." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 [55 Cal.Rptr.2d 724, 920 P.2d 669].)

- "[T]he essence of a private nuisance is its interference with the use and enjoyment of land. The activity in issue must 'disturb or prevent the comfortable enjoyment of property,' such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery." (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 [90 Cal.Rptr.2d 491], internal citations omitted.)

- "Unlike public nuisance, which is an interference with the rights of the community at large, private nuisance is a civil wrong based on disturbance of rights in land. A nuisance may be both public and private, but to proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [29 Cal.Rptr.2d 664], internal citation omitted.)

- "Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. 'So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.' " (*Koll-Irvine Center Property Owners Assn., supra,* 24 Cal.App.4th at p. 1041, internal citation omitted.)

- "The first additional requirement for recovery of damages on a nuisance theory is proof that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage.' The Restatement recognizes the same requirement as the need for proof of 'significant harm,' which it variously defines as 'harm of importance' and a 'real and appreciable invasion of the plaintiff's interests' and an invasion that is 'definitely offensive, seriously annoying or intolerable.' The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? 'If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.' This is, of course, a question of fact that turns on the circumstances of each case." (*San Diego Gas & Electric Co., supra,* 13 Cal.4th at p. 938, internal citations omitted.)

- "The second additional requirement for nuisance is superficially similar but analytically distinct: 'The interference with the protected interest must not only be substantial, but it must also be unreasonable', i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.' The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' "(*San Diego Gas & Electric Co., supra,* 13 Cal.4th at pp. 938-939, internal citations omitted.)

- "Appellant first argues that the judgment is erroneous because there is no showing that any act or conduct of his caused the damage. It is true that there is neither showing nor finding of any negligent or wrongful act or omission of defendant proximately causing the falling of the trees. But no such showing is required. If the trees remained upright, with some of their branches extending over or upon plaintiff's land, they clearly would constitute a nuisance, which defendant could be required to abate." (*Mattos v. Mattos* (1958) 162 Cal.App.2d 41, 42 [328 P.2d 269].)

- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1552 [87 Cal.Rptr.3d 602], internal citations omitted.)

- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)

- Restatement Second of Torts, section 822 provides:
One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is

either

(a) intentional and unreasonable, or

(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

- Restatement Second of Torts, section 826 provides:

  An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

  (a) the gravity of the harm outweighs the utility of the actor's conduct, or

  (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

- Restatement Second of Torts, section 827 provides:

  In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

  (a) the extent of the harm involved;

  (b) the character of the harm involved;

  (c) the social value that the law attaches to the type of use or enjoyment invaded;

  (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and

  (e) the burden on the person harmed of avoiding the harm.

- Restatement Second of Torts, section 828 provides:

  In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

  (a) the social value that the law attaches to the primary purpose of the conduct;

  (b) the suitability of the conduct to the character of the locality; and

  (c) the impracticability of preventing or avoiding the invasion.

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 153

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.05 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.13 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 (Matthew Bender)

California Civil Practice: Torts ~~(Thomas West)~~ §§ 17:1, 17:2, 17:4 (Thomson Reuters West)

VF-2006. Private Nuisance

We answer the questions submitted to us as follows:

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

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

2. **Did [*name of defendant*], by acting or failing to act, create a condition or permit a condition to exist that was harmful to health?**
   ____ 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 condition interfere with [*name of plaintiff*]'s use or enjoyment of [his/her] land?**
   ____ 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*] consent to [*name of defendant*]'s conduct?**
   ____ Yes ____ No

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

5. **Would an ordinary person have been reasonably annoyed or disturbed by [*name of defendant*]'s conduct?**
   ____ 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 conduct a substantial factor in causing harm to [*name of plaintiff*]?**
   ____ Yes ____ No

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

7. Did the seriousness of the harm outweigh the public benefit of [*name of defendant*]'s conduct?

____ Yes ____ No

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

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

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2007, December 2010, December 2011

Directions for Use

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

This form is based on CACI No. 2021, *Private Nuisance—Essential Factual Elements*.

Depending on the facts of the case, question 2 can be modified, as in element 2 of CACI No. 2021.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

2508. Failure to File Timely Administrative Complaint (Gov. Code, § 12960(d))—Plaintiff Alleges Continuing Violation

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[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit may not proceed because [***name of plaintiff***] did not timely file a complaint with the Department of Fair Employment and Housing (DFEH). A complaint is timely if it was filed within one year of the date on which [***name of defendant***]'s alleged unlawful practice occurred.**

[*Name of plaintiff***] filed a complaint with the DFEH on [***date***]. [***Name of defendant***] claims that its alleged unlawful practice that triggered the requirement to file a complaint occurred no later than [***date more than one year before DFEH complaint was filed***]. [***Name of plaintiff***] claims that [***name of defendant***]'s unlawful practice was a continuing violation so that the requirement to file a complaint was triggered no earlier than [***date less than one year before DFEH complaint was filed***].**

[*Name of defendant***]'s alleged unlawful practice is considered as continuing to occur as long as all of the following three conditions continue to exist:**

1. **Conduct occurring within a year of the date on which [***name of plaintiff***] filed [his/her] complaint with the ~~department~~ DFEH was similar or related to the conduct that occurred earlier;**

2. **The conduct was reasonably frequent; and**

3. **The conduct had not yet become permanent.**

"Permanent" in this context means that the conduct has stopped, [*name of plaintiff***] has resigned, or [***name of defendant***]'s statements and actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be futile.**

The burden is on [*name of plaintiff/name of defendant***] to prove that the complaint [was/was not] filed on time with the department.**

New June 2010; Revised December 2011

Directions for Use

Give this instruction if the plaintiff relies on the continuing-violation doctrine in order to avoid the bar of the limitation period of one year within which to file an administrative complaint. (See Gov. Code, § 12960(d).) Although the continuing-violation doctrine is labeled an equitable exception to the one-year deadline, it may involve triable issues of fact. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 723-724 [85 Cal.Rptr.3d 705].)

If the case involves multiple claims of FEHA violations, replace "lawsuit" in the opening sentence with reference to the particular claim or claims to which the continuing-violation rule may apply.

In the second paragraph, insert the date on which the administrative complaint was filed and the dates on which both sides allege that the complaint requirement was triggered. The verdict form should ask the jury to specify the date that it finds that the requirement accrued. If there are multiple claims with different continuing-violation dates, repeat this paragraph for each claim.

No case directly addresses which party has the burden of proof regarding the continuing-violation doctrine. One view is that because the statute of limitations is an affirmative defense, the defendant bears the burden of proving every aspect of the defense including disproving a continuing violation. Another view is that the continuing-violation doctrine is similar to the delayed-discovery rule, on which the plaintiff bears the burden of proof under most circumstances. (See CACI No. 455, *Statute of Limitations—Delayed Discovery*.) Give the last sentence according to how the court determines that the burden of proof should be allocated.

Sources and Authority

- Government Code section 12960 provides:

  (a) The provisions of this article govern the procedure for the prevention and elimination of practices made unlawful pursuant to Article 1 (commencing with Section 12940) of Chapter 6.

  (b) Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department. The director or his or her authorized representative may in like manner, on his or her own motion, make, sign, and file a complaint.

  (c) Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this part may file with the department a verified complaint asking for assistance by conciliation or other remedial action.

  (d) No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred, except that this period may be extended as follows:

  (1) For a period of time not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of their occurrence.

  (2) For a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer.

  (3) For a period of time, not to exceed one year from the date the person aggrieved by an alleged violation of Section 51.7 of the Civil Code becomes aware of the identity of a person liable for the

alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation.

(4) For a period of time not to exceed one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority.

- "Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department 'after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,' with an exception for delayed discovery not relevant here." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 [105 Cal.Rptr.2d 652], original italics, internal citations omitted.)

- "[Plaintiff] argued below, as she does on appeal, that her DFEH complaint was timely under an equitable exception to the one-year deadline known as the continuing violation doctrine. Under this doctrine, a FEHA complaint is timely if discriminatory practices occurring outside the limitations period continued into that period. A continuing violation exists if (1) the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period; (2) the conduct was reasonably frequent; and (3) it had not yet acquired a degree of permanence." (*Dominguez, supra,* 168 Cal.App.4th at pp. 720–721, internal citations omitted.)

- " '[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [¶] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823–824 [111 Cal.Rptr.2d 87, 29 P.3d 175], internal citations omitted.)

- "A continuing violation may be established by demonstrating 'a company wide policy or practice' or 'a series of related acts against a single individual.' 'The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide

basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions." ' The plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." … The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.' " (*Morgan, supra,* 88 Cal.App.4th at p. 64, internal citations omitted.)

- "[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [he] was being discriminated against at the time the earlier events occurred." (*Morgan, supra,* 88 Cal.App.4th at p. 65.)

- "The Supreme Court has extended the continuing violation doctrine to retaliation claims. And the doctrine also applies to racial harassment claims. Indeed, as we observed in *Morgan v. Regents of University of California, supra,* 88 Cal.App.4th 52, 65: 'Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.' " (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 270 [100 Cal.Rptr.3d 296], internal citations omitted.)

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 948

3 Witkin, California Procedure (5th ed. 2008) Actions, § 564

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:561.1, 7:975 (The Rutter Group) ~~¶¶ 7:561.1, 7:975, 16:85~~

Chin, et al., California Practice Guide: Employment Litigation, Ch. 16-A, *Failure To Exhaust Administrative Remedies*, ¶ 16:85 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.51[1] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.59 (Matthew Bender)

2526. Affirmative Defense—Avoidable Consequences Doctrine (Sexual Harassment by a Supervisor)

If [*name of plaintiff*] proves that [*name of supervisor*] sexually harassed [him/her], [*name of employer defendant*] is responsible for [*name of plaintiff*]'s harm caused by the harassment. However, [~~*Name name of employer defendant*~~] claims that [*name of plaintiff*] could have avoided some or all of the harm with reasonable effort. To succeed, [*name of employer defendant*] must prove all of the following:

1. **That [*name of employer defendant*] took reasonable steps to prevent and correct workplace sexual harassment;**

2. **That [*name of plaintiff*] unreasonably failed to use ~~[[*name of defendant*]'s harassment complaint procedures/~~the preventive and corrective measures for sexual harassment that [*name of employer defendant*] provided~~[~~; and**

3. **That the reasonable use of [*name of employer defendant*]'s procedures would have prevented some or all of [*name of plaintiff*]'s harm.**

You should consider the reasonableness of [*name of plaintiff*]'s actions in light of the circumstances facing [him/her] at the time, including [his/her] ability to report the conduct without facing undue risk, expense, or humiliation.

If you decide that [*name of employer defendant*] has proved this claim, you should not include in your award of damages the amount of damages that [*name of plaintiff*] could have reasonably avoided.

New April 2004; Revised December 2011

Directions for Use

For an instruction that may also be given on failure to mitigate damages generally, see CACI No. 3930, *Mitigation of Damages (Personal Injury)*.

Sources and Authority

- "[W]e conclude that under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. But strict liability is not absolute liability in the sense that it precludes all defenses. Even under a strict liability standard, a plaintiff's own conduct may limit the amount of damages recoverable or bar recovery entirely." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [6 Cal.Rptr.3d 441, 79 P.3d 556], internal citations omitted.)

- "Under the avoidable consequences doctrine as recognized in California, a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure. The reasonableness of the injured party's efforts must be judged in light of the situation existing at the time and not with the benefit of hindsight. 'The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law.' The defendant bears the burden of pleading and proving a defense based on the avoidable consequences doctrine." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1043, internal citations omitted.)

- "Although courts explaining the avoidable consequences doctrine have sometimes written that a party has a 'duty' to mitigate damages, commentators have criticized the use of the term 'duty' in this context, arguing that it is more accurate to state simply that a plaintiff may not recover damages that the plaintiff could easily have avoided." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1043, internal citations omitted.)

- "We hold ... that in a FEHA action against an employer for hostile environment sexual harassment by a supervisor, an employer may plead and prove a defense based on the avoidable consequences doctrine. In this particular context, the defense has three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1044.)

- "This defense will allow the employer to escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1044, internal citations omitted.)

- "If the employer establishes that the employee, by taking reasonable steps to utilize employer-provided complaint procedures, could have caused the harassing conduct to cease, the employer will nonetheless remain liable for any compensable harm the employee suffered before the time at which the harassment would have ceased, and the employer avoids liability only for the harm the employee incurred thereafter." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1045, internal citations omitted.)

- "We stress also that the holding we adopt does not demand or expect that employees victimized by a supervisor's sexual harassment must always report such conduct immediately to the employer through internal grievance mechanisms. The employer may lack an adequate antiharassment policy or adequate procedures to enforce it, the employer may not have communicated the policy or procedures to the victimized employee, or the employee may reasonably fear reprisal by the harassing supervisor or other employees. Moreover, in some cases an employee's natural feelings of embarrassment, humiliation, and shame may provide a sufficient excuse for delay in reporting acts of sexual harassment by a supervisor." (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1045.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-D, *Employer Liability For Workplace Harassment*, ¶¶ 10:360, 10:361, 10:365–10:367, 10:371, 10:375 (The Rutter Group) ~~¶¶ 10:360–10:361, 10:365–10:367, 10:371, 10:375~~

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.81[7][c], 41.92A (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.36[2][a], 115.54[3] (Matthew Bender)

2804. Removal or Noninstallation of Power Press Guards—Essential Factual Elements (Lab. Code, § 4558)

A "power press" is a machine that forms materials with a die in the manufacture of other products. A "die" is a tool that imparts shape to material by pressing against or through the material. A "guard" is any device that keeps a worker's hands or other parts of the body outside the point of operation.

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] [removed/failed to install] guards on a power press. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [employer/supervisor];**

2. **That [***name of plaintiff***] was injured while operating a power press;**

3. **That [***name of defendant***] gave an affirmative instruction to [remove/not install] the guards before [***name of plaintiff***]'s injury;**

4. **That when [***name of defendant***] did so, [he/she/it] knew ~~[authorized the [removal of/failure to install]] the guards, knowing~~ that ~~this~~ the lack of guards would create a probability of serious injury or death;**

~~4~~5. **That the power press's [designer/fabricator/assembler] ~~had~~ [designed the press with guards/installed guards on the press/required guards be attached/specified that guards be attached] and ~~had~~ directly or indirectly conveyed this information to [***name of defendant***]; and**

~~5~~6. **That [***name of defendant***]'s [removal/failure to install] the guards was a substantial factor in causing [***name of plaintiff***]'s harm.**

~~**A "power press" is a machine that forms materials with a die in the manufacture of other products. A "die" is a tool that imparts shape to material by pressing against or through the material. A "guard" is any device that keeps a worker's hands or other parts of the body outside the point of operation.**~~

New September 2003; Revised December 2011

Directions for Use

This instruction is ~~intended~~ for use ~~in cases where the employer is the defendant and~~ if the plaintiff alleges that the ~~case~~ claim for injury or death falls outside of the workers' compensation exclusivity rule because the employer removed or failed to install power press guards. (See Lab. Code § 4558.)

Sources and Authority

- Labor Code section 4558 provides:

(a) As used in this section:

(1) "Employer" means a named identifiable person who is, prior to the time of the employee's injury or death, an owner or supervisor having managerial authority to direct and control the acts of employees.

(2) "Failure to install" means omitting to attach a point of operation guard either provided or required by the manufacturer, when the attachment is required by the manufacturer and made known by him or her to the employer at the time of acquisition, installation, or manufacturer-required modification of the power press.

(3) "Manufacturer" means the designer, fabricator, or assembler of a power press.

(4) "Power press" means any material-forming machine that utilizes a die which is designed for use in the manufacture of other products.

(5) "Removal" means physical removal of a point of operation guard which is either installed by the manufacturer or installed by the employer pursuant to the requirements or instructions of the manufacturer.

(6) "Specifically authorized" means an affirmative instruction issued by the employer prior to the time of the employee's physical injury or death, but shall not mean any subsequent acquiescence in, or ratification of, removal of a point of operation safety guard.

(b) An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death.

(c) No liability shall arise under this section absent proof that the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer. Proof of conveyance of this information to the employer by the manufacturer may come from any source.

(d) No right of action for contribution or indemnity by any defendant shall exist against the employer; however, a defendant may seek contribution after the

employee secures a judgment against the employer pursuant to the provisions of this section if the employer fails to discharge his or her comparative share of the judgment.

- "The obvious legislative intent and purpose in section 4558 is to protect workers from employers who wilfully remove or fail to install appropriate guards on large power tools. Many of these power tools are run by large mechanical motors or hydraulically. These sorts of machines are difficult to stop while they are in their sequence of operation. Without guards, workers are susceptible to extremely serious injuries. For this reason, the Legislature passed section 4558, subdivision (b), which subjects employers to legal liability for removing guards from powerful machinery where the manufacturer has designed the machine to have a protective guard while in operation." (*Ceja v. J.R. Wood, Inc.* (1987) 196 Cal.App.3d 1372, 1377 [242 Cal.Rptr. 531], internal citation omitted.)

- "A cause of action under section 4558 includes the following elements: (a) that the injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press; and (b) that this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death." (*Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1516 [285 Cal.Rptr. 385].)

- "From the plain language of section 4558, it is clear that an exception to the exclusivity of workers' compensation only arises for a power press injury where the employer has been expressly informed by the manufacturer that a point of operation guard is required, where the employer then affirmatively removes or fails to install such guard, and where the employer does so under conditions known by the employer to create a probability of serious injury or death. Absent facts which would establish the employer's knowledge or action regarding the absence of a point of operation guard on a power press, the incident would not come within the exception of section 4558, and an employee would not be entitled to bring 'an action at law for damages' arising from the power press injury. If such action cannot be brought on its own where the facts fail to establish all the elements of the power press exception under section 4558, it follows that individual causes of action against an employer which do not meet the requirements of section 4558 cannot be bootstrapped onto a civil action for damages which is properly brought under section 4558." (*Award Metals, Inc. v. Superior Court* (1991) 228 Cal.App.3d 1128, 1134 [279 Cal.Rptr. 459].)

- "This statutory definition embraces four elements. 'The power press itself is a machine. It is a machine that forms materials. The formation of materials is effectuated with a die. Finally, the materials being formed with the die are being formed in the manufacture of other products.' " (*McCoy v. Zahniser Graphics, Inc.* (1995) 39 Cal.App.4th 107, 110 [45 Cal.Rptr.2d 871], internal citation omitted.)

- "In all its pertinent uses, then, the term 'die' refers to a tool that imparts shape to material by pressing or impacting against or through the material, that is, by punching, stamping or extruding; in none of its uses does the term refer to a tool that imparts shape by cutting along the material in the manner of a blade." (*Rosales v. Depuy Ace Medical Co.* (2000) 22 Cal.4th 279, 285 [92 Cal.Rptr.2d 465, 991 P.2d 1256].)

- "[U]nder subdivisions (a)(2) and (c), liability for 'failure to install' a point of operation guard under section 4558 must be predicated upon evidence that the 'manufacturer' either provided or required such a device, which was not installed by the employer." (*Flowmaster, Inc. v. Superior Court* (1993) 16 Cal.App.4th 1019, 1027 [20 Cal.Rptr.2d 666].)

- "We find that the term guard, as used in section 4558, is meant to include the myriad apparatus which are available to accomplish the purpose of keeping the hands of workers outside the point of operation whenever the ram is capable of descending. Because we find that the term guard is not a specific legal term of art, we hold that the trial court properly provided the jury with a dictionary definition of the term guard to explain its meaning under section 4558." (*Bingham v. CTS Corp.* (1991) 231 Cal.App.3d 56, 65 [282 Cal.Rptr. 161], internal citation omitted.)

- "Physical removal, for the purpose of liability under section 4558, means to render a safeguarding apparatus, whether a device or point of operation guard, dysfunctional or unavailable for use by the operator for the particular task assigned." (*Bingham, supra*, 231 Cal.App.3d at p. 68.)

- "Nothing in the language, history or objectives underlying section 4558 convinces us that the Legislature intended that section 4558 would immunize employers who design, manufacture and install their own power presses without point of operation guards. A manufacturer is defined broadly in section 4558 as a 'designer, fabricator, or assembler of a power press.' An 'employer' is not excluded from the definition of a manufacturer, nor would doing so promote the objectives of the statute." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at pp. 1029–1030, internal citation omitted.)

- "The element of knowledge requires 'actual awareness' by the employer-rather than merely constructive knowledge-that a point of operation guard has either been provided for or is required to prevent the probability of serious injury or death." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at pp. 1031-1032, internal citation and footnote omitted.)

- "Liability under section 4558 can only be imposed if the employer fails to use or removes a safety device required by the manufacturer of the press. Essentially, the culpable conduct is the employer's ignoring of the manufacturer's safety directive ... . 'From the plain language of section 4558, it is clear that an exception to the exclusivity of workers' compensation only arises for a power press injury where the employer has been expressly informed by the manufacturer that a point of operation guard is required, where the employer then affirmatively removes or fails to install such guard, and where the employer does so under conditions known by the employer to create a probability of serious injury or death.' " (*Aguilera v. Henry Soss & Co.* (1996) 42 Cal.App.4th 1724, 1730 [50 Cal.Rptr.2d 477], internal citation omitted.)

- "As defined in the statute, 'specifically authorized' requires an 'affirmative instruction' by the employer, as distinguished from mere acquiescence in or ratification of an act or omission." (*Mora v. Hollywood Bed & Spring* (2008) 164 Cal.App.4th 1061, 1068 [79 Cal.Rptr.3d 640].)

- "Specific authorization demands evidence of an affirmative instruction or other wilful acts on the part of the employer despite actual knowledge of the probability of serious harm." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at p. 1032, internal citation and footnote omitted.)

- "[I]mputation solely because of an agency relationship cannot bring an employer within the reach of section 4558. Only an employer who directly authorized by an affirmative instruction the removal or failure to install a guard may be sued at law under section 4558." (*Watters Associates v. Superior Court* (1990) 218 Cal.App.3d 1322, 1325 [267 Cal.Rptr. 696].)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 49–51, 102

Chin et al., California Practice Guide: Employment Litigation, Ch. 13-I, *Collateral (Non-OSH) Actions Relating To Occupational Safety And Health*, ¶ 13:953 (The Rutter Group) ~~¶¶ 13:953, 15:572~~

Chin, et al., California Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption*, ¶ 15:572 (The Rutter Group)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.20 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.12[1][e] (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.11[1][f] (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.314[5] (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

VF-2803. Removal or Noninstallation of Power Press Guards (Lab. Code, § 4558)

We answer the questions submitted to us as follows:

1. Was [*name of defendant*] [*name of plaintiff*]'s [employer/supervisor]?
____ Yes ____ No

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

2. Was [*name of plaintiff*] injured while operating a power press?
____ 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 [*name of defendant*] gIve an affirmative instruction to [remove/not install] the guards before [*name of plaintiff*]'s injury~~[remove/fail to install] [authorize the [removal of/failure to install]] the guards knowing that this would create a probability of serious injury or death~~?
____ Yes ____ No

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

4. When [*name of defendant*] did so, did [he/she/it] actually know that the lack of guards would create a probability of serious injury or death?

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.

~~4~~5. Did the power press's [designer/fabricator/assembler] [design the press with guards/install guards on the press/require guards be attached/specify that guards be attached] and directly or indirectly convey this information to [*name of defendant*]?
____ Yes ____ No

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

~~5~~6. Was [*name of defendant*]'s [removal/failure to install] the guards a substantial factor

in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question ~~5~~ 6 is yes, then answer question ~~6~~7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~6~~7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2011

Directions for Use

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

This verdict form is based on CACI No. 2804, *Removal or Noninstallation of Power Press Guards—Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages 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*.

3009. Local Government Liability—Failure to Train—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [he/she] was deprived of [his/her] civil rights as a result of [***name of local governmental entity***]'s failure to train its [officers/employees]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of local governmental entity***]'s training program was not adequate to train its [officers/employees];**

2. **That [***name of local governmental entity***] knew because of a pattern of similar violations[, or it should have been obvious to it,] that the inadequate training program was likely to result in a deprivation of the right [***specify right violated***];**

3. **That [***name of officer or employee***] violated [***name of plaintiff***]'s right [***specify right***]; and**

4. **That the failure to provide adequate training was the cause of the deprivation of [***name of plaintiff***]'s right [***specify right***].**

New September 2003; Revised December 2010, December 2011

Directions for Use

Give this instruction if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the entity's failure to adequately train its officers or employees. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements,* and the instructions on the particular constitutional violation alleged.

The inadequate training must amount to a deliberate indifference to constitutional rights. (*Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1249.) Element 2 expresses this deliberate-indifference standard. Deliberate indifference requires proof of a pattern of violations in all but a few very rare situations in which the unconstitutional consequences of failing to train are patently obvious. (See *Connick v. Thompson* (2011) – U.S. --, -- [131 S.Ct. 1350, 1361, 179 L.Ed.2d 417].) Delete the bracketed language in element 2 unless the facts present the possibility of liability based on patently obvious violations.

For other theories of liability against a local governmental entity, see CACI No. 3007, *Local Government Liability—Policy or Custom—Essential Factual Elements,* and CACI No. 3010, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- Title 42 United States Code section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ... ."

- "We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell* and *Polk County v. Dodson*, that a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.' Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." (*City of Canton v. Harris* (1989) 489 U.S. 378, 388–389 [109 S.Ct. 1197, 103 L.Ed.2d 412], internal citations and footnote omitted.)

- "In *Canton*, the Court left open the possibility that, 'in a narrow range of circumstances,' a pattern of similar violations might not be necessary to show deliberate indifference. The Court posed the hypothetical example of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force. Given the known frequency with which police attempt to arrest fleeing felons and the 'predictability that an officer lacking specific tools to handle that situation will violate citizens' rights,' the Court theorized that a city's decision not to train the officers about constitutional limits on the use of deadly force could reflect the city's deliberate indifference to the 'highly predictable consequence,' namely, violations of constitutional rights. The Court sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." (*Connick, supra*, 131 S.Ct. at p. 1361], internal citations omitted.)

- "To impose liability on a local government for failure to adequately train its employees, the government's omission must amount to 'deliberate indifference' to a constitutional right. This standard is met when 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.' For example, if police activities in arresting fleeing felons 'so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers,' then the city's failure to train may constitute 'deliberate indifference.' " (*Clouthier, supra,* 591 F.3d at p. 1249, internal citations omitted.)

- "It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective." (*Farmer v. Brennan* (1994) 511 U.S. 825, 841 [114 S.Ct. 1970, 128 L.Ed.2d 811].)

- "To prove deliberate indifference, the plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation." (*Gibson v. County of Washoe* (2002) 290 F.3d 1175, 1186, internal citation omitted.)

- " 'The issue in a case like this one ... is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." ' Furthermore, the inadequacy in the city's training program must be closely related to the 'ultimate injury,' such that the injury would have been avoided had the employee been trained under a program that was not deficient in the identified respect." (*Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 526 [27 Cal.Rptr.2d 433], internal citations omitted.)

- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)

- "Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]'s injuries. [Plaintiff]'s recovery, if any, based upon a *Monell* claim would be limited to nominal damages." (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 822

17A Moore's Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 123.23 (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3017. Supervisor Liability for Acts of Subordinates (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of supervisor defendant*] is personally liable for [his/her] harm. In order to establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of supervisor defendant*] knew, or in the exercise of reasonable diligence should have known, of [*name of subordinate employee defendant*]'s wrongful conduct;**

2. **That [*name of supervisor defendant*] knew that the wrongful conduct created a substantial risk of harm to [*name of plaintiff*];**

~~2.~~3. **That [*name of supervisor defendant*] disregarded that risk by [expressly approving/impliedly approving/ [or] failing to take adequate action to prevent] the wrongful conduct;~~That [*name of supervisor defendant*]'s response was so inadequate that it showed deliberate indifference to, or tacit authorization of, [*name of employee defendant*]'s conduct~~; and**

~~3.~~4. **That [*name of supervisor defendant*]'s ~~inaction~~ conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New April 2007; Renumbered from CACI No. 3013 December 2010: Revised December 2011

Directions for Use

Read this instruction in cases in which a supervisor is alleged to be personally liable for the violation of the plaintiff's civil rights under Title 42 United States Code section 1983.

Sources and Authority

- "A 'supervisory official may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates. … [T]hat liability is not premised upon *respondeat superior* but upon "a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict." ' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 209 [73 Cal.Rptr.2d 571], internal citations omitted.)

- "[W]hen a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates." (*Starr v. Baca* (9th Cir. 2011) ~~633~~ -- F.3d ~~1191~~--, ~~1196~~--.) 2011 US.App. LEXIS 15283

- "[A] plaintiff may state a claim against a supervisor for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates. ~~[W]here the applicable constitutional standard is deliberate indifference, a plaintiff may state a claim for supervisory liability based upon the supervisor's knowledge of and~~

~~acquiescence in unconstitutional conduct by others.~~" (*Starr, supra,* ~~633 --~~ F.3d at p. ~~1196--~~.)

- "To establish supervisory liability under section 1983, [plaintiff] was required to prove: (1) the supervisor had actual or constructive knowledge of [defendant's] wrongful conduct; (2) the supervisor's response ' " was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices' " '; and (3) the existence of an 'affirmative causal link' between the supervisor's inaction and [plaintiff's] injuries." (*Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1279–1280 [48 Cal.Rptr.3d 715], internal citations omitted.)

- "We have found supervisorial liability under § 1983 where the supervisor 'was personally involved in the constitutional deprivation or a sufficient causal connection exists between the supervisor's unlawful conduct and the constitutional violation.' Thus, supervisors 'can be held liable for: 1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others.' " (*Edgerly v. City & County of San Francisco* (9th Cir. 2010) 599 F.3d 946, 961, internal citations omitted.)

- "A defendant may be held liable as a supervisor under § 1983 'if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the ~~'~~supervisor's wrongful conduct and the constitutional violation.' '[A] plaintiff must show the supervisor breached a duty to plaintiff which was the proximate cause of the injury. The law clearly allows actions against supervisors under section 1983 as long as a sufficient causal connection is present and the plaintiff was deprived under color of law of a federally secured right.' " (*Starr, supra,* -- F.3d at p. --, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 347

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

2 Civil Rights Actions, Ch. 7, *Deprivation of Rights Under Color of State Law—General Principles*, ¶ 7.10 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.20[4] (Matthew Bender)

VF-3006. Public Entity Liability—Failure to Train (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Was [***name of local governmental entity***]'s training program inadequate to train its [officers/employees] to properly handle usual and recurring situations?**
   ____ 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 local governmental entity***] know[, or should it have been obvious to it,] that the inadequate training program was likely to result in a deprivation of the right [***specify right violated***]?**
   ____ 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 [***name of officer or employee***] violate [***name of plaintiff***]'s right [***specify right***]?**
   ____ 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. **Was the failure to provide adequate training the cause of the deprivation of [***name of plaintiff***]'s right [***specify right***]?**
   ____ 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. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other past economic loss	**$ _____]**

   Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2011, December 2011

Directions for Use

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

This verdict form is based on CACI No. 3009, *Local Government Liability—Failure to Train—Essential Factual Elements.* It should be given with CACI No. VF-3000, *Violation of Federal Civil Rights—In General,* to impose liability on the governmental entity for the acts of its officer or employee.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages 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*.

3200. Failure to Repurchase or Replace Consumer Good After Reasonable Number of Repair Opportunities—Essential Factual Elements (Civ. Code, § 1793.2(d))

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of defendant***]'s failure to repurchase or replace [a/an] [***consumer good***] after a reasonable number of repair opportunities. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought [a/an] [***consumer good***] [from/distributed by/manufactured by] [***name of defendant***];**

2. **That [***name of defendant***] gave [***name of plaintiff***] a warranty by [***insert at least one of the following:***]**

   [making a written statement that [*describe alleged express warranty***];] [or]**

   [showing [him/her] a sample or model of the [*consumer good***] and representing, by words or conduct, that [his/her] [***consumer good***] would match the quality of the sample or model;]**

3. **That the [***consumer good***] [***insert at least one of the following:***]**

   [did not perform as stated for the time specified;] [or]

   [did not match the quality [of the [sample/model]] [or] [as set forth in the written statement];]

4. **[That [***name of plaintiff***] delivered the [***consumer good***] to [***name of defendant***] or its authorized repair facilities for repair;]**

   [*or***]**

   [That [*name of plaintiff***] notified [***name of defendant***] in writing of the need for repair because [he/she] reasonably could not deliver the [***consumer good***] to [***name of defendant***] or its authorized repair facilities because of the [size and weight/method of attachment/method of installation] [or] [the nature of the defect] of the [***consumer good***]]; [and]**

5. **That [***name of defendant***] or its representative failed to repair the [***consumer good***] to match the [written statement/represented quality] after a reasonable number of opportunities; [and]**

6. **[That [***name of defendant***] did not replace the [***consumer good***] or reimburse [***name of plaintiff***] an amount of money equal to the purchase price of the [***consumer good***], less the value of its use by [***name of plaintiff***] before discovering the defect[s].]**

[A written statement need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant*] to have specifically intended to create a warranty. A warranty is not created if [*name of defendant*] simply stated the value of the [*consumer good*] or gave an opinion about the [*consumer good*]. General statements concerning customer satisfaction do not create a warranty.]

New September 2003; Revised April 2007, December 2007, December 2011

Directions for Use

An instruction on the definition of "consumer good" may be necessary if that issue is disputed. Civil Code section 1791(a) provides: " 'Consumer goods' means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. 'Consumer goods' shall include new and used assistive devices sold at retail."

Select the alternative in element 4 that is appropriate to the facts of the case.

Regarding element 4, if the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute, Civil Code section 1793.2(c), is unclear on this point.

Depending on the circumstances of the case, further instruction on element 6 may be needed to clarify how the jury should calculate "the value of its use" during the time before discovery of the defect.

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] [did not match the quality [of the [sample/model]]/as set forth in the written statement];

See also CACI No. 1243, *Notification/Reasonable Time*.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect in the [*consumer good*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of consumer goods.

See also CACI No. 3202, "*Repair Opportunities" Explained.*

Sources and Authority

- Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an ... express warranty ... may bring an action for the recovery of damages and other legal and equitable relief."

- Civil Code section 1791.2 provides:

    (a) "Express warranty" means:

        (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or

        (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.

    (b) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.

    (c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.

- Civil Code section 1795 provides, in part: "If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer."

- Civil Code section 1793.2(d) provides, in part:

    (1) Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to discovery of the nonconformity.

    (2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle ... or promptly make restitution to the buyer ... . However, the

buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle.

- Under Civil Code section 1793.1(a)(2), if the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect.

- Civil Code section 1793.2(c) provides, in part: "The buyer shall deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section."

- Civil Code section 1795.5 provides, in part: "Notwithstanding the provisions ... defining consumer goods to mean 'new' goods, the obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers," with limited exceptions provided by statute.

- Civil Code section 1790.3 provides: "The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail."

- Civil Code section 1793.1(a)(2) provides, in part: "The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed."

- Civil Code section 1795.6 provides, in part:

  (a) Every warranty period relating to an ... express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

  (b) Notwithstanding the date or conditions set for the expiration of the warranty

period, such warranty period shall not be deemed expired if ... : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

- " 'The Song-Beverly Act is a remedial statute designed to protect consumers who have purchased products covered by an express warranty. … One of the most significant protections afforded by the act is … that "if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer … ." …' In providing these remedies, the Legislature has not required that the consumer maintain possession of the goods at all times. All that is necessary is that the consumer afford the manufacturer a reasonable number of attempts to repair the goods to conform to the applicable express warranties." (*Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 191 [122 Cal.Rptr.3d 497], internal citation omitted.)

- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties. ... [¶] [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)

- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra*, 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)

- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that ... a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 52, 56, 314–324

1 California UCC Sales and Leases (Cont.Ed.Bar) Warranties, §§ 3.4, 3.8, 3.15, 3.87

2 California UCC Sales and Leases (Cont.Ed.Bar) Prelitigation Remedies, § 17.70

2 California UCC Sales and Leases (Cont.Ed.Bar) Litigation Remedies, § 18.25

2 California UCC Sales and Leases (Cont.Ed.Bar) Leasing of Goods, § 19.38

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.42, 502.53 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.100 et seq. (Matthew Bender)

5 California Civil Practice: Business Litigation. ~~(Thomson West)~~ §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27 (Thomson Reuters West)

3201. Failure to Promptly ~~Purchase~~ Repurchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities—Essential Factual Elements (Civ. Code, § 1793.2(d))

[*Name of plaintiff***] claims that [***name of defendant***] failed to promptly repurchase or replace [a/an] [***new motor vehicle***] after a reasonable number of repair opportunities. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [bought/leased] [a/an] [***new motor vehicle***] [from/distributed by/manufactured by] [***name of defendant***];**

2. **That [***name of defendant***] gave [***name of plaintiff***] a written warranty that [***describe alleged express warranty***];**

3. **That the vehicle had [a] defect[s] that [was/were] covered by the warranty and that substantially impaired its use, value, or safety to a reasonable person in [***name of plaintiff***]'s situation;**

4. **[That [***name of plaintiff***] delivered the vehicle to [***name of defendant***] or its authorized repair facility for repair of the defect[s];]**

   [*or***]**

   [That [*name of plaintiff***] notified [***name of defendant***] in writing of the need for repair of the defect[s] because [he/she] reasonably could not deliver the vehicle to [***name of defendant***] or its authorized repair facility because of the nature of the defect[s];]**

5. **That [***name of defendant***] or its authorized repair facility failed to repair the vehicle to match the written warranty after a reasonable number of opportunities to do so; and**

6. **That [***name of defendant***] did not promptly replace or buy back the vehicle.**

[It is not necessary for [*name of plaintiff***] to prove the cause of a defect in the [***new motor vehicle***].]**

[A written warranty need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. A warranty is not created if [***name of defendant***] simply stated the value of the vehicle or gave an opinion about the vehicle. General statements concerning customer satisfaction do not create a warranty.]**

New September 2003; Revised February 2005, December 2005, April 2007, December 2007, December 2011

Directions for Use

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*new motor vehicle*] had a defect covered by the warranty;

See also CACI No. 1243, *Notification/Reasonable Time*.

Regarding element 4, if the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute, Civil Code section 1793.2(c), is unclear on this point.

Include the bracketed sentence preceding the final bracketed paragraph if appropriate to the facts. The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)-(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of a motor vehicle.

See also CACI No. 3202, "*Repair Opportunities" Explained*, CACI No. 3203, *Reasonable Number of Repair Opportunities—Rebuttable Presumption*, and CACI No. 3204, *"Substantially Impaired" Explained*.

Sources and Authority

- Under Civil Code section 1793.1(a)(2), if the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect.

- Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an ... express warranty ... may bring an action for the recovery of damages and other legal and equitable relief."

- Civil Code section 1790.3 provides: "The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail."

- Civil Code section 1791.2 provides:

  (a) "Express warranty" means:

  (1) A written statement arising out of a sale to the consumer of a consumer

good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or

(2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.

(b) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.

(c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.

- " 'The Song-Beverly Act is a remedial statute designed to protect consumers who have purchased products covered by an express warranty. … One of the most significant protections afforded by the act is … that "if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer … ." …' In providing these remedies, the Legislature has not required that the consumer maintain possession of the goods at all times. All that is necessary is that the consumer afford the manufacturer a reasonable number of attempts to repair the goods to conform to the applicable express warranties." (*Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 191 [122 Cal.Rptr.3d 497], internal citation omitted.)

- Civil Code section 1795 provides, in part: "If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer."

- Civil Code section 1793.22(e)(2) provides, in part: " 'New motor vehicle' means a new motor vehicle that is bought or used primarily for personal, family, or household purposes. 'New motor vehicle' also means a new motor vehicle ... that is bought or used primarily for business purposes by a person ... or any ... legal entity, to which not more than five motor vehicles are registered in this state. 'New motor vehicle' includes the chassis, chassis cab, and that portion of a motor home devoted to its propulsion ... , a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty."

- Civil Code section 1793.2(d)(2) provides, in part: "If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle ... or promptly make restitution to the buyer. ... However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle."

- Civil Code section 1793.2(c) provides, in part: "The buyer shall deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section."

- Civil Code section 1793.1(a)(2) provides, in part: "The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed."

- Civil Code section 1795.6 provides, in part:

    (a) Every warranty period relating to an ... express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

    (b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if ... : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties. ... [¶] [T]he purpose of the Act has been to provide broad relief to

purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)

- "A plaintiff pursuing an action under the Act has the burden to prove that (1) the vehicle had a nonconformity covered by the express warranty that substantially impaired the use, value or safety of the vehicle (the nonconformity element); (2) the vehicle was presented to an authorized representative of the manufacturer of the vehicle for repair (the presentation element); and (3) the manufacturer or his representative did not repair the nonconformity after a reasonable number of repair attempts (the failure to repair element)." (*Oregel, supra,* 90 Cal.App.4th at p. 1101.)

- The Song-Beverly Act does not apply unless the vehicle was purchased in California. (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 490 [30 Cal.Rptr.3d 823, 115 P.3d 98].)

- "Under well-recognized rules of statutory construction, the more specific definition [of 'new motor vehicle'] found in the current section 1793.22 governs the more general definition [of 'consumer goods'] found in section 1791." (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 126 [41 Cal.Rptr.2d 295].)

- " 'Nonconformity' is defined as 'a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.' The term is similar to what the average person would understand to be a 'defect.' " (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249 [40 Cal.Rptr.2d 576], internal citation omitted; see also *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 801, fn.11 [50 Cal.Rptr.3d 731] [nonconformity can include entire complex of related conditions].)

- "The issue of whether the problems constituted substantial impairment is one for the trier of fact." (*Schreidel, supra,* 34 Cal.App.4th at p. 1250.)

- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra*, 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)

- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that ... a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

- "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.' " (*Oregel, supra,* 90 Cal.App.4th at p. 1103, original italics, internal citation omitted.)

- "[T]he Act does not *require* consumers to take any affirmative steps to secure relief for the failure of a manufacturer to service or repair a vehicle to conform to applicable warranties—other than, of course, permitting the manufacturer a reasonable opportunity to repair the vehicle. ... In reality, … , the manufacturer seldom on its own initiative offers the consumer the options available under the Act: a replacement vehicle or restitution. Therefore, as a practical matter, the consumer will likely request replacement or restitution. But the consumer's request is not mandated by any provision in the Act. Rather, the consumer's request for replacement or restitution is often prompted by the manufacturer's unforthright approach and stonewalling of fundamental warranty problems." (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1050 [104 Cal.Rptr.3d 853], original italics.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 52, 56, 314–324

1 California UCC Sales and Leases (Cont.Ed.Bar) Warranties, §§ 7.4, 7.8, 7.15, 7.87; *id.,* Prelitigation Remedies, § 13.68; *id.*, Litigation Remedies, § 14.25, *id.*, Division 10: Leasing of Goods, § 17.31

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43[5][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.104 (Matthew Bender)

5 California Civil Practice: Business Litigation. ~~(Thomson West)~~ §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27 (Thomson Reuters West)

3205. Failure to Begin Repairs Within Reasonable Time or to Complete Repairs Within 30 Days—Essential Factual Elements (Civ. Code, § 1793.2(b))

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] failed to [begin repairs on the [***consumer good/new motor vehicle***] in a reasonable time/ [or] repair the [***consumer good/new motor vehicle***] within 30 days]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [bought/leased] [a/an] [***consumer good/new motor vehicle***] [from/distributed by/manufactured by] [***name of defendant***];**

2. **That [***name of defendant***] gave [***name of plaintiff***] a written warranty that [***describe alleged express warranty***];**

3. **That the [***consumer good/new motor vehicle***] had [a] defect[s] that [was/were] covered by the warranty;**

4. **That [***name of defendant***] or its authorized repair facility failed to [begin repairs within a reasonable time/ [or] complete repairs within 30 days so as to conform to the applicable warranties].**

New December 2011

Directions for Use

Give this instruction for the defendant's alleged breach of Civil Code section 1793.2(b), which requires that repairs be commenced within a reasonable time and finished within 30 days unless the buyer otherwise agrees in writing. This instruction assumes that the statute contains two separate requirements, one for starting repairs and one for finishing them, either of which would be a violation.

Sources and Authority

- Civil Code section 1793.2(b) provides as follows: "Where those service and repair facilities are maintained in this state and service or repair of the goods is necessary because they do not conform with the applicable express warranties, service and repair shall be commenced within a reasonable time by the manufacturer or its representative in this state. Unless the buyer agrees in writing to the contrary, the goods shall be serviced or repaired so as to conform to the applicable warranties within 30 days. Delay caused by conditions beyond the control of the manufacturer or its representatives shall serve to extend this 30-day requirement. Where delay arises, conforming goods shall be tendered as soon as possible following termination of the condition giving rise to the delay."

- Civil Code section 1794(a) provides as follows: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and

equitable relief."

- "[T]he fifth cause of action in each complaint clearly stated a cause of action under Civil Code section 1794 … . Plaintiff had pleaded that he was such a buyer who was injured by a 'willful' violation of Civil Code section 1793.2, subdivision (b) which in pertinent part requires that with respect to consumer goods sold in this state for which the manufacturer has made an express warranty and service and repair facilities are maintained in this state (undisputed herein) and 'repair of the goods is necessary because they do not conform with the applicable express warranties, service and repair shall be commenced within a reasonable time by the manufacturer or its representative.' " (*Gomez v. Volkswagen of Am.* (1985) 169 Cal.App.3d 921, 925 [215 Cal.Rptr. 507], footnote omitted.)

- "[Defendant] also argues it was incumbent on [plaintiff] to prove not only that the car leaked oil but also to show the cause of the leak, and that he failed to meet this burden because he produced no expert testimony proving the cause of the leak. However, the statute requires only that [plaintiff] prove the car did not conform to the express warranty, and proof that there was a persistent leak that [dealer] could not locate or repair suffices. We do not interpret the statute as depriving a consumer of a remedy if he cannot do what the manufacturer, with its presumably greater expertise, was incapable of doing, i.e. identify the source of the leak." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 317 et seq.

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.43, 502.161 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.103 (Matthew Bender)

30 California Legal Forms, Ch. 92, *Service Contracts*, § 92.52 (Matthew Bender)

3240. Reimbursement Damages—Consumer Goods (Civ. Code, §§ 1793.2(d)(1), 1794(b))

If you decide that [*name of defendant*] or its representative failed to repair or service the [*consumer good*] to match the [written warranty/represented quality] after a reasonable number of opportunities, then [*name of plaintiff*] is entitled to be reimbursed for the purchase price of the [*consumer good*], less the value of its use by [*name of plaintiff*] before discovering the defect.

[*Name of plaintiff*] must prove the amount of the purchase price, and [*name of defendant*] must prove the value of the use of the [*consumer good*].

New September 2003; Revised December 2011

Directions for Use

This instruction is intended for use with claims involving consumer goods under the Song-Beverly Consumer Warranty Act. The remedy is replacement of the goods or reimbursement measured by the purchase price minus the value of the plaintiff's use before discovery of the defect. (Civ. Code, § 1793.2(d)(1).) For claims involving new motor vehicles, see CACI No. 3241, *Restitution From Manufacturer—New Motor Vehicle*.

The basic measure of damages provided for in the Song-Beverly Act for all claims is replacement or reimbursement plus additional remedies provided by the Commercial Code. (Civ. Code, § 1794(b); see Comm. Code, §§ 2711–2715.) The remedies for consumer goods are also available for implied-warranty claims. (See Civ. Code, § 1791.1(d).) The first paragraph of this instruction can be modified if it is being used for claims other than those ~~described in the instruction~~brought under Civil Code section 1793.2(d)(1). See also CACI No. 3242, *Incidental Damages*, and CACI No. 3243, *Consequential Damages*.

Sources and Authority

- Civil Code section 1793.2(d)(1) provides, in part: "[I]f the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity."

- Civil Code section 1794(b) provides:

  > The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:
  >
  > (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.

(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Civil Code section 1791.1(d) provides: "Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and where applicable by a breach of the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, Section 1794 of this chapter shall apply."

- "The clear mandate of section 1794 ... is that the compensatory damages recoverable for breach of the [Song-Beverly Consumer Warranty] Act are those available to a buyer for a seller's breach of a sales contract." (*Kwan v. Mercedes-Benz of N. Am.* (1994) 23 Cal.App.4th 174, 188 [28 Cal.Rptr.2d 371].)

- ~~Civil Code section 1791.1(d) provides: "Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and where applicable by a breach of the implied warranty of fitness has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, Section 1794 of this chapter shall apply."~~

- "[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159]); see also *Kwan, supra*, 23 Cal.App.4th at pp. 187-192.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.103 (Matthew Bender)

5 California Civil Practice: Business Litigation ~~(Thomson West)~~ § 53:32 (Thomson Reuters West)

3241. Restitution From Manufacturer—New Motor Vehicle (Civ. Code, §§ 1793.2(d)(2), 1794(b))

If you decide that [*name of defendant*] or its authorized repair facility failed to repair the defect(s) after a reasonable number of opportunities, then [*name of plaintiff*] is entitled to recover the amounts [he/she] proves [he/she] paid for the car, including:

1. **The amount paid to date for the vehicle, including finance charges [and any amount still owed by [*name of plaintiff*]];**

2. **Charges for transportation and manufacturer-installed options; and**

3. **Sales tax, license fees, registration fees, and other official fees.**

In determining the purchase price, do not include any charges for items supplied by someone other than [*name of defendant*].

[[*Name of plaintiff*]'s recovery must be reduced by the value of the use of the vehicle before it was [brought in/submitted] for repair. [*Name of defendant*] must prove how many miles the vehicle was driven between the time when [*name of plaintiff*] took possession of the vehicle and the time when [*name of plaintiff*] first delivered it to [*name of defendant*] or its authorized repair facility to fix the defect. [*Insert one of the following:*]

[Using this mileage number, I will reduce [*name of plaintiff*]'s recovery based on a formula.]

[Multiply this mileage number by the purchase price, including any charges for transportation and manufacturer-installed options, and divide that amount by 120,000. Deduct the resulting amount from [*name of plaintiff*]'s recovery.]]

New September 2003; Revised February 2005, June 2005, December 2011

Directions for Use

This instruction is intended for use with claims involving new motor vehicles under the Song-Beverly Consumer Warranty Act. The remedy is replacement of the vehicle or restitution. (Civ. Code, § 1793.2(d)(2).) For claims involving other consumer goods, see CACI No. 3240, *Reimbursement Damages—Consumer Goods*.

Incidental damages are recoverable as part of restitution. (Civ. Code, § 1793.2(d)(2)(B).) For ~~claims involving~~an instruction on incidental damages, see CACI No. 3242, *Incidental Damages*. See also CACI No. 3243, *Consequential Damages*.

The remedies for new motor vehicles provided by Civil Code section 1793.2(d)(2) apply to all claims under the Song-Beverly Consumer Warranty Act. (Civ. Code, § 1794(b).) These remedies are also available for implied-warranty claims. (See Civ. Code, § 1791.1(d).) The first paragraph of this

instruction can be modified if it is being used for claims other than those brought under Civil Code section 1793.2(d)(2).~~described in the instructions. In lieu of restitution, plaintiff may request replacement with "a new motor vehicle substantially identical to the vehicle replaced," pursuant to Civil Code section 1793.2(d)(2)(A). If plaintiff so requests, elements 1-3 should be replaced with appropriate language.~~

Modify element 1 depending on whether plaintiff still has an outstanding obligation on the financing of the vehicle.

The last two bracketed options are intended to be read in the alternative. Use the last bracketed option if the court desires for the jury to make the calculation of the deduction. The "formula" referenced in the last bracketed paragraph can be found at Civil Code section 1793.2(d)(2)(C).

Additional remedies under the Commercial Code are provided for "goods." (See Civ. Code, § 1794(b).) Although consumer goods and new motor vehicles are treated differently under Civil Code section 1793.2, "consumer goods" are defined broadly under Song-Beverly (see Civ. Code, § 1791(a) ["consumer goods" means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables]). At least one court has applied the Commercial Code remedies for new motor vehicles. (See *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302 [45 Cal.Rptr.2d 10].)

Sources and Authority

- Civil Code section 1794(b) provides:

  > The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:
  >
  > (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
  >
  > (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Civil Code section 1793.2(d)(2) provides, in part:

  > If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle.
  >
  > (A) In the case of replacement, the manufacturer shall replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced. The

replacement vehicle shall be accompanied by all express and implied warranties that normally accompany new motor vehicles of that specific kind. The manufacturer also shall pay for, or to, the buyer the amount of any sales or use tax, license fees, registration fees, and other official fees which the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(B) In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(C) When the manufacturer replaces the new motor vehicle pursuant to subparagraph (A), the buyer shall only be liable to pay the manufacturer an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. The amount directly attributable to use by the buyer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. Nothing in this paragraph shall in any way limit the rights or remedies available to the buyer under any other law.

- "[A]s the conjunctive language in Civil Code section 1794 indicates, the statute itself provides an additional measure of damages beyond replacement or reimbursement and permits, at the option of the buyer, the Commercial Code measure of damages which includes 'the cost of repairs necessary to make the goods conform.' " (*Krotin*, *supra*, ~~*v. Porsche Cars North America, Inc.* (1995)~~ 38 Cal.App.4th at p.~~294,~~ 302 ~~[45 Cal.Rptr.2d 10]~~, internal citation omitted.)

- "[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159], emphasis in original; see also *Kwan v. Mercedes-Benz of N. Am.* (1994) 23

Cal.App.4th 174, 187-192 [28 Cal.Rptr.2d 371].)

- "[F]inding an implied prohibition on recovery of finance charges would be contrary to both the Song-Beverly Consumer Warranty Act's remedial purpose and section 1793.2(d)(2)(B)'s description of the refund remedy as restitution. A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute." (*Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 37 [95 Cal.Rptr.2d 81].)

- "[Defendant] argues that [plaintiff] would receive a windfall if he is not required to pay for using the car after his buyback request. But to give [defendant] an offset for that use would reward it for its delay in replacing the car or refunding [plaintiff]'s money when it had complete control over the length of that delay, and an affirmative statutory duty to replace or refund promptly." (*Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1244 [13 Cal.Rptr.3d 679].)

- "[T]he imposition of a requirement that [plaintiff] mitigate his damages so as to avoid rental car expenses—after [defendant] had a duty to respond promptly to [plaintiff]'s demand for restitution—would reward [defendant] for its delay in refunding [plaintiff]'s money." (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1053 [104 Cal.Rptr.3d 853].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, §§ 206.127, 206.128 (Matthew Bender)

5 California Civil Practice: Business Litigation ~~(Thomson West)~~ § 53:26 (Thomson Reuters West)

3242. Incidental Damages

[*Name of plaintiff***] also claims additional reasonable expenses for [***list claimed incidental damages***].**

To recover these expenses, [*name of plaintiff***] must prove all of the following:**

1. **That the expense was actually charged;**

2. **That the expense was reasonable; and**

3. **That [***name of defendant***]'s [breach of warranty/[***other violation of Song-Beverly Consumer Warranty Act***]] was a substantial factor in causing the expense.**

New September 2003; Revised December 2011

Directions for Use

This instruction is for use if incidental damages are sought in an action under the Song-Beverly Consumer Warranty Act. Incidental damages are allowed as part of the restitution remedy for new motor vehicles. (Civ. Code, § 1793.2(d)(2)(B).) See also CACI No. 3241, *Restitution From Manufacturer—New Motor Vehicle*.

With regard to claims for consumer goods, the availability of incidental damages may be limited. If the plaintiff has elected to accept the goods, incidental damages under Commercial Code section 2715 and the cost of repairs required to make the goods conform to the warranty are allowed. (Civ. Code, § 1794(b)(2).) If the buyer has rightfully rejected or justifiably revoked acceptance, incidental damages are allowed under Commercial Code sections 2711, 2712, and 2713 for the seller's nondelivery or repudiation of the contract or in connection with cover (obtaining replacement goods from another seller). (Civ. Code, § 1794(b)(1).) If any of these matters are disputed, additional instructions will be required on these points.

If incidental damages are otherwise recoverable, they are recoverable regardless of the nature of the claim under Song-Beverly. (See Civ. Code, § 1794(b) [statute covers all Song-Beverly actions].)

Sources and Authority

- Civil Code section 1794(b) provides, in part:
  The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:

  (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.

(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Civil Code section 1793.2(d)(2)(B) provides, in part: "In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer ... plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer."

- Commercial Code section 2711(1) provides:

> Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
>
> (a) "Cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
>
> (b) Recover damages for nondelivery as provided in this division (Section 2713).

- Commercial Code section 2712(2) provides~~, in part~~: "The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2715), but less expenses saved in consequence of the seller's breach."

- Commercial Code section 2713(1) provides: "Subject to the provisions of this division with respect to proof of market price (Section 2723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this division (Section 2715), but less expenses saved in consequence of the seller's breach."

- Commercial Code section 2715(1) provides~~, in part~~:

> (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
>
> ~~(2) Consequential damages resulting from the seller's breach include~~
>
> ~~(a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and~~

~~(b) Injury to person or property proximately resulting from any breach of warranty.~~

- "In light of the relevant legislative history and express language in the Act, we conclude California Uniform Commercial Code section 2715's reference to losses must be construed and applied in the context of monetary losses *actually* incurred." (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 756 [52 Cal.Rptr.2d 134], ~~emphasis in~~ original italics.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 318

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.160 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.43 (Matthew Bender)

5 California Civil Practice: Business Litigation ~~(Thomson West)~~ § 53:32 (Thomson Reuters West)

3243. Consequential Damages

[*Name of plaintiff*] also claims additional amounts for [*list claimed consequential damages*].

To recover these damages, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*]'s [*describe violation of Song-Beverly Consumer Warranty Act*] was a substantial factor in causing damages to [*name of plaintiff*];**

2. **That the damages resulted from [*name of plaintiff*]'s requirements and needs;**

3. **That [*name of defendant*] had reason to know of those requirements and needs at the time of the [sale/lease] to [*name of plaintiff*];**

4. **That [*name of plaintiff*] could not reasonably have prevented the damages; and**

5. **The amount of the damages.**

New September 2003; Revised December 2011

Directions for Use

This instruction is ~~intended~~ for use ~~where~~ if the plaintiff claims consequential damages under the Song-Beverly Consumer Warranty Act~~pursuant to Commercial Code section 2715(2)(a)~~ based on the plaintiff's foreseeable needs or requirements. (See Civ. Code, § 1794(b); Comm. Code, § 2715(2)(a).)

The availability of consequential damages under Song-Beverly may be limited. If the plaintiff has elected to accept the goods, consequential damages under Commercial Code section 2715 and the cost of repairs required to make the goods conform to the warranty are allowed. (Civ. Code, § 1794(b)(2).) If the buyer has rightfully rejected or justifiably revoked acceptance, consequential damages are allowed under Commercial Code sections 2711, 2712, and 2713 for the seller's nondelivery or repudiation of the contract or in connection with cover (obtaining replacement goods from another seller). (Civ. Code, § 1794(b)(1).)

If consequential damages are otherwise recoverable, they are recoverable regardless of the nature of the claim under Song-Beverly. (See Civ. Code, § 1794(b) [statute covers all Song-Beverly actions].)

Sources and Authority

- Civil Code section 1794(b) provides~~,~~ in part:
  The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:

  (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the

goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.

(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Commercial Code section 2711(1) provides:

> Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
>
> (a) "Cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
>
> (b) Recover damages for nondelivery as provided in this division (Section 2713).

- Commercial Code section 2712(2) provides~~, in part~~: "The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2715), but less expenses saved in consequence of the seller's breach."

- Commercial Code section 2713(1) provides: "Subject to the provisions of this division with respect to proof of market price (Section 2723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this division (Section 2715), but less expenses saved in consequence of the seller's breach."

- Commercial Code section 2715(2) provides~~, in part~~:

> ~~(2)~~ Consequential damages resulting from the seller's breach include
>
> (a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) Injury to person or property proximately resulting from any breach of warranty.

- "In light of the relevant legislative history and express language in the Act, we conclude California Uniform Commercial Code section 2715's reference to losses must be construed and applied in the context of monetary losses *actually* incurred." (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 756 [52 Cal.Rptr.2d 134], ~~emphasis in~~ original italics.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 206

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.160 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.43 et seq. (Matthew Bender)

5 California Civil Practice: Business Litigation ~~(Thomson West)~~ § 53:32 (Thomson Reuters West)

3244. Civil Penalty—Willful Violation (Civ. Code, § 1794(c))

[*Name of plaintiff***] claims that [***name of defendant***]'s failure to [***describe violation of Song-Beverly Consumer Warranty Act*, *e.g., repurchase or replace the vehicle after a reasonable number of repair opportunities***] was willful and therefore asks that you impose a civil penalty against [***name of defendant***]. A civil penalty is an award of money in addition to a plaintiff's damages. The purpose of this civil penalty is to punish a defendant or discourage [him/her/it] from committing such violations in the future.**

If [*name of plaintiff***] has proved that [***name of defendant***]'s failure was willful, you may impose a civil penalty against [him/her/it]. "Willful" means that [***name of defendant***] knew what [he/she/it] was doing and intended to do it. However, you may not impose a civil penalty if you find that [***name of defendant***] believed reasonably and in good faith that [***describe facts negating statutory obligation***].**

The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [*name of plaintiff***]'s actual damages.**

New September 2003; Revised February 2005, December 2005, December 2011

Directions for Use

This instruction is intended for use when the plaintiff requests a civil penalty under Civil Code section 1794(c). In the opening paragraph, set forth all claims for which a civil penalty is sought. ~~The parties will need to draft a separate instruction for cases involving a civil penalty based on the defendant's violation of Civil Code section 1793.2(d)(2).~~

~~If there are multiple causes of action, ensure that the jury knows to which claim this instruction applies.~~Depending on the nature of the claim at issue, factors that the jury may consider in determining willfulness may be added. (See, e.g., *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 136 [41 Cal.Rptr.2d 295] [among factors to be considered by the jury are whether (1) the manufacturer knew the vehicle had not been repaired within a reasonable period or after a reasonable number of attempts, and (2) whether the manufacturer had a written policy on the requirement to repair or replace].)

Sources and Authority

- Civil Code section 1794 provides, in part:

> (a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief.
>
> ....
>
> (c) If the buyer establishes that the failure to comply was willful, the judgment may

include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages. This subdivision shall not apply in any class action ... or with respect to a claim based solely on a breach of an implied warranty.

- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507].)

- "Whether a manufacturer willfully violated its obligation to repair the car or refund the purchase price is a factual question for the jury that will not be disturbed on appeal if supported by substantial evidence." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1104 [109 Cal.Rptr.2d 583].

- " 'In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.' " (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64], internal citations omitted.)

- "[A] violation … is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product *did* conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [¶] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a standard requiring the plaintiff to prove the defendant *actually knew* of its obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund, our interpretation preserves the Act's distinction between willful and nonwillful violations. Accordingly, '[a] decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision.' " (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1051 [104 Cal.Rptr.3d 853], original italics, internal citation omitted.)

- "There is evidence [defendant] was aware that numerous efforts to find and fix the oil leak had been unsuccessful, which is evidence a jury may consider on the question of willfulness. Additionally, the jury could conclude that [defendant]'s policy, which requires a part be replaced or adjusted before [defendant] deems it a repair attempt but excludes from repair attempts any visit during which a mechanic searches for but is unable to locate the source of the problem, is unreasonable and not a good faith effort to honor its statutory obligations to repurchase defective cars. Finally, there was evidence that [defendant] adopted internal policies that erected hidden obstacles to the ability of an

unwary consumer to obtain redress under the Act. This latter evidence would permit a jury to infer that [defendant] impedes and resists efforts by a consumer to force [defendant] to repurchase a defective car, regardless of the presence of an unrepairable defect, and that [defendant]'s decision to reject [plaintiff]'s demand was made pursuant to [defendant]'s policies rather than to its good faith and reasonable belief the car did not have an unrepairable defect covered by the warranty or that a reasonable number of attempts to effect a repair had not yet occurred." (*Oregel*, *supra*, 90 Cal.App.4th at pp. 1104–1105, internal citations omitted.)

- "[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages." (*Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 184 [28 Cal.Rptr.2d 371].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.30 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.53[1][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.129 (Matthew Bender)

5 California Civil Practice: Business Litigation ~~(Thomson West)~~ § 53:32 (Thomson Reuters West)

VF-3200. Failure to ~~Purchase~~ Repurchase or Replace Consumer Good After Reasonable Number of Repair Opportunities (Civ. Code, § 1793.2(d))

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] buy a[n] [***consumer good***] [from/distributed by/manufactured by] [***name of defendant***]?**
   ____ Yes ____ No

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

2. **Did [***name of defendant***] give [***name of plaintiff***] a warranty?**
   ____ Yes ____ No

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

3. **Did the [***consumer good***] fail to perform as represented in the warranty?**
   ____ 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 defendant***] or its authorized repair facility repair the [***consumer good***] to conform to the [written statement/represented quality] after a reasonable number of opportunities?**
   ____ Yes ____ No

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

5. **Did [***name of defendant***] fail to replace the [***consumer good***] or reimburse [***name of plaintiff***] the appropriate amount of money?**
   ____ 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. **What amount is [***name of plaintiff***] entitled to receive as reimbursement for the**

[*consumer good*]? Calculate as follows:

Determine: Purchase price of the [*consumer good*]: $_____

Subtract: Value of use by [*name of plaintiff*] before [he/she/it] discovered the defect:

$_____

Subtract: The amount, if any, that [*name of defendant*] previously reimbursed [*name of plaintiff*] for the [*consumer good*]

$_____

TOTAL $_____

[7. What amount is plaintiff entitled to recover for [*insert item(s) of claimed incidental damages*]? $_____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised June 2005, October 2008, December 2010, December 2011

Directions for Use

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

This verdict form is based on CACI No. 3200, *Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities—Essential Factual Elements*, and CACI No. 3240, *Reimbursement Damages—Consumer Goods*.

If the plaintiff was unable to deliver the good, modify question 4 as in element 4 of CACI No. 3200. See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages. Question 7 can be used to account for claimed incidental damages included under CACI No. 3242, *Incidental Damages*.

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*.

VF-3202. Failure to ~~Purchase~~ Repurchase or Replace Consumer Good After Reasonable Number of Repair Opportunities —Affirmative Defense—Unauthorized or Unreasonable Use (Civ. Code, § 1793.2(d))

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] buy a/~~n~~an [*consumer good*] [from/distributed by/manufactured by] [*name of defendant*]?**
   ____ Yes ____ No

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

2. **Did [*name of defendant*] give [*name of plaintiff*] a warranty?**
   ____ Yes ____ No

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

3. **Did the [*consumer good*] fail to perform as represented in the warranty?**
   ____ 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. **Was the failure to comply with the warranty caused by unauthorized or unreasonable use of the [*consumer good*] following its sale?**
   ____ Yes ____ No

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

5. **Did [*name of defendant*] or its authorized repair facility repair the [*consumer good*] to conform to the [written statement/represented quality] after a reasonable number of opportunities?**
   ____ Yes ____ No

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

6. **Did [*name of defendant*] fail to replace the [*consumer good*] or reimburse [*name of plaintiff*] the appropriate amount of money?**
____ 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 amount is [*name of plaintiff*] entitled to receive as reimbursement for the [*consumer good*]? Calculate as follows:**

Determine: **Purchase price of the [*consumer good*]:** **$_____**

Subtract: **Value of use by [*name of plaintiff*] before [he/she/it] discovered the defect:**
$_____

Subtract: **The amount, if any, that [*name of defendant*] previously reimbursed [*name of plaintiff*] for the [*consumer good*]**
$_____

TOTAL **$_____**

[Answer question 8.]

[8. **What amount is [*name of plaintiff*] entitled to recover for [*insert item(s) of claimed incidental damages*]?**
$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised June 2005, October 2008, December 2010, December 2011

Directions for Use

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

This verdict form is based on CACI No. 3200, *Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities—Essential Factual Elements,* CACI No. 3220, *Affirmative Defense—Unauthorized or Unreasonable Use*, and CACI No. 3240, *Reimbursement Damages—Consumer Goods*.

If the plaintiff was unable to deliver the good, modify question 4 as in element 4 of CACI No. 3200. See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages. Question 8 can be used to account for claimed incidental damages included under CACI No. 3242, *Incidental Damages*.

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*.

3712. Joint Ventures

Each of the members of a joint venture, and the joint venture itself, are responsible for the wrongful conduct of a member acting in furtherance of the venture.

You must decide whether a joint venture was created in this case. A joint venture exists if all of the following have been proved:

1. **Two or more persons or business entities combine their property, skill, or knowledge with the intent to carry out a single business undertaking;**

2. **Each has an ownership interest in the business;**

3. **They have joint control over the business, even if they agree to delegate control; and**

4. **They agree to share the profits and losses of the business.**

A joint venture can be formed by a written or an oral agreement or by an agreement implied by the parties' conduct.

New September 2003; Revised June 2011, December 2011

Directions for Use

This instruction can be modified for cases involving unincorporated associations by substituting the term "unincorporated association" for "joint venture."

If the venture has no commercial purpose, this instruction may be modified by deleting elements 2 and 4, which do not apply to a noncommercial enterprise. Also modify elements 1 and 3 to substitute another word for "business" depending on the kind of activity involved. (See *Shook v. Beals* (1950) 96 Cal.App.2d 963, 969–970 [217 P.2d 56]; see also *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 872 [32 Cal.Rptr.3d 351].)

Sources and Authority

- "A joint venture is 'an undertaking by two or more persons jointly to carry out a single business enterprise for profit.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482 [286 Cal.Rptr. 40, 816 P.2d 892], internal citations omitted.)

- "A joint venture has been defined in various ways, but most frequently perhaps as an association of two or more persons who combine their property, skill or knowledge to carry out a single business enterprise for profit." (*Holtz v. United Plumbing and Heating Co.* (1957) 49 Cal.2d 501, 506 [319 P.2d 617].)

- " 'There are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an ownership interest in the enterprise. … .' 'Whether a joint venture actually exists depends on the intention of the parties. … [¶] … [¶] [W]here evidence is in dispute the existence or nonexistence of a joint venture is a question of fact to be determined by the jury. [Citation.]' " (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 370 [76 Cal.Rptr.3d 146], internal citations omitted.)

- "The law requires little formality in the creation of a joint venture and the agreement is not invalid because it may be indefinite with respect to its details." (*Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272, 285 [55 Cal.Rptr. 610].)

- "The distinction between joint ventures and partnerships is not sharply drawn. A joint venture usually involves a single business transaction, whereas a partnership may involve 'a continuing business for an indefinite or fixed period of time.' Yet a joint venture may be of longer duration and greater complexity than a partnership. From a legal standpoint, both relationships are virtually the same. Accordingly, the courts freely apply partnership law to joint ventures when appropriate." (*Weiner, supra,* 54 Cal.3d at p. 482, internal citations omitted.)

- "The incidents of a joint venture are in all important respects the same as those of a partnership. One such incident of partnership is that all partners are jointly and severally liable for partnership obligations, irrespective of their individual partnership interests. Because joint and several liability arises from the partnership or joint venture, Civil Code section 1431.2 [Proposition 51] is not applicable." (*Myrick v. Mastagni* (2010) 185 Cal.App.4th 1082, 1091 [111 Cal.Rptr.3d 165], internal citations omitted.)

- "Normally, … a partnership or joint venture is liable to an injured third party for the torts of a partner or venturer acting in furtherance of the enterprise." (*Orosco v. Sun-Diamond Corp.* (1997) 51 Cal.App.4th 1659, 1670 [60 Cal.Rptr.2d 179, 186].)

- "It has generally been recognized that in order to create a joint venture there must be an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control." (*Holtz, supra,* 49 Cal.2d at pp. 506–507.)

- "The joint enterprise theory, while rarely invoked outside the automobile accident context, is well established and recognized in this state as an exception to the general rule that imputed liability for the negligence of another will not be recognized." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 893 [2 Cal.Rptr.2d 79, 820 P.2d 181], internal citation omitted.)

- "The term 'joint enterprise' may cause some confusion because it is 'sometimes used to define a noncommercial undertaking entered into by associates with equal voice in directing the conduct of the enterprise … .' However, when it is 'used to describe a business or commercial undertaking[,] it has been used interchangeably with the term "joint venture" and courts have not drawn any significant legal distinction between the two.' " (*Jeld-Wen, Inc., supra, ~~v. Superior Court (2005)~~* 131 Cal.App.4th at p.~~853,~~ 872 ~~[32 Cal.Rptr.3d 351]~~, internal citation omitted.)

- "In the annotations [to Restatement of the Law of Torts, section 491], many California cases are cited holding that to have a joint venture there must be ' "a community of interest in objects and equal right to direct and govern movements and conduct of each other with respect thereto. Each must have voice and right to be heard in its control and management" . . .' " (*Shook, supra,* 96 Cal.App.2d at pp. 969–970.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1235

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.07 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Actions*, § 82.16 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.132 (Matthew Bender)

35 California Forms of Pleading and Practice, Ch. 401, *Partnerships: Actions Between General Partners and Partnership*, § 401.11 (Matthew Bender)

~~37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)~~

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

17 California Points and Authorities, Ch. 170, *Partnerships*, § 170.222 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson Reuters West)~~ §§ 3:38–3:39 (Thomson Reuters West)

VF-4200. Actual Intent to Defraud Creditor—Affirmative Defense—Good Faith

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] have a right to payment from [***name of debtor***]?**
   ____ 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 debtor***] [transfer property/incur an obligation] to [***name of defendant***]?**
   ____ 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 [***name of debtor***] [transfer the property/incur the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/its] creditors?**
   ____ 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. **Was [***name of debtor***]'s conduct a substantial factor in causing [***name of plaintiff***]'s harm?**
   ____ 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***]/[***name of third party***]] receive the property from [***name of debtor***] in good faith?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip question 6 and answer question 7.

6. **Did [[***name of defendant***]/[***name of third party***]] receive the property for a reasonably equivalent value?**
   ____ Yes ____ No

   If your answer to question 6 is yes, stop here, answer no further questions, and have

the presiding juror sign and date this form. If you answered no, then answer question 7.

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New December 2011

Directions for Use

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

This verdict form is based on CACI No. 4200, *Actual Intent to Defraud a Creditor—Essential Factual Elements*, and CACI No. 4207, *Affirmative Defense—Good Faith*. The defendant is the transferee of the property. The transferee may have received the property in good faith even though the debtor had a fraudulent intent. (See *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924].)

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

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

VF-4201. Constructive Fraudulent Transfer

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] have a right to payment from [*name of debtor*]?**
____ 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 debtor*] [transfer property/incur an obligation] to [*name of defendant*]?**
____ 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 [*name of debtor*] fail to receive a reasonably equivalent value in exchange for the [transfer/obligation]?**
____ 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. **[[Was [*name of debtor*] [in business/about to start a business]/Did [*name of debtor*] enter into a transaction] when [his/her/its] remaining assets were unreasonably small for the [business/transaction]?]**

[*or*]

[Did [*name of debtor*] intend to incur debts beyond [his/her/its] ability to pay as they became due?]

[*or*]

[Did [*name of debtor*] believe or should [he/she/it] reasonably have believed that [he/she/it] would incur debts beyond [his/her/its] ability to pay as they became due?]

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.
____ Yes ____ No

5. **Was [*name of debtor*]'s conduct a substantial factor in causing [*name of plaintiff*]'s**

harm?
____ 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. What are [*name of plaintiff*]'s damages?

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New December 2011

Directions for Use

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

This verdict form is based on CACI No. 4202, *Constructive Fraudulent Transfer—Essential Factual Elements.*

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

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

VF-4202. Constructive Fraudulent Transfer—Insolvency

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] have a right to payment from [***name of debtor***]?**
   ____ 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 debtor***] [transfer property/incur an obligation] to [***name of defendant***]?**
   ____ 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 [***name of debtor***] fail to receive a reasonably equivalent value in exchange for the [transfer/obligation]?**
   ____ 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***]'s right to payment from [***name of debtor***] arise before [***name of debtor***] [transferred property/incurred an obligation]?**
   ____ 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. **Was [***name of debtor***] insolvent at that time or did [***name of debtor***] become insolvent as a result of the [transfer/ obligation]**

   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 debtor***]'s conduct a substantial factor in causing [***name of plaintiff***]'s harm?**

   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?

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New December 2011

Directions for Use

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

This verdict form is based on CACI No. 4203, *Constructive Fraudulent Transfer (Insolvency)—Essential Factual Elements.*

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

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

4302. Termination for Failure to Pay Rent—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has failed to pay the rent. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That under the [lease/rental agreement/sublease], [***name of defendant***] was required to pay rent in the amount of $[***specify amount***] per [***specify period, e.g., month***];**

4. **That [***name of plaintiff***] properly gave [***name of defendant***] three days' written notice to pay the rent or vacate the property~~[, or that [*name of defendant*] actually received this notice at least three days before [*date on which action was filed*]]~~;**

5. **That as of [***date of three-day notice***], at least the amount stated in the three-day notice was due;**

6. **That [***name of defendant***] did not pay [or attempt to pay] the amount stated in the notice within three days after [service/receipt] of the notice; and**

7. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011, December 2011

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in element 7 if persons other than the tenant-defendant are occupying the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, "rented" in element 2, and either "lease" or "rental agreement" in element 3. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "leases" in element 1, "subleased" in element 2, and "sublease" in element 3. (Code Civ. Proc., § 1161(3).)

~~If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 4.~~ Defective service may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in elements 4, 5, and 6, provided that it is not less than three days.

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in element 6.

See CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent,* for an instruction regarding proper notice.

Sources and Authority

- Code of Civil Procedure section 1161 provides in part:

  A tenant of real property … is guilty of unlawful detainer:

  2. When he or she continues in possession, in person or by subtenant, without the permission of his or her landlord … after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment … shall have been served upon him or her and if there is a subtenant in actual occupation of the premises, also upon the subtenant.

- Civil Code section 1952.3(a) provides, in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action … ."

- "[M]ere failure of a tenant to quit the premises during the three-day notice period does not necessarily justify an unlawful detainer action. If a tenant vacates the premises and

surrenders possession to the landlord prior to the complaint being filed, then no action for unlawful detainer will lie even though the premises were not surrendered during the notice period. This is true because the purpose of an unlawful detainer action is to recover possession of the premises for the landlord. Since an action in unlawful detainer involves a forfeiture of the tenant's right to possession, one of the matters that must be pleaded and proved for unlawful detainer is that the tenant remains in possession of the premises. Obviously this cannot be established where the tenant has surrendered the premises to landlord prior to the filing of the complaint. In such a situation the landlord's remedy is an action for damages and rent." (*Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 Cal.App.3d 900, 905–906 [126 Cal.Rptr. 34], footnote and internal citations omitted.)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 723–725

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.35–8.45

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.17–6.37

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:96 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

Miller & Starr, California Real Estate, Ch. 19, *Landlord-Tenant*, § 19:200 (Thomson Reuters West)

UNLAWFUL DETAINER

4303. Sufficiency and Service of Notice of Termination for Failure to Pay Rent

[*Name of plaintiff***] contends that [he/she/it] properly gave [***name of defendant***] three days' notice to pay the rent or vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/it] must pay the amount due within three days or vacate the property;**

2. **That the notice stated [no more than/a reasonable estimate of] the amount due, and the name, telephone number, and address of the person to whom the amount should be paid, and**

   [*Use if payment was to be made personally:*

   the usual days and hours that the person would be available to receive the payment; and]

   [*or: Use if payment was to be made into a bank account:*

   the number of an account in a bank located within five miles of the rental property into which the payment could be made, and the name and street address of the bank; and]

   [*or: Use if an electronic funds transfer procedure had been previously established:*

   that payment could be made by electronic funds transfer; and]

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s residence or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[The three-day notice period begins the day after the notice was given to [*name of defendant***]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [***name of defendant***]'s time to pay the rent or vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]**

~~**[If [***name of plaintiff***] did not properly give [***name of defendant***] the required written notice, the notice is still effective if [***name of defendant***] actually received it at least three days before [***insert date on which action was filed***].]**~~

[A notice stating a reasonable estimate of the amount of rent due that is within 20 percent of the amount actually due is reasonable unless [*name of defendant***] proves that it was not reasonable. In determining the reasonableness of the estimate, you may consider whether calculating the amount of rent required information primarily within the knowledge of [***name of defendant***] and whether [***name of defendant***] accurately furnished that information to [***name of plaintiff***].]**

New August 2007; Revised December 2010; June 2011, December 2011

Directions for Use

Use the reasonable-estimate option in the first sentence of element 2 and include the final paragraph only in cases involving commercial leases. (Code Civ. Proc., § 1161.1(a); see also Code Civ. Proc., § 1161.1(e) [presumption that if amount found to be due is within 20 percent of amount stated in notice, then estimate was reasonable].)

In element 2, select the applicable manner in which the notice specifies that payment is to be made; directly to the landlord, into a bank account, or by electronic funds transfer. (Code Civ. Proc., § 1161(2).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the third-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout, provided that it is not less than three days.

~~If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the next-to-last paragraph.~~ Defective service may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- Code Civil Procedure section 1161(2) provides in part: "When he or she continues in possession … without the permission of his or her landlord … after default in the payment of rent … and three days' notice, in writing, requiring its payment, stating the amount which is due, the name, telephone number, and address of the person to whom the rent payment shall be made, and, if payment may be made personally, the usual days and hours that person will be available to receive the payment (provided that, if the address does not allow for personal

delivery, then it shall be conclusively presumed that upon the mailing of any rent or notice to the owner by the tenant to the name and address provided, the notice or rent is deemed received by the owner on the date posted, if the tenant can show proof of mailing to the name and address provided by the owner), or the number of an account in a financial institution into which the rental payment may be made, and the name and street address of the institution (provided that the institution is located within five miles of the rental property), or if an electronic funds transfer procedure has been previously established, that payment may be made pursuant to that procedure, or possession of the property, shall have been served upon him or her and if there is a subtenant in actual occupation of the premises, also upon the subtenant."

- Code of Civil Procedure 1161.1 provides in part:

  With respect to application of Section 1161 in cases of possession of commercial real property after default in the payment of rent:

  (a) If the amount stated in the notice provided to the tenant pursuant to subdivision (2) of Section 1161 is clearly identified by the notice as an estimate and the amount claimed is not in fact correct, but it is determined upon the trial or other judicial determination that rent was owing, and the amount claimed in the notice was reasonably estimated, the tenant shall be subject to judgment for possession and the actual amount of rent and other sums found to be due. However, if (1) upon receipt of such a notice claiming an amount identified by the notice as an estimate, the tenant tenders to the landlord within the time for payment required by the notice, the amount which the tenant has reasonably estimated to be due and (2) if at trial it is determined that the amount of rent then due was the amount tendered by the tenant or a lesser amount, the tenant shall be deemed the prevailing party for all purposes. If the court determines that the amount so tendered by the tenant was less than the amount due, but was reasonably estimated, the tenant shall retain the right to possession if the tenant pays to the landlord within five days of the effective date of the judgment (1) the amount previously tendered if it had not been previously accepted, (2) the difference between the amount tendered and the amount determined by the court to be due, and (3) any other sums as ordered by the court.

  (e) For the purposes of this section, there is a presumption affecting the burden of proof that the amount of rent claimed or tendered is reasonably estimated if, in relation to the amount determined to be due upon the trial or other judicial determination of that issue, the amount claimed or tendered was no more than 20 percent more or less than the amount determined to be due. However, if the rent due is contingent upon information primarily within the knowledge of the one party to the lease and that information has not been furnished to, or has not accurately been furnished to, the other party, the court shall consider that fact in determining the reasonableness of the amount of rent claimed or tendered pursuant to subdivision (a).

- Code of Civil Procedure section 1162 provides:

(a) Except as provided in subdivision (b), the notices required by Sections 1161 and 1161a may be served by any of the following methods:

(1) By delivering a copy to the tenant personally;

(2) If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence;

(3) If such place of residence and business cannot be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

(b) The notices required by Section 1161 may be served upon a commercial tenant by any of the following methods:

(1) By delivering a copy to the tenant personally.

(2) If he or she is absent from the commercial rental property, by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated.

(3) If, at the time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated. Service upon a subtenant may be made in the same manner.

(c) For purposes of subdivision (b), "commercial tenant" means a person or entity that hires any real property in this state that is not a dwelling unit, as defined in subdivision (c) of Section 1940 of the Civil Code, or a mobilehome, as defined in Section 798.3 of the Civil Code.

- "A valid three-day pay rent or quit notice is a prerequisite to an unlawful detainer action. Because of the summary nature of an unlawful detainer action, a notice is valid only if the lessor strictly complies with the statutorily mandated notice requirements. [¶] A three-day notice must contain 'the amount which is due.' A notice which demands rent in excess of the amount due does not satisfy this requirement. This rule ensures that a landlord will not be entitled to regain possession in an unlawful detainer action unless the tenant has had the opportunity to pay the delinquent rent." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697 [32 Cal.Rptr.2d 635], internal citations and footnote omitted.)

- "[W]e do not agree that a proper notice may not include anything other than technical rent. It is true that subdivision 2 of Code of Civil Procedure section 1161 relates to a default in the payment of rent. However, the subdivision refers to the 'lease or agreement under which the property is held' and requires the notice state 'the amount which is due.' The language is not 'the amount of rent which is due' or 'the rent which is due.' We think the statutory language is sufficiently broad to encompass any sums due under the lease or agreement under which the property is held." (*Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 492 [144 Cal.Rptr. 474].)

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

- "An unlawful detainer action based on failure to pay rent must be preceded by a three-day notice to the tenant to pay rent or quit the premises. Failure to state the exact amount of rent due in the notice is fatal to the subsequent unlawful detainer action." (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 606, fn. 2 [267 Cal.Rptr. 189], internal citations omitted.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because

there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 722–725, 727

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.30, Ch. 8

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.10, 7:327 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.13, 236.13A (Matthew Bender)

Miller & Starr, California Real Estate, Ch. 19, *Landlord-Tenant*, §§ 19:202–19:204 (Thomson Reuters West)

UNLAWFUL DETAINER

4304. Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has failed to perform [a] requirement(s) under [his/her/its] [lease/rental agreement/sublease]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That under the [lease/rental agreement/sublease], [***name of defendant***] agreed [***insert required condition(s) that were not performed***];**

4. **That [***name of defendant***] failed to perform [that/those] requirement(s) by [***insert description of alleged failure to perform***];**

5. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to [either [***describe action to correct failure to perform***] or] vacate the property~~[, or that [*name of defendant*] actually received this notice at least three days before [*date on which action was filed*]]~~; [and]**

[6. That [*name of defendant***] did not [***describe action to correct failure to perform***]; and]**

7. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

[[*Name of defendant***]'s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not be trivial, but must be a substantial violation of [an] important obligation(s).]**

New August 2007; Revised June 2010, December 2010, June 2011, December 2011

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph, in element 5, and in the last element if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the opening paragraph and in element 3, "owns" in element 1, and "rented" in element 2. Commercial

documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease" in the opening paragraph and in element 3, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

~~If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 5.~~ Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5.

If the violation of the condition or covenant involves assignment, sublet, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4) ; *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in element 5 and also omit element 6. If the violation involves nuisance or illegal activity, give CACI No. 4308, *Termination for Nuisance or Unlawful Use—Essential Factual Elements*.

Include the last paragraph if the tenant alleges that the violation was trivial. It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479].)

Local or federal law may impose additional requirements for the termination of a rental agreement based on breach of a condition. This instruction should be modified accordingly.

See CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement,* for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- Code of Civil Procedure section 1161, repealed and replaced with a new version January 1, 2012, provides in part:

  A tenant of real property … is guilty of unlawful detainer:

  3. When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease.

  4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter. For purposes of this subdivision, a person who commits an offense described in subdivision (c) of Section 3485 of the Civil Code, or subdivision (c) of Section 3486 of the Civil Code, or uses the premises to further the purpose of that offense shall be deemed to have committed a nuisance upon the premises. For purposes of this subdivision, if a person commits an act of domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 261, 261.5, 262, 286, 288a, or 289 of the Penal Code, or stalking as defined in Section 1708.7 of the Civil Code, against another tenant or subtenant on the premises there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises, provided, however, that this shall not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises. This subdivision shall not be construed to supersede the provisions of the Violence Against Women and Department of Justice

Reauthorization Act of 2005 (Public Law 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence against cotenants.

- Civil Code section 1952.3(a) provides in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action … ."

- "[Code of Civil Procedure section 1161(3)] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord's claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of this statute is to speedily permit a landlord to obtain possession of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law otherwise would accord him under the proceeding." (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449].)

- "It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent *or* quit, perform the covenant *or* quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman, supra,* 172 Cal.App.2d at p. 29.)

- "The law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. Following the lead of the Restatements of Contracts, California courts allow

termination only if the breach can be classified as 'material,' 'substantial,' or 'total.' " (*Superior Motels, Inc., supra,* 195 Cal.App.3d at p. 1051, internal citations omitted.)

- "California too accepts that '[whether] a breach is so material as to constitute cause for the injured party to terminate a contract is ordinarily a question for the trier of fact.' " (*Superior Motels, Inc., supra*, 195 Cal.App.3d at pp. 1051–1052, internal citations omitted.)

- "As to the substantiality of the violation, the evidence shows that the violation was wilful. Therefore, the court will not measure the extent of the violation." (*Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 66 [202 P.2d 378].)

- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist., supra,* 256 Cal.App.2d at p. 529.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be

shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 726

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.50–8.54

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.38–6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 12-G, *Termination Of Section 8 Tenancies*, ¶ 12:200 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:93 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.20 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 19, *Landlord-Tenant*, §§ 19:200–19.205 (Thomson Reuters West)

4305. Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement

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[*Name of plaintiff***] contends that [he/she/it] properly gave [***name of defendant***] three days' notice to [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/it] must, within three days, [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property;**

2. **That the notice described how [***name of defendant***] failed to comply with the requirements of the [lease/rental agreement/sublease] [and how to correct the failure];**

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s home or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the

notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[The three-day notice period begins on the day after the notice was given to [*name of defendant***]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [***name of defendant***]'s time to correct the failure or to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]**

~~**[If [***name of plaintiff***] did not properly give [***name of defendant***] the required written notice, the notice is still effective if [***name of defendant***] actually received it at least three days before [***insert date on which action was filed***].]**~~

New August 2007; Revised December 2010, June 2011, December 2011

Directions for Use

If the violation of the condition or covenant involves assignment, subletting, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4); *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in the first paragraph and in elements 1 and 2. If the violation involves nuisance or illegal activity, give CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the optional language in the opening paragraph and in elements 1 and 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease." (Code Civ. Proc., § 1161(3).)

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout the instruction, provided that it is not less than three days.

~~If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the last paragraph.~~ Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- Code of Civil Procedure section 1161, repealed and replaced with a new version January 1, 2012, provides in part:

  A tenant of real property … is guilty of unlawful detainer:

  > 3. When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease.

4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter. For purposes of this subdivision, a person who commits an offense described in subdivision (c) of Section 3485 of the Civil Code, or subdivision (c) of Section 3486 of the Civil Code, or uses the premises to further the purpose of that offense shall be deemed to have committed a nuisance upon the premises. For purposes of this subdivision, if a person commits an act of domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 261, 261.5, 262, 286, 288a, or 289 of the Penal Code, or stalking as defined in Section 1708.7 of the Civil Code, against another tenant or subtenant on the premises there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises, provided, however, that this shall not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises. This subdivision shall not be construed to supersede the provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence against cotenants.

- Code of Civil Procedure section 1162 provides:

(a) Except as provided in subdivision (b), the notices required by Sections 1161 and 1161a may be served by any of the following methods:

(1) By delivering a copy to the tenant personally;

(2) If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence;

(3) If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

(b) The notices required by Section 1161 may be served upon a commercial tenant by any of the following methods:

(1) By delivering a copy to the tenant personally.

(2) If he or she is absent from the commercial rental property, by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated.

(3) If, at the time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated. Service upon a subtenant may be made in the same manner.

(c) For purposes of subdivision (b), "commercial tenant" means a person or entity that hires any real property in this state that is not a dwelling unit, as defined in subdivision (c) of Section 1940 of the Civil Code, or a mobilehome, as defined in Section 798.3 of the Civil Code.

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

- "It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent *or* quit, perform the covenant *or* quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman, supra,* 172 Cal.App.2d at p. 29.)

- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist., supra,* 256 Cal.App.2d at p. 529.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her

fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 726, 727

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.26–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.10–6.16, 6.25–6.29, 6.38–6.49, Ch. 8

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.12 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 19, *Landlord-Tenant*, §§ 19:202–19:204 (Thomson Reuters West)

4306. Termination of Month-to-Month Tenancy—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because the tenancy has ended. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***] under a month-to-month [lease/rental agreement/sublease];**

3. **That [***name of plaintiff***] gave [***name of defendant***] proper [30/60] days' written notice that the tenancy was ending~~[, or that [*name of defendant*] actually received this notice at least [30/60] days before [*date on which action was filed*]]~~; and**

4. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011, December 2011

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in element 4 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1 and "rented" and either "lease" or "rental agreement" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "leases" in element 1 and "subleased" and "sublease" in element 2. (Code Civ. Proc., § 1161(3).)

In element 3, select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days' notice is generally required. (Civ. Code, §§ 1946, 1946.1(b)–(d).)

~~If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 3.~~ Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d

867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Do not give this instruction to terminate a tenancy if the tenant is receiving federal financial assistance through the Section 8 program. (See *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1115 [29 Cal.Rptr.3d 262, 112 P.3d 647]; Civ. Code, § 1954.535 (90 days' notice required).) Specific grounds for terminating a federally subsidized low-income housing tenancy are required and must be set forth in the notice. (See, e.g., 24 C.F.R. § 982.310.)

See CACI No. 4307, *Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy,* for an instruction on proper advanced written notice.

Sources and Authority

- Code of Civil Procedure section 1161 provides in part:

  A tenant of real property … is guilty of unlawful detainer:

  1. When he or she continues in possession, in person or by subtenant … after the expiration of the term for which it is let to him or her; provided the expiration is of a nondefault nature however brought about without the permission of his or her landlord … including the case where the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant, or employer and employee, or principal and agent, or licensor and licensee, has been lawfully terminated or the time fixed for occupancy by the agreement between the parties has expired; but nothing in this subdivision shall be construed as preventing the removal of the occupant in any other lawful manner; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

- Civil Code section 1946 provides: "A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days; provided, however, that as to tenancies from month to month either of the parties may terminate the same by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date of termination. It shall be

competent for the parties to provide by an agreement at the time such tenancy is created that a notice of the intention to terminate the same may be given at any time not less than seven days before the expiration of the term thereof. The notice herein required shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail addressed to the other party. In addition, the lessee may give such notice by sending a copy by certified or registered mail addressed to the agent of the lessor to whom the lessee has paid the rent for the month prior to the date of such notice or by delivering a copy to the agent personally."

- Civil Code section 1946.1 provides in part:

  (a) Notwithstanding Section 1946, a hiring of residential real property for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his or her intention to terminate the tenancy, as provided in this section.

  (b) An owner of a residential dwelling giving notice pursuant to this section shall give notice at least 60 days prior to the proposed date of termination. A tenant giving notice pursuant to this section shall give notice for a period at least as long as the term of the periodic tenancy prior to the proposed date of termination.

  (c) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if any tenant or resident has resided in the dwelling for less than one year.

  (d) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if all of the following apply:

    (1) The dwelling or unit is alienable separate from the title to any other dwelling unit.
    (2) The owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent, as defined in Sections 17004 and 17200 of the Financial Code, or a licensed real estate broker, as defined in Section 10131 of the Business and Professions Code.
    (3) The purchaser is a natural person or persons.
    (4) The notice is given no more than 120 days after the escrow has been established.
    (5) Notice was not previously given to the tenant pursuant to this section.
    (6) The purchaser in good faith intends to reside in the property for at least one full year after the termination of the tenancy.

  (e) (*omitted*)

(f) The notices required by this section shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail.

- Civil Code section 1944 provides: "A hiring of lodgings or a dwelling-house for an unspecified term is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a monthly rate of rent is presumed to be for one month. In the absence of any agreement respecting the length of time or the rent, the hiring is presumed to be monthly."

- Civil Code section 1952.3(a) provides in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action … ."

- " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

- "The Act provides that as a prerequisite to filing an unlawful detainer action based on a terminated month-to-month tenancy, the landlord must serve the tenant with a 30-day written notice of termination." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799], internal citations omitted.)

- "Proper service on the lessee of a valid … notice … is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a … notice … by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich*, *supra*, 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant

denied, in his answer and at trial, that he had ever received the … notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a … notice … provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the … notice may be effected on a residential tenant: … . As explained in *Liebovich, supra*, … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 680

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69–8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.3, 7.5, 7.11

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.40 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 19, *Landlord-Tenant*, § 19:188 (Thomson Reuters West)

4307. Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy

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[*Name of plaintiff***] contends that [he/she/it] properly gave [***name of defendant***] written notice that the tenancy was ending. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that the tenancy would end on a date at least [30/60] days after notice was given to [him/her/it];**

2. **That the notice was given to [***name of defendant***] at least [30/60] days before the date that the tenancy was to end; and**

3. **That the notice was given to [***name of defendant***] at least [30/60] days before [***insert date on which action was filed***];**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[the notice was sent by certified or registered mail in an envelope addressed to [*name of defendant***], in which case notice is considered given on the date the notice was placed in the mail[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s home or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her] residence/the commercial property]. In this case, notice is considered given on the date the second notice was placed in the mail[./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was placed in the mail.]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a

copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant*]. In this case, notice is considered given on the date the second notice was placed in the mail.]

[The [30/60]-day notice period begins on the day after the notice was given to [*name of defendant*]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [*name of defendant*]'s time to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]

~~**[If [*name of plaintiff*] did not properly give [*name of defendant*] the required written notice, the notice is still effective if [*name of defendant*] actually received it at least [30/60] days before [*insert date on which action was filed*].]**~~

New August 2007; Revised December 2010, June 2011, December 2011

Directions for Use

Select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days is generally required. (Civ. Code, §§ 1946, 1946.1(b)–(d).)

If 30 days' notice is sufficient and the lease provided for a notice period other than the statutory 30-day period (but not less than 7), insert that number instead of "30" or "60" throughout the instruction. (Civ. Code, § 1946.)

Select all manners of service used, including personal service, certified or registered mail, substituted service by leaving the notice at the defendant's home or place of work or at the rental property, and substituted service by posting on the property. (See Civ. Code, §§ 1946, 1946.1(f); Code Civ. Proc., § 1162.)

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

~~If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the last paragraph.~~ Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744,

752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- Civil Code section 1946 provides: "A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days; provided, however, that as to tenancies from month to month either of the parties may terminate the same by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date of termination. It shall be competent for the parties to provide by an agreement at the time such tenancy is created that a notice of the intention to terminate the same may be given at any time not less than seven days before the expiration of the term thereof. The notice herein required shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail addressed to the other party. In addition, the lessee may give such notice by sending a copy by certified or registered mail addressed to the agent of the lessor to whom the lessee has paid the rent for the month prior to the date of such notice or by delivering a copy to the agent personally."

- Civil Code section 1946.1 provides in part:

  (a) Notwithstanding Section 1946, a hiring of residential real property for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his or her intention to terminate the tenancy, as provided in this section.

  (b) An owner of a residential dwelling giving notice pursuant to this section shall give notice at least 60 days prior to the proposed date of termination. A tenant giving notice pursuant to this section shall give notice for a period at least as long as the term of the periodic tenancy prior to the proposed date of termination.

  (c) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if any tenant or resident has resided in the dwelling for less than one year.

  (d) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if all of the following apply:

(1) The dwelling or unit is alienable separate from the title to any other dwelling unit.
(2) The owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent, as defined in Sections 17004 and 17200 of the Financial Code, or a licensed real estate broker, as defined in Section 10131 of the Business and Professions Code.
(3) The purchaser is a natural person or persons.
(4) The notice is given no more than 120 days after the escrow has been established.
(5) Notice was not previously given to the tenant pursuant to this section.
(6) The purchaser in good faith intends to reside in the property for at least one full year after the termination of the tenancy.

(e) (*omitted*)

(f) The notices required by this section shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail.

- Code of Civil Procedure section 1162 provides in part:

(a) Except as provided in subdivision (b), the notices required … may be served by any of the following methods:

(1) By delivering a copy to the tenant personally;

(2) If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence;

(3) If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

(b) The notices required by Section 1161 may be served upon a commercial tenant by any of the following methods:

(1) By delivering a copy to the tenant personally.

(2) If he or she is absent from the commercial rental property, by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated.

(3) If, at the time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated. Service upon a subtenant may be made in the same manner.

(c) For purposes of subdivision (b), "commercial tenant" means a person or entity that hires any real property in this state that is not a dwelling unit, as defined in subdivision (c) of Section 1940 of the Civil Code, or a mobilehome, as defined in Section 798.3 of the Civil Code.

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a … notice … by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the … notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a … notice … provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the … notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be

shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 680, 727

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69–8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 5.3, Ch. 7

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.10–236.12 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 19, *Landlord-Tenant*, §§ 19:188, 19:192 (Thomson Reuters West)

4308. Termination for Nuisance or Unlawful Use—Essential Factual Elements (Code Civ. Proc, § 1161(4))

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has [created a nuisance on the property/ [or] used the property for an illegal purpose]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That [***name of defendant***] [***include one or both of the following:***]**

   created a nuisance on the property by [*specify conduct constituting nuisance***];**

   [or]

   used the property for an illegal purpose by [*specify illegal activity***];**

4. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to vacate the property~~[, or that [*name of defendant*] actually received this notice at least three days before [*date on which action was filed*]]~~; and**

5. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New December 2010; Revised June 2011, December 2011

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in elements 4 and 5 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, and "rented" in element 2.

If the plaintiff is a tenant seeking to recover possession from a subtenant, include the bracketed language on subtenancy in the opening paragraph and in element 4, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

Certain conduct or statutory violations that constitute or create a rebuttable presumption of a nuisance are set forth in Code of Civil Procedure section 1161(4). If applicable, insert the

appropriate ground in element 3. (See also Health & Saf. Code, § 17922 [adopting various uniform housing and building codes].)

~~If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 4.~~ Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 4.

For nuisance or unlawful use, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4).)

Local or federal law may impose additional requirements for the termination of a rental agreement based on nuisance or illegal activity. This instruction should be modified accordingly.

See CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use,* for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- Code of Civil Procedure section 1161, repealed and replaced with a new version January 1, 2012, provides in part:

  A tenant of real property … is guilty of unlawful detainer:

  > 4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or

his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter. For purposes of this subdivision, a person who commits an offense described in subdivision (c) of Section 3485 of the Civil Code, or subdivision (c) of Section 3486 of the Civil Code, or uses the premises to further the purpose of that offense shall be deemed to have committed a nuisance upon the premises. For purposes of this subdivision, if a person commits an act of domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 261, 261.5, 262, 286, 288a, or 289 of the Penal Code, or stalking as defined in Section 1708.7 of the Civil Code, against another tenant or subtenant on the premises there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises, provided, however, that this shall not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises. This subdivision shall not be construed to supersede the provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence against cotenants.

- Civil Code section 3479 provides: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a

copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra*, 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich*, *supra*, 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich*, *supra*, … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC*, *supra*, 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 674, 726

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.55, 8.58, 8.59

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.46, 6.48, 6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:136 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination of Tenancies*, § 200.38 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.11 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 19, Landlord-Tenant, §§ 19:200–19.205 (Thomson Reuters West)

UNLAWFUL DETAINER

4309. Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use

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[*Name of plaintiff***] contends that [he/she/it] properly gave [***name of defendant***] three days' notice to vacate the property. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that [he/she/it] must vacate the property within three days;**

2. **That the notice described how [***name of defendant***] [created a nuisance on the property/ [or] used the property for an illegal purpose]; and**

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***].**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s residence or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her] residence/the commercial property]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail][./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope

addressed to [*name of defendant*]. In this case, notice is considered given on the date the second notice was [received by [*name of defendant*]/placed in the mail].]

[The three-day notice period begins on the day after the notice was given to [*name of defendant*]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [*name of defendant*]'s time to correct the failure or to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]

~~**[If [*name of plaintiff*] did not properly give [*name of defendant*] the required written notice, the notice is still effective if [*name of defendant*] actually received it at least three days before [*insert date on which action was filed*].]**~~

New December 2010; Revised June 2011, December 2011

Directions for Use

Select the manner of service used: personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial property, or substituted service by posting on the property. (See Code Civ. Proc., § 1162.)

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second, third, and fourth bracketed options for the manner of service.

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout the instruction, provided that it is not less than three days.

~~If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the last paragraph.~~ Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744,

752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- Code of Civil Procedure section 1161, repealed and replaced with a new version January 1, 2012, provides in part:

  A tenant of real property … is guilty of unlawful detainer:

  > 4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter. For purposes of this subdivision, a person who commits an offense described in subdivision (c) of Section 3485 of the Civil Code, or subdivision (c) of Section 3486 of the Civil Code, or uses the premises to further the purpose of that offense shall be deemed to have committed a nuisance upon the premises. For purposes of this subdivision, if a person commits an act of domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 261, 261.5, 262, 286, 288a, or 289 of the Penal Code, or stalking as defined in Section 1708.7 of the Civil Code, against another tenant or subtenant on the premises there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises, provided, however, that this shall not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises. This subdivision shall not be construed to supersede the provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence against cotenants.

- Code of Civil Procedure section 1162 provides:

(a) Except as provided in subdivision (b), the notices required by Sections 1161 and 1161a may be served by any of the following methods:

  (1) By delivering a copy to the tenant personally;

(2) If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence;

(3) If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

(b) The notices required by Section 1161 may be served upon a commercial tenant by any of the following methods:

(1) By delivering a copy to the tenant personally.

(2) If he or she is absent from the commercial rental property, by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated.

(3) If, at the time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated. Service upon a subtenant may be made in the same manner.

(c) For purposes of subdivision (b), "commercial tenant" means a person or entity that hires any real property in this state that is not a dwelling unit, as defined in subdivision (c) of Section 1940 of the Civil Code, or a mobilehome, as defined in Section 798.3 of the Civil Code.

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the … notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a … notice … provided in section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the … notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties'

lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 674, 726, 727

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.62–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.25–6.29

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.5 et seq., 7:137 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.11 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 19, Landlord-Tenant, §§ 19:200–19:205 (Thomson Reuters West)

4328. Affirmative Defense—Tenant Was Victim of Domestic Violence, Sexual Assault, or Stalking (Code Civ. Proc., § 1161.3)

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her] because [***name of plaintiff***] filed this lawsuit based on [an] act[s] of [domestic violence/sexual assault/ [or] stalking] against [***name of defendant***]/ [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 household] was a victim of [domestic violence/sexual assault/ [or] stalking];**

2. **That the act[s] of [domestic violence/sexual assault/ [or] stalking] [was/were] documented in a [court order/law enforcement report];**

3. **That the person who committed the act[s] of [domestic violence/sexual assault/ [or] stalking] is not also a tenant of the same living unit as [***name of defendant***]; and**

4. **That [***name of plaintiff***] filed this lawsuit because of the act[s] of [domestic violence/sexual assault/ [or] stalking].**

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

1. **[Either] [***Name of defendant***] allowed the person who committed the act[s] of [domestic violence/sexual assault/ [or] stalking] to visit the property after [the taking of a police report/issuance of a court order] against that person;**

   [or]

   [*Name of plaintiff***] reasonably believed that the presence of the person who committed the act[s] of [domestic violence/sexual assault/ [or] stalking] posed a physical threat to [other persons with a right to be on the property/ [or] another tenant's right of quiet possession];**

and

2. **[***Name of plaintiff***] previously gave at least three days' notice to [***name of defendant***] to correct this situation.**

New December 2011

Directions for Use

This instruction is a tenant's affirmative defense alleging that he or she is being evicted because he or she was the victim of domestic violence, sexual assault, or stalking. (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.

Under the exception the tenant may be evicted if the landlord reasonably believes that the presence of the perpetrator poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to quiet possession pursuant to section 1927 of the Civil Code. (Code Civ. Proc., § 1161.3(b)(1)(B).) In the second option for element 1 of the landlord's response, this group has been expressed as "other persons with a right to be on the property." If more specificity is required, use the appropriate words from the statute.

The tenant must prove that the perpetrator is not a tenant of the same "dwelling unit" (see Code Civ. Proc., § 1161.3(a)(2)), which is expressed in element 3 as "living unit." Presumably, the legislative intent is to permit the perpetrator to be evicted notwithstanding that the victim will be evicted also. "The term "dwelling unit" is not defined. In a multi-unit building, the policies underlying the statute would support defining "dwelling unit" to include a single unit or apartment, but not the entire building. Otherwise, the victim could be evicted if the perpetrator lives in the same building but not the same apartment.

Sources and Authority

- Code of Civil Procedure section 1161.3 provides:

  (a) Except as provided in subdivision (b), a landlord shall not terminate a tenancy or fail to renew a tenancy based upon an act or acts against a tenant or a tenant's household member that constitute domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 1219, or stalking as defined in Section 1708.7 of the Civil Code or Section 646.9 of the Penal Code, if both of the following apply:

  (1) The act or acts of domestic violence, sexual assault, or stalking have been documented by one of the following:

  (A) A temporary restraining order or emergency protective order lawfully issued within the last 180 days pursuant to Section 527.6, Part 3 (commencing with Section 6240), Part 4 (commencing with Section 6300), or Part 5 (commencing with Section 6400) of Division 10 of the Family Code, Section 136.2 of the Penal Code, or Section 213.5 of the Welfare and Institutions Code that protects the tenant or household member from domestic violence, sexual assault, or stalking.

  (B) A copy of a written report, written within the last 180 days, by a peace officer employed by a state or local law enforcement agency acting in his or her official capacity, stating that the tenant or household member has filed a report alleging that he or she or the household member is a victim of domestic violence, sexual assault, or stalking.

  (2) The person against whom the protection order has been issued or who was named in the police report of the act or acts of domestic violence, sexual assault, or stalking is not a tenant of the same dwelling unit as the tenant or household member.

(b) A landlord may terminate or decline to renew a tenancy after the tenant has availed himself or herself of the protections afforded by subdivision (a) if both of the following apply:

(1) Either of the following:

(A) The tenant allows the person against whom the protection order has been issued or who was named in the police report of the act or acts of domestic violence, sexual assault, or stalking to visit the property.

(B) The landlord reasonably believes that the presence of the person against whom the protection order has been issued or who was named in the police report of the act or acts of domestic violence, sexual assault, or stalking poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to quiet possession pursuant to Section 1927 of the Civil Code.

(2) The landlord previously gave at least three days' notice to the tenant to correct a violation of paragraph (1).

(c) Notwithstanding any provision in the lease to the contrary, the landlord shall not be liable to any other tenants for any action that arises due to the landlord's compliance with this section.

(d) For the purposes of this section, "tenant" means tenant, subtenant, lessee, or sublessee.

(e) The Judicial Council shall, on or before January 1, 2012, develop a new form or revise an existing form that may be used by a party to assert in the responsive pleading the grounds set forth in this section as an affirmative defense to an unlawful detainer action.

Secondary Sources

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 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 330, *Landlord and Tenant: Eviction Actions*, § 330.28 (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

4532. Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay

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[*Name of plaintiff***] claims that [***name of defendant***] breached the parties' contract by failing to [substantially] complete the [project/***describe construction project, e.g., apartment building***] by the completion date required by the contract. If you find that [***name of plaintiff***] has proven this claim, the parties' contract calls for damages in the amount of $ _____ for each day between [***insert contract completion date***] and the date on which the project was [substantially] completed. You will be asked to find the date on which the project was [substantially] completed. I will then calculate the amount of damages.**

[If you find that [*name of plaintiff***] granted or should have granted time extensions to [***name of defendant***], you will be asked to find the number of days of the time extension and add these days to the completion date set forth in the contract. I will then calculate [***name of plaintiff***]'s total damages.]**

New December 2010; Revised December 2011

Directions for Use

This instruction should be used when the owner seeks to recover liquidated damages against the contractor for delay in completing the project under a provision of the contract. Include the optional second paragraph if there is a dispute over whether the contractor is entitled to an extension of time. Give CACI No. 4520, *Contractor's Claim for Changed or Extra Work,* to guide the jury on how to determine if the contractor is entitled to a time extension for extra work. A special instruction may be required to guide the jury on how to determine if the contractor is entitled to a time extension for excusable or compensable delays.

Include "substantially" throughout if there is a dispute of fact as to when the project should be considered as finished. Unless otherwise defined by the contract to mean actual completion or some other measure of completion (see, e.g., *London Guarantee & Acci. Co. v. Las Lomitas School Dist.* (1961) 191 Cal.App.2d 423, 427 [12 Cal.Rptr. 598]), "completion" for the purpose of determining liquidated damages ordinarily is understood to mean "substantial completion." (See *Vrgora v. L.A. Unified Sch. Dist.* (1984) 152 Cal.App.3d 1178, 1186 [200 Cal.Rptr. 130]; see generally *Perini Corp. v. Greate Bay Hotel & Casino, Inc.* (1992) 129 N.J. 479, 500–501, overruled on other grounds in *Tretina v. Fitzpatrick & Assocs.* (1994) 135 N.J. 349, 358 [discussing standard practices in the construction industry].)

There are few or no general principles set forth in California case law as to what may constitute substantial completion. It would seem to be dependent on the unique facts of each case. (See, e.g., *Continental Illinois Nat'l Bank & Trust Co. v. United States* (1952) 121 Ct.Cl. 203, 243–244.) The related doctrine of substantial performance, which allows the contractor to obtain payment for its work even if there are some minor or trivial deviations from the contract requirements, may perhaps be looked to for guidance for when a project is substantially complete for purposes of stopping the running of the clock on liquidated damages. (See CACI No. 4524, ~~*Substantial Performance*~~ *Contractor's Claim for*

Compensation Due Under Contract— Substantial Performance.) But they are separate doctrines. Substantial performance focuses on *what* was done. Substantial completion focuses on *when* it was done. (See *Hill v. Clark* (1908) 7 Cal.App. 609, 612 [95 P. 382] [only substantial performance, not substantial completion, was at issue].) See also Code Civ. Proc., § 337.15 and CACI No. 4551, *Affirmative Defense—Statute of Limitations—Latent Construction Defect* (limitation period begins to run on substantial completion).

If the liquidated damages provision is found to be unenforceable because its enforcement would constitute a penalty rather than an approximation of actual damages that are difficult to ascertain, the owner may be entitled to recover its general and special damages, as those damages are defined in CACI No. 350, *Introduction to Contract Damages,* and CACI No. 351, *Special Damages*.

Sources and Authority

- Civil Code section 1671(b) provides: "Except as provided in subdivision (c), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made."

- Public Contract Code section 10226 provides: "Every contract shall contain a provision in regard to the time when the whole or any specified portion of the work contemplated shall be completed, and shall provide that for each day completion is delayed beyond the specified time, the contractor shall forfeit and pay to the state a specified sum of money, to be deducted from any payments due or to become due to the contractor. The sum so specified is valid as liquidated damages unless manifestly unreasonable under the circumstances existing at the time the contract was made. A contract for a road project, flood control project, or project involving facilities of the State Water Resources Development System may also provide for the payment of extra compensation to the contractor, as a bonus for completion prior to the specified time, the provision, if used, to be included in the specifications and to clearly set forth the basis for the payment."

- "Liquidated damage clauses in public contracts are frequently validated precisely because delay in the completion of projects such as highways 'would cause incalculable inconvenience and damage to the public.' … Thus, it is accepted that damage in the nature of inconvenience and loss of use by the public are real but often, as a matter of law, not measurable." (*Westinghouse Electric Corp. v. County of Los Angeles* (1982) 129 Cal.App.3d 771, 782–783 [181 Cal.Rptr. 332], internal citations omitted.)

- "[I]n the absence of a contractual provision for extensions of time, the rule generally followed is that an owner is precluded from obtaining liquidated damages not only for late completion caused entirely by him but also for a delay to which he has contributed, even though the contractor has caused some or most of the delay. … Acceptance of the reasoning urged by defendant would mean that, solely because there has been noncompliance with an extension-of-time provision, the position of an owner could be completely changed so that he could withhold liquidated damages for all of the period of late completion even though he alone caused the delay." (*Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist.* (1963) 59 Cal.2d 241, 245 [28 Cal.Rptr. 714, 379

P.2d 18], internal citation omitted.)

- "[A]cceptance may not be arbitrarily delayed to the prejudice of a contractor, and work should be viewed as accepted when it is finished even though a governmental body specifies a later date." (*Peter Kiewit Sons' Co., supra,* 59 Cal.2d at p. 246.)

- "Lacking any authority, appellant asserts 'that something is wrong here' and '[it] does not make sense to compensate the owner for the loss of use of something that it is actually using.' For all practical purposes, we perceive appellant as attempting to invoke the equitable doctrine of unjust enrichment and therein seek a setoff. The No. 1 problem with the applicability of said theory is that although [defendant] may have benefitted by using the facility, the fact that the facility had not been fully or even substantially completed suggests that the enrichment obtained is de minimis or is at best undefinable." (*Vrgora, supra,* 152 Cal.App.3d at p. 1186, footnote omitted.)

- "Was the contract completed on September 5, 1953? The trial court did not find that the building was completed on that date. It found that it was 'substantially completed.' On September 8, 1953, the uncontradicted evidence shows that some of the class rooms were insufficiently complete to be used; the plumbing was not complete; and the fencing of the playground had not been started. There were workmen in the building and there was grading equipment in the yard area. The salary of the inspector for the school district, who was required by state law, had to be paid until October 22, 1953. The inspector's report made on September 1, 1953, showed that the work was 94 per cent complete as of that time. His report made on September 16, 1953 showed the work to be 96 per cent complete. On September 16 there was admittedly about $ 9,800 worth of work yet to be done. The contract called for a complete building and not a substantially complete one. [¶] The fact that the school district occupied portions of the building on September 8, 1953, does not change the situation. [The contract] provides that occupancy of any portion of the building ' … shall not constitute an acceptance of any part of the work, unless so stated in writing by the Board of the District.' The board of the district did not so state." (*London Guarantee & Acci. Co., supra*, 191 Cal.App.2d at pp. 426-427.)

- "In *London Guar. & Acc. Co. v. Las Lomitas School Dist., supra,* 191 Cal.App.2d 423, the appellate court reviewed the efficacy of an 'adjusted' liquidated damages award by the trial court on the basis of the date of 'substantial completion' as opposed to 'actual completion.' … The appellate court reversed the trial court's judgment, finding no validity to the argument employed at trial, that once the contractor had substantially performed his obligation (96 percent completion of the building), the school district was not entitled to liquidated damages. In effect, the court held that since the parties contracted for 'actual' performance in the form of a '. . . complete building and not a substantially complete one', liquidated damages were appropriate." (*Vrgora, supra,* 152 Cal.App.3d at p. 1187.)

- "We perceive no error in the action of the court sustaining the objection to a question asked defendant, as follows: 'Can you state to the court how much and to what extent you have been injured by the failure of the plaintiff to complete this work; the question is, can you tell?' The contract provided for a fixed sum as liquidated damages for delay in the completion of the work beyond the time specified in the contract. No issue was presented as to the amount of the liquidated damages, or claim on account thereof, and the question objected to could have no

reference thereto; and the court finding that the contract was substantially completed, there was no room for inquiry as to the damages, and no prejudice could result to defendant from such ruling." (*Hill, supra,* 7 Cal.App. at p. 612.)

- "Finding 51 shows that the work … was 99.6% complete on December 30, as of which day liquidated damages began, and that the only work remaining to be done had to do with the boiler house equipment, and certain 'punch list items' which are usually minor adjustments which recur for an indefinite time after the completion of an extensive building project. The boiler house work would, apparently, not have interfered with the occupancy of the houses by tenants, and tenants in new houses expect to be troubled for a while by adjustments due to tests. Two hundred dollars a day was a severe penalty for so slight an asserted delinquency and our observation of other cases tells us that it is not customary to draw the line so strictly. The refusal, which we hold unjustified, of the Government to accept the project on December 30, 1936, subjected the contractor, not only to the liquidated damages discussed above, but to continued expenditures for coal, light, power and fire insurance in the amount of $2,454.75. The plaintiff may recover this amount." (*Continental Illinois Nat'l Bank & Trust Co., supra,* 121 Ct.Cl. at pp. 243–244.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 503 et seq.

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.112

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, § 6.91 et seq.

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, §§ 9.103, 9.107

3 Stein, Construction Law, Ch. 11, *Remedies and Damages*, ¶ 11.02 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 434, *Government Contracts*, § 434.41 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.27, 104.226 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.211 (Matthew Bender)

15 California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts*, § 30D.224 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.243 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.05[3]

10 Miller & Starr, California Real Estate (Thomson Reuters West 3d ed.) Ch. 27, *Construction Law and Contracting,* § 27:81

Acret, California Construction Law Manual (Thomson Reuters West 6th ed. 2005) Ch. 1, *Contracts,* §§ 1:86–1:88

Acret, California Construction Law Manual (Thomson Reuters West 6th ed. 2005) Ch. 7, *Public Contracts,* §§ 7:84, 7:85

5 Bruner & O'Connor on Construction Law (Thomson Reuters West 2002) Ch. 15, *Risks of Construction Time: Delay, Suspension, Acceleration and Disruption,* § 15:15, 15:82

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 5, *Breach of Contract by Contractor,* § 5.02

4550. Affirmative Defense—Statute of Limitations—Patent Construction Defect (Code Civ. Proc., § 337.1)

[*Name of plaintiff***] claims that [his/her] harm was caused by a defect in the [design/specifications/surveying/planning/supervision/ [or] observation] of [a construction project/a survey of real property/[***specify project, e.g., the roof replacement***]]. [***Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That an average person during the course of a reasonable inspection would have discovered the defect; and**

2. **That the date on which the [construction project/survey of real property/[***specify project, e.g., roof replacement***]] was substantially complete was more than four years before [***insert date***], the date on which this action was filed.**

New December 2011

Directions for Use

Give this instruction if the defendant asserts the running of the statute of limitations in Code of Civil Procedure section 337.1 as a defense. This section provides a four-year limitation period from the date of substantial completion for harm caused by a patent construction defect. Do not give this instruction if the claim is for injuries to persons or property based on tort principles occurring in the fourth year after substantial completion. (See Code Civ. Proc., § 337.1(b).)

For discussion of substantial completion, see the Directions for Use to CACI No. 4532, *Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay*. See also CACI No. 4524, *Contractor's Claim for Compensation Due Under Contract—Substantial Performance.*

Sources and Authority

- Code of Civil Procedure section 337.1 provides:

  (a) Except as otherwise provided in this section, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any of the following:

  (1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property;

(2) Injury to property, real or personal, arising out of any such patent deficiency; or

(3) Injury to the person or for wrongful death arising out of any such patent deficiency.

(b) If, by reason of such patent deficiency, an injury to property or the person or an injury causing wrongful death occurs during the fourth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within one year after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than five years after the substantial completion of construction of such improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

(d) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(e) As used in this section, "patent deficiency" means a deficiency which is apparent by reasonable inspection.

(f) Subdivisions (a) and (b) shall not apply to any owner-occupied single-unit residence.

- "[A] patent defect is one that can be discovered by the kind of inspection made in the exercise of ordinary care and prudence. In contrast, a latent defect is hidden, and would not be discovered by a reasonably careful inspection." (*The Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 35 [108 Cal.Rptr.3d 606].)

- "The test to determine whether a construction defect is patent is an objective test that asks 'whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.' This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary judgment)." (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 256 [99 Cal.Rptr.3d 258], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1159

3 Witkin, California Procedure (5th ed. 2008) Actions, § 484

12 California Real Estate Law and Practice, Ch. 441, *Consumer's Remedies*, § 441.08 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.54, 104.267 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.248 (Matthew Bender)

4551. Affirmative Defense—Statute of Limitations—Latent Construction Defect (Code Civ. Proc., § 337.15)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that the date on which the [construction project/survey of real property/[***specify project, e.g., roof replacement***]] was substantially complete was more than 10 years before [***insert date***], the date on which this action was filed.**

New December 2011

Directions for Use

Give this instruction if the defendant asserts the running of the statute of limitations in Code of Civil Procedure section 337.15 as a defense. This section provides a 10-year outside limitation period for harm caused by a latent construction defect regardless of delayed discovery.

The jury may also be instructed on the limitations periods for the particular theories of recovery alleged. (See, e.g., Code Civ. Proc., §§ 338 [three years for injury to real property], 337 [four years for breach of written contract].) However, for latent defects, delayed discovery (see CACI No. 455, *Statute of Limitations—Delayed Discovery*) generally defeats that otherwise applicable statute.

The most likely question of fact for the jury is the date of substantial completion. The statute provides four possible events, the earliest of which may constitute substantial completion of an improvement. (See Code Civ. Proc., § 337.15(g).) The latest date is one year from cessation of all work on the improvement. However, substantial completion of an improvement may occur before any of these dates. (See *Nelson v. Gorian & Assocs.* (1998) 61 Cal.App.4th 93, 97 [71 Cal.Rptr.2d 345].) The statute of limitations may start to run at a later date against the developer if the development includes many improvements. (*Id.* at p. 99; cf. *Schwetz v. Minnerly* (1990) 220 Cal.App.3d 296, 298 [269 Cal.Rptr. 417] ["developer" can be an "improver" and a "development" is a "work of improvement" for purposes of subsection (g)].) For further discussion of substantial completion, see the Directions for Use to CACI No. 4532, *Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay*. See also CACI No. 4524, *Contractor's Claim for Compensation Due Under Contract—Substantial Performance.*

Sources and Authority

- Code of Civil Procedure section 337.15 provides:

  (a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:

(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.

(2) Injury to property, real or personal, arising out of any such latent deficiency.

(b) As used in this section, "latent deficiency" means a deficiency which is not apparent by reasonable inspection.

(c) As used in this section, "action" includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this section, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of Section 428.10 in an action which has been brought within the time period set forth in subdivision (a) of this section.

(d) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for bringing any action.

(e) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action.

(f) This section shall not apply to actions based on willful misconduct or fraudulent concealment.

(g) The 10-year period specified in subdivision (a) shall commence upon substantial completion of the improvement, but not later than the date of one of the following, whichever first occurs:

(1) The date of final inspection by the applicable public agency.

(2) The date of recordation of a valid notice of completion.

(3) The date of use or occupation of the improvement.

(4) One year after termination or cessation of work on the improvement.

The date of substantial completion shall relate specifically to the performance or furnishing design, specifications, surveying, planning, supervision, testing, observation of construction or construction services by each profession or trade rendering services to the improvement.

- "The purpose of section 337.15 has been stated as 'to protect developers of real estate against liability extending indefinitely into the future.' … [We have] noted that '[a] contractor is in the business of constructing improvements and must devote his capital to that end; the need to provide reserves against an uncertain liability extending indefinitely into the future could seriously impinge upon the conduct of his enterprise.' " (*Martinez v. Traubner* (1982) 32 Cal.3d 755, 760 [187 Cal.Rptr. 251, 653 P.2d 1046], internal citations omitted.)

- "A 'latent' construction defect is one that is 'not apparent by reasonable inspection.' As to a latent defect that is alleged in the context of the challenged causes of action here—negligence, breach of warranty, and breach of contract—three statutes of limitations are in play: sections 338, 337 and 337.15. 'The interplay between these [three] statutes sets up a two-step process: (1) actions for a latent defect must be filed within three years (§ 338 [injury to real property]) or four years (§ 337 [breach of written contract]) of discovery, but (2) in any event must be filed within ten years (§ 337.15) of substantial completion.' " (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 257–258 [99 Cal.Rptr.3d 258], internal citations omitted.)

- "The test to determine whether a construction defect is patent is an objective test that asks 'whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.' This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary judgment)." (*Creekridge Townhome Owners Assn., Inc., supra,* 177 Cal.App.4th at p. 256, internal citations omitted.)

- "Our reading of the express words of section 337.15, our giving consideration to its legislative history, and harmonizing that section in the context of the statutory framework as a whole, leads us to conclude that section 337.15 does not limit the time within which direct actions for personal injury damages or wrongful death may be brought against the persons specified in the statute." (*Martinez, supra,* 32 Cal.3d at p. 759.)

- "The 10-year period commences to run in respect to a person who has contributed towards 'an improvement' when such improvement has been substantially completed irrespective of whether or not the improvement is part of a development." (*Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 772 [167 Cal.Rptr. 440].)

- "In 1981, the Legislature codified the holding in *Liptak* by adding subdivision (g) to section 337.15. 'The Senate Committee on Judiciary and the Senate Republican Caucus digests for the bill that became Code of Civil Procedure section 337.15, subdivision (g) state in pertinent part: " 'In [*Liptak*], the [C]ourt of [A]ppeal held that with respect to a developer, the ten-year limitation period does not commence until the development is substantially completed. [¶] With respect to a person who has contributed to an improvement on the developed property, the court held that the period commences when that particular improvement has been substantially completed, regardless of the completion time of the development itself. [¶] AB 605 would codify the *Liptak* holding on these issues.' " [Citation.]' " (*Nelson, supra,* 61 Cal.App.4th at pp. 96–97, internal citations omitted.)

- "Turning to the plain meaning of the statute as well as the legislative intent of enactment of section 337.15, subdivision (g), it is clear the intent was to define what event triggered the 10-year period and not what label is used to define the person who performed the work of improvement. The particular development or work of improvement can be one 'improvement' such as grading. It can also be a 'particular development,' i.e., a completed structure or dwelling. When the work of improvement meets one of the four criteria of section 337.15, subdivision (g), the 'improver'—

whether an architect, engineer, subcontractor, contractor, or developer—is entitled to raise the provisions of section 337.15, subdivision (g), as a bar to an action which seeks damages for latent defects after the 10-year period has passed." (*Schwetz, supra,* 220 Cal.App.3d at p. 308.)

- "Appellants claim that the 10-year period is calculated pursuant to section 337.15, subdivision (g)(1)–(4), which describes four events: (1) a final inspection, (2) the notice of completion, (3) use or occupancy of the property, or (4) termination or cessation of work for one year. Subdivision (g), however, states that the 10-year period '*shall commence upon substantial completion of the improvement,* but not later than' the occurrence of any one of the four events described in subdivision (g)(1) through (g)(4). … [¶] The trial court correctly ruled that the notice of completion date (§ 337.15, subd. (g)(2)) did not control if the improvement was substantially completed at an earlier date." (*Nelson, supra,* 61 Cal.App.4th at p. 97, original italics.)

- " 'As used in section 337.15 "an improvement" is in the singular and refers separately to each of the individual changes or additions to real property that qualifies as an "improvement" irrespective of whether the change or addition is grading and filling, putting in curbs and streets, laying storm drains or of other nature.' " (*Nelson, supra,* 61 Cal.App.4th at p. 97.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 488

12 California Real Estate Law and Practice, Ch. 441, *Consumer's Remedies*, § 441.08A (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.25, 104.267 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, § 143.49 (Matthew Bender)

5007. Removal of Claims or Parties and Remaining Claims and Parties

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[[*Name of plaintiff*]'s claim for [*insert claim*] is no longer an issue in this case.]

[[*Name of party*] is no longer a party to this case.]

Do not speculate as to why this [claim/person] is no longer involved in ~~this~~ the case. You should not consider this during your deliberations.

The following claims remain for you to resolve by your deliberations:

1. **[*Name of plaintiff*]'s claim against [*name of defendant*] for [*specify claim*] [to which [*name of defendant*] alleges [*specify affirmative defense*]].**

2. **[*Repeat for all claims, defenses, and parties that will go to the jury.*]**

New April 2004; Revised December 2011

Directions for Use

This instruction may be read ~~as appropriate~~if some of the claims and parties before the jury at the beginning of the trial (see CACI No. 101, *Overview of Trial*) are no longer to be resolved by the jury. The instruction then summarizes the claims and parties that remain for the jury to resolve. ~~If this instruction is used, t~~The advisory committee recommends that ~~it~~ this instruction be read to the jury before reading instructions on the substantive law.

In the second part of the instruction that sets forth the remaining claims, include the optional language if there are affirmative defenses that the jury will be asked to determine.

5020. Demonstrative Evidence

During the trial, materials have been shown to you to [help explain testimony or other evidence in the case/ [*specify other purpose*]]. [Some of these materials have been admitted into evidence, and you will be able to review them during your deliberations.]

Other materials have also been shown to you during the trial, but they have not been admitted into evidence. You will not be able to review them during your deliberations because they are not themselves evidence or proof of any facts. You may, however, consider the testimony given in connection with those materials.

New December 2011

Directions for Use

This instruction may be given if the jury has been provided with charts, summaries, or other demonstrative evidence during the trial to assist in understanding complex evidence. The purpose of the instruction is to explain to the jury why certain materials are available for deliberations and other materials are not. Include the bracketed sentence if some materials have been admitted into evidence.

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 161

Cotchett, California Courtroom Evidence, Ch. 2, *Words and Phrased Defined*, § 2.09 (Matthew Bender)

Cotchett, California Courtroom Evidence, Ch. 27, *Demonstrative and Experimental Evidence*, § 27.01 (Matthew Bender)

Johnson, California Trial Guide, Unit 65, *Presentation of Demonstrative Evidence*, §§ 65.01, 65.10 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, *Questioning Witnesses and Objections*, 11.109 et seq.